PARLIAMENT OF VICTORIA

LEGISLATIVE ASSEMBLY
Legal and Social Issues Committee

Inquiry into anti-vilification protections

Parliament of Victoria
Legislative Assembly Legal and Social Issues Committee

Ordered to be published

VICTORIAN GOVERNMENT PRINTER
March 2021

PP No 207, Session 2018–2021
ISBN 978 1 922425 22 5 (print version), 978 1 922425 23 2 (PDF version)

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Functions

The Legal and Social Issues Standing Committee is established under the Legislative Assembly Standing Orders Chapter 24—Committees.

The Committee's functions are to inquire into and report on any proposal, matter or thing connected with—

- the Department of Health and Human Services
- the Department of Justice and Community Safety
- the Department of Premier and Cabinet and related agencies.

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This report is available on the Committee's website.

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Inquiry into anti-vilification protections

On 12 September 2019, the Legislative Assembly agreed to the following motion:

That this house refers, an inquiry into current anti-vilification laws, their possible expansion, and/or extension of protections beyond existing classes to the Legal and Social Issues Committee for consideration and report no later than 1 September 2020.*

The Committee should consider:

1. The effectiveness of the operation of the Racial and Religious Tolerance Act 2001 (the Act) in delivering upon its purposes;
2. The success or otherwise of enforcement of the Act, and the appropriateness of sanctions in delivering upon the Act's purposes;
3. Interaction between the Act and other state and Commonwealth legislation;
4. Comparisons in the operation of the Victorian Act with legislation in other jurisdictions;
5. The role of state legislation in addressing online vilification.
6. The effectiveness of current approaches to law enforcement in addressing online offending.
7. Any evidence of increasing vilification and hate conduct in Victoria;
8. Possible extension of protections or expansion of protection to classes of people not currently protected under the existing Act;
9. Any work underway to engage with social media and technology companies to protect Victorians from vilification.

* The reporting date was changed to 1 March 2021.

Chair's foreword

In 2001, the Victorian Government passed the *Racial and Religious Tolerance Act 2001* (Vic) to protect Victorian Aboriginal, multicultural and multifaith communities from vilification and to offer victims a pathway for redress. Unfortunately, as demonstrated in this report, prejudice and hate are still rife in Victoria, and our anti-vilification laws are failing to deliver upon its objectives and purposes. This prompted the initial referral of the Inquiry to the Committee.

Throughout the Inquiry, the Committee received firsthand evidence from people about their experiences of vilification. I believe I can speak on behalf of the Committee when I say it was very unsettling to hear how people had been targeted, including children at school. We heard that vilification is common for many Victorians, including those who identify as Aboriginal and Torres Strait Islander, Muslim, Jewish, women, LGBTIQ+ or who have a disability. We heard that vilification and other prejudicial behaviour comes in many forms and is often frequent and repeated. For some groups, it is systemic and inter-generational. Most of us have experienced similar abuse and hate, especially online, and I am aware of how normalised this behaviour has become.

The Committee also learned that the harmful impacts of vilification are real and pervasive. Victims of vilifying conduct are likely to experience various mental health impacts as it undermines self-worth and heightens vulnerability and isolation. Alarmingly, it can have a silencing effect on individuals and lead to an under-reporting of incidents to the appropriate authority.

A key theme that the Committee received evidence about is the lack of awareness of Victoria's anti-vilification laws among our community. There is also widespread frustration about the inaccessibility and ineffectiveness of these laws. The legal definition of incitement is often very different to what people understand and it also does not reflect the hate and abuse that people experience in-person and online. This makes the laws hard to use, especially for individuals who might be experiencing language barriers and other challenges as they adapt to life in Australia. Interestingly, the Committee heard that awareness of the laws is higher among communities that are not currently protected under the legislation, such as the LGBTIQ+ community.

From the outset, the Committee was determined to strengthen Victoria's anti-vilification laws to protect a broad range of Victorians and to make the laws fit for purpose so to improve victims' ability to exercise their rights. This will be achieved through recommendations such as lowering the legal threshold for incitement-based vilification and introducing a harm-based vilification provision to make it easier to substantiate a complaint. We also make a number of recommendations to support individuals and communities affected by vilification and to help them navigate the reporting processes. This is in addition to strengthening the regulatory and enforcement powers of the Victorian and Equal Opportunity and Human Rights Commission to shift the burden away from the individual.

In recognition that prevention is as important as changing the law, the Committee has recommended various initiatives in the areas of research, school-based education, public awareness campaigns, and responsible media reporting to address the causes of discrimination and hostility towards minority groups. We also importantly recommend establishing a positive duty on organisations to try to prevent vilification from occurring in certain environments in the first place.

I strongly believe that effective anti-vilification laws can protect people and communities and promote social cohesion and harmony. This inquiry has been an important reminder that preventing and addressing vilification cannot be achieved at the individual level but rather is a societal responsibility.

My colleagues and I thank everyone who shared their time, ideas and expertise throughout the inquiry. I particularly wish to acknowledge the individuals who so bravely shared their experiences of vilification and abuse with us. The evidence received from the submissions and public hearings contributed to this robust report that makes over 30 recommendations to the Victorian Government.

I would like to thank my fellow Committee Members, James Newbury MP, Christine Couzens MP, Michaela Settle MP, David Southwick MP and Meng Heang Tak MP for their dedication and contributions to this inquiry. On behalf of the Committee, I also thank very much the secretariat, Yuki Simmonds, Raylene D'Cruz, Alice Petrie, Richard Slade and Cat Smith, for their hard work and support throughout the inquiry and particularly during the COVID-19 pandemic.

Natalie Suleyman
Chair and Member for St Albans

Executive summary

Chapter 1: Introduction

The introduction details the inquiry's Terms of Reference, the context surrounding the inquiry and the inquiry process.

The purpose of the inquiry is to explore the effectiveness of the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), which is a key component of Victoria's human rights framework, alongside the *Equal Opportunity Act 2010* (Vic) (EOA) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).

Symbolically, the RRTA sets the standards of appropriate behaviour for a harmonious, multicultural society. However, its ability to address racial and religious vilification is questionable and the incidence of vilification and hate conduct continues to rise. This is for Aboriginal Victorians, multicultural and multifaith groups, in addition to women; lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) people; people with a disability and other minority groups. Based on the evidence received throughout the inquiry and the occurrence of local and international events, the Committee determined the need to strengthen Victoria's anti-vilification legislative framework.

A common criticism of the RRTA is that the definition of vilification is often different to how people experience vilification and the everyday terms they use to describe it. Rather, people use terms, such as hate speech, trolling or cyberbullying interchangeably to describe experiences of vilification, harassment, hate or prejudice. The Committee shares these various experiences throughout the report, including those not currently deemed unlawful under the RRTA, to examine the various, complex and interrelated harms experienced by communities.

The Committee received 62 submissions and 11 supplementary submissions. It held seven days of public hearings in Melbourne, both in person and remotely via video link.

Chapter 2: Context of anti-vilification laws in Victoria

Victoria's equality and human rights laws derive from international law obligations, particularly the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. These international laws oblige Australia to protect people from racial and religious discrimination or hatred while upholding the right to freedom of speech.

The Commonwealth Government and most other states and territories have anti-discrimination and vilification laws. Section 18C of the Commonwealth *Racial Discrimination Act 1975* (RDA) civilly prohibits conduct that offends, insults, humiliates

or intimidates a person or group based on race, colour or national or ethnic origin. The Australian Human Rights Commission (AHRC) is responsible for conciliating complaints under the RDA, along with other complaints about unlawful sex, disability and age discrimination made under other Commonwealth anti-discrimination laws. Race is the only protected attribute in the RDA, however, a draft Religious Discrimination Bill 2019 (Cth) proposes to introduce new religious protections in Australia.

Victoria's RRTA aims to reduce racial and religious vilification and promote tolerance and harmony in Victoria. Specifically, the Act prohibits public behaviour (rather than personal beliefs) that incites or encourages hatred, serious contempt, revulsion or severe ridicule against another person or group of people because of their race and/or religion. The RRTA contains a number of exceptions to the law in order to balance freedom from vilification with the right to freedom of speech.

The RRTA has not previously been subject to review. However, in 2019, Fiona Patten MLC introduced the Racial and Religious Tolerance Amendment Bill 2019 (Vic) in the Legislative Council to extend the list of protected attributes under the RRTA, lower the threshold for civil and criminal vilification, and expand the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) regulatory functions and powers. The Bill remains at the second-reading stage.

Other Victorian laws that complement the RRTA include the EOA and the Charter. Further, the *Sentencing Act 1991* (Vic) (Sentencing Act) provides that courts consider whether an offence was motivated by hatred or prejudice when determining an offender's sentence. The Victorian Government also has numerous policies and strategies that aim to improve equality, multiculturalism and diversity.

Chapter 3: Experiences of vilification among Victorian communities

The Committee heard throughout the inquiry that vilification takes many forms and is experienced differently by and within communities. Despite Victoria's multiculturalism and diversity in religious observations, racial and religious discrimination, harassment and vilification remain prevalent throughout the State. As vilification is broadly under-reported by those who experience it, there is limited quantitative data to establish an accurate picture of hate in Victoria. However, the Committee received evidence of numerous examples of significant public vilification incidents.

Discrimination, harassment and vilification continue to be commonplace for Aboriginal and Torres Strait Islander people, most of which stems from systemic racism and has resulted in intergenerational trauma, systemic and structural exclusion, and serious, multiple and ongoing harms. African Australians have been exposed to an increase in racially-motivated prejudice and discrimination in Victoria in recent years, mostly due to a media and political focus on perceived issues of 'African gangs'. Islamophobia is on the rise in the community, with a reported increase in incidents following the Christchurch terror attack, and political rhetoric impacting broader societal attitudes

towards the Muslim community. Antisemitism is also a growing problem, including in schools and in online environments where there has been a rise in right-wing extremist discourse.

The Committee also received evidence about the increase in racial threats and vilification throughout the Coronavirus Pandemic in 2020, particularly directed at Asian communities in Victoria, in addition to the Jewish community.

The Committee also considered vilification targeted at other groups who are not currently protected under the RRTA, including the LGBTIQ+ community, women and people with a disability. Vilification towards persons who identify as LGBTIQ+ is pervasive and takes many forms. For example, the AHRC reported in 2015 that nearly 75% of LGBTI people in Australia have experienced bullying, harassment or violence on the basis of their sexual orientation or gender identity.[1] Gendered hate speech and vilification of women is also commonplace in Australia and a normalised feature of everyday public life, especially in online environments. Further, Victorians continue to hold negative stereotypes and beliefs about persons with a disability, who subsequently face harassment and hate conduct and also experience greater barriers to addressing such conduct.

The harmful impacts of vilification are wide-ranging and severe. Persons targeted by vilification are likely to experience various mental and physical health impacts that affect their quality of life. It undermines self-worth and heightens vulnerability, isolation and exclusion. This silences individuals who feel unwelcome or reduces their ability to participate in public life. In addition, it can diminish trust in public institutions and lead to under-reporting of vilification incidents.

Based on the evidence received, the Committee recommends that Victoria's anti-vilification protections be as inclusive as possible to provide adequate protection from harm for women, gender diverse people, people with a disability and people with HIV/AIDS. The Committee also recommends that a person be able to make a complaint based on multiple protected attributes.

Chapter 4: Preventing vilification in Victoria

Addressing the causes of discrimination, prejudice and hatred towards minority groups is complex, and efforts to do so in the past have often fallen short. It is essential that the Victorian Government implement legislative reform and complementary prevention-based strategies to reduce and eliminate vilification in Victoria. The Committee notes, however, that various reviews and reports have made similar recommendations over the past several decades with varying success. The Committee recommends funding for ongoing research on the drivers of vilifying conduct and prejudice to enhance understanding of the drivers behind vilification in Victoria and to develop effective strategies to prevent this conduct.

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1 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report*, AHRC, 2015, p. 15.

The Committee heard that media and political commentary negatively impacts communities commonly targeted by vilification. The Committee supports the recommendation of the Australian Parliamentary Joint Committee on Human Rights, in its 2017 *Inquiry into freedom of speech in Australia*, which proposes that 'leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public'.[2] Further, the Committee recommends that the Victorian Government advocate to the Commonwealth Government to implement the recommendations of the Australian Competition and Consumer Commission in its 2019 *Digital Platforms Inquiry Final Report*, regarding the need for a national regulatory framework for all forms of media.

Throughout the inquiry, the Committee heard that a key area for prevention activities is school-based education. It is critical to proactively target prejudice in early schooling years to ensure that it does not become further entrenched and systemic, and to allow children to feel safe, learn and develop at school. Families told the Committee about how schools had failed to respond and support their children who were victims of serious antisemitic bullying at school. These experiences demonstrate that broader societal influences can impact the way educators and schools respond to vilification incidents. In response, the Committee recommends enhanced professional development for educators and school leadership on preventing and responding to hate conduct within schools.

To prevent vilification more broadly, inquiry stakeholders identified a need for community engagement and empowerment, community education initiatives, legal education and assistance, targeted initiatives, and strengthening Victoria's human rights culture. The Committee recommends that the Victorian Government work with relevant organisations, such as VEOHRC and the Victorian Multicultural Commission, to develop community education campaigns about vilification laws, hate conduct, responding to incidents, online vilification and strengthening social cohesion. Such education should be both broad to the public and tailored to specific groups that are protected under the amended anti-vilification laws.

The Committee also discusses how to prevent events where vilification is likely to occur, such as the 2019 neo-Nazi Hammered Music Festival. The event was reportedly cancelled by its organisers, although the Victorian Government stated that it was otherwise unable to stop the event. Victoria Police told the Committee that breach of the peace provisions are the primary mechanism to prevent such events, but that these apply only to events held on public land. The Committee received limited evidence on other legal solutions to prevent such hatred-based events, although it considered the efficacy of a positive duty for vilification, whereby employers and service providers would be prohibited from engaging or promoting vilification in the course of their business activities.

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2 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Parliament of Australia, February 2017, p. 49.

The Committee also explored the Commonwealth process of 'listing' a group in relation to a terrorist activity, which has been used in other international jurisdictions to deal with groups that have clearly engaged in serious hate conduct and vilification. There are no extreme right-wing groups listed in Australia, although the Australian Parliamentary Joint Committee on Intelligence and Security commenced an inquiry into extremist movements and radicalism in Australia in December 2020, which will examine, among other matters, 'changes that could be made to the Commonwealth's terrorist organisation listing laws to ensure they are fit for purpose'.[3]

Chapter 5: Civil anti-vilification protections

The RRTA is the cornerstone of Victoria's anti-vilification framework. It is an incitement-based regime that prohibits conduct that incites hatred of another person or group because of their race and/or religion.

The Committee heard that the RRTA is under-utilised and does not effectively deliver on its purpose of promoting racial and religious tolerance and providing redress to victims of vilification. A common theme in the evidence was that the high threshold for the incitement test and the difficulty in substantiating a complaint of vilification were key to the Act's legal ineffectiveness. In response, the Committee recommends lowering the high threshold for the civil provision from 'conduct that incites' to 'conduct that is likely to incite'. This aligns with existing judicial interpretation and the standard of proof in the criminal vilification provisions.

Various inquiry stakeholders also reported to the Committee that characterising vilification as incitement fundamentally reduces the effectiveness of the RRTA. Most people understand or experience vilification as targeted hatred or abuse, whereas the current incitement test places too much emphasis on a third party rather than the harms of conduct on victims. While the Committee endorses retaining the incitement-based provision, it recommends the establishment of a complementary harm-based provision to assess vilification from the perspective of the victim. Rather than adopt a harm-based provision based on section 18C of the RDA and Tasmania's *Anti-Discrimination Act 1998* (ADA), the Committee recommends that the Victorian Government take an innovative approach in its drafting to ensure the provision is clear and accessible to those who seek its protection.

The Committee recommends several other changes to the civil provisions to strengthen Victoria's anti-vilification provisions, including that the Victorian Government explore narrowing the religious purpose exception to align with the Charter, and adopt the definition of a 'public act' from section 93Z(5) of the NSW *Crimes Act 1900* for application to the civil and criminal provisions.

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3 Parliamentary Joint Committee on Intelligence and Security, *Terms of Reference: Inquiry into extremist movements and radicalism in Australia*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ExtremistMovements/Terms_of_Reference> accessed 1 February 2021.

Chapter 6: Improving accessibility and enforcement

To enhance accessibility to and enforcement of Victoria's anti-vilification laws, the Committee considered incorporating the RRTA into the EOA and strengthening VEOHRC's regulatory and enforcement powers.

The Committee heard that community awareness of the RRTA is far lower than that of the EOA, and accordingly there are fewer vilification enquiries, complaints and prosecutions. Various stakeholders supported incorporating the anti-vilification laws into the EOA in order to capitalise on the public's familiarity with the EOA and to also establish a single equality framework that comprises all VEOHRC's regulatory functions and powers. There was some opposition to this proposal on the basis that the laws would lose their symbolic value of promoting multiculturalism and specifically addressing racial and religious vilification. Other stakeholders also expressed concern that co-locating anti-vilification and discrimination laws in the same act risks diluting the discrimination laws. On the other hand, the Committee heard that vilification often occurs alongside other unlawful conduct, such as discrimination, and co-locating the provisions could streamline the complaints process.

The Committee recommends streamlining the anti-vilification laws and moving the provisions into a distinct section of the EOA. This will enhance public awareness of the anti-vilification laws and achieve better outcomes for communities. It also ensures consistency with other jurisdictions who have incorporated vilification protections into their anti-discrimination laws.

The Committee learned that VEOHRC has fewer powers and functions for vilification compared to discrimination. This has limited VEOHRC's ability to enforce the RRTA and places a significant burden on individuals. To shift the burden of enforcement to VEOHRC, the Committee recommends applying all VEOHRC's function and powers under the EOA to the anti-vilification provisions.

Numerous stakeholders advocated for expanding VEOHRC's powers beyond those currently in the EOA to enhance its investigatory and enforcement powers and provide it with more capacity to address systemic discrimination. As these powers were removed from the EOA in 2011, the Committee recommends that the Victorian Government consider reinstating them and applying them to vilification.

The Committee also identified that VEOHRC should be empowered to direct a person to provide information or produce a document needed for a vilification complaint. This will allow it to more effectively enforce the anti-vilification provisions, especially in the online environment where anonymity of perpetrators can significantly hinder dispute resolution.

The Committee also recommends establishing a positive duty for organisations to take reasonable and proportionate measures to eliminate vilification. The Committee heard that establishing a positive duty is essential to the effective operation of anti-vilification laws, as it is concerned with addressing issues from a systemic perspective.

Lastly, the Committee recommends that the Victoria Government fund VEOHRC based on the reforms to the anti-vilification legislative framework to ensure it is adequately resourced.

Chapter 7: Criminal anti-vilification protections

The offences for serious vilification are reserved for the most extreme forms of vilifying conduct, however, similar to the civil provisions, the Committee heard there are significant impediments to initiating and enforcing such offences under the RRTA. Two successful criminal prosecutions under the Act in twenty years, including one in the last year, is not indicative of the prevalence of serious vilification in the community.

One explanation for the low number of prosecutions is that Victorian Police officers are more likely to use alternative offences for criminal conduct that involves some element of prejudice or hatred, such as assault under the *Crimes Act 1958* (Vic) (Crimes Act) or threatening behaviour under the *Summary Offences Act 1966* (Vic). The Committee heard that this reflects police officers' limited awareness and understanding of the RRTA, despite Victoria Police having a holistic serious vilification framework.

As with the civil provisions, stakeholders proposed lowering the threshold for the serious vilification provision to enhance its effectiveness. Some stakeholders proposed that Victoria emulate the recent criminal vilification reforms in NSW, or the Western Australian laws that focus on harassment as a legislative model. In the end, the Committee recommends streamlining the criminal offences into a single section that addresses incitement of hatred and threats of violence, as well as incorporate the 'recklessness' standard to lower the threshold. The Committee also recommends that serious vilification offences be duplicated in the Crimes Act to ensure they are appropriately considered by Victoria Police in the normal course of their duties.

To facilitate further criminal investigations and enforcement, the Committee recommends reviewing the requirement for consent from the Director of Public Prosecutions to commence a prosecution. The Committee also recommends reviewing the maximum penalties for serious vilification offences to ensure they are commensurate with comparable criminal offences. This will further incentivise Victoria Police to prosecute offenders using the criminal vilification offence. Further, the Committee recommends investigating issues relating to the under-utilisation of the section on prejudice-motivated crime in the Sentencing Act, including examining international models, such as that in the United Kingdom, that effectively consider prejudice as an aggravating factor in sentencing.

Another recurrent theme throughout the inquiry was the criminalisation of the public display of vilifying materials, such as the Nazi swastika. Some stakeholders advocated for a targeted approach that specifically bans the public display of Nazi symbols, whereas others supported a broader, principled approach to prohibit the display of symbols of hate. The Committee believes it is important to send a clear message to the community that Nazi symbolism is not acceptable in any form and has wide-ranging, negative societal impacts. It recommends that the Victorian Government establish a

criminal offence that prohibits the display of symbols of Nazi ideology, including the Nazi swastika, with considered exceptions to the law. This would allow Victoria Police to immediately remove Nazi symbols that are on deliberate display to vilify targeted communities.

In recognition that subjects of hate change over time, as do the means and methods of vilifying them, the Committee also recommends that the Government monitor the public display of other hateful symbols to determine whether a broad-based offence should be established.

Chapter 8: Reporting and data

The Committee heard throughout the inquiry that vilification in Victoria is prevalent yet under-reported. This can result in conduct going unacknowledged and becoming normalised and entrenched in the Victorian community.

There is a lack of community awareness and understanding of anti-vilification laws, especially among groups currently protected under the RRTA. Further, the burden on individuals to make complaints and resolve disputes is a barrier to reporting and enforcement. There is also a disconnect between the law and targeted communities due to the lack of culturally appropriate services to help people access and navigate the system for reporting vilification. The Committee recommends that the Victorian Government fund services and programs to support targeted communities, including those that provide legal information and assistance. The Committee also recommends funding organisations to engage in strategic litigation to enhance awareness of anti-vilification laws, increase the body of case law and further minimise the onus on individuals

Various stakeholders advised the Committee that people are often unwilling to report vilification for fear of victimisation or other negative consequences, such as losing employment. Victimisation was a significant concern for Aboriginal Victorians, newly arrived migrants, Jewish people and people with a disability. The Committee recommends enabling representative complaints to be made to VEOHRC without the need to name an individual complainant. This would provide victims with expert support throughout the dispute process and ease concerns around potential victimisation.

Distrust or a lack of confidence in the police and public institutions was identified as another key barrier to reporting vilification, particularly for historically marginalised groups, in addition to limited effective outcomes from complaints processes. Advocacy and legal organisations told the Committee that they questioned whether to advise clients to proceed with making a complaint given the immense effort and resources involved and the likely negative outcome. The Committee is confident, however, that the proposed recommendations will improve the legal and operational effectiveness of Victoria's anti-vilification laws, and accordingly minimise existing outcome deficits. Further, the Committee recommends that VEOHRC and Victoria Police strengthen working relationships, information sharing and cooperation to ensure all reports or

complaints about vilification are appropriately addressed, and that third party, including community-led, reporting mechanisms be implemented to facilitate greater reporting of vilification incidents.

The Committee also heard that prejudice-motivated crime is commonly under-reported by victims and under-recorded by police officers, resulting in inconsistent recording processes or use of definitions. VEOHRC advised in its submission that there is limited clarity around when and where hate crimes occur, which makes it difficult to understand its prevalence in the community. In response, the Committee recommends mandatory, standardised recording of prejudice-motivated crime by Victoria Police, and also recommends strengthening education and training on responding to vilification and prejudice-motivated crime for Victoria Police, as well as members of the judiciary.

Comprehensive and accurate data recording surrounding vilification and related incidents is central to understanding the extent and nature of hate conduct in the community and designing policy and policing responses. This includes data on civil and criminal vilification incidents and prejudice-motivated crime. Poor data collection and sharing results in limited understanding of the forms and prevalence of hate in the community, leading to poorly-targeted policy and legislative responses. The Committee recommends the Victorian Government work with enforcement agencies and community organisations to develop a strategy to collect, monitor and regularly report data on vilification and prejudice-motivated crime. Data should refer to outcome measures and indicators to monitor the effectiveness of legislation, programs and services in reducing vilification.

Chapter 9: Online vilification

Since the RRTA was enacted, the proliferation of the internet and smartphones has resulted in the digitisation of human life. The use of social media platforms (SMPs) like Facebook and Twitter has also fundamentally changed the landscape of the internet. Unfortunately, harmful online conduct and content, including online vilification, has arisen from this digitisation of life.

Online vilification is now a significant and growing problem for Victorians. Research shows that 70% of Australians think 'hate speech' is increasing and that it primarily occurs online on SMPs.

The Committee heard that online vilification is an everyday experience for Victorians who are Muslim, Jewish, women, LGBTIQ+ and/or have a disability. The COVID-19 pandemic increased online vilification directed at Victorians of Chinese origin and amplified the vilification of other minority communities who were blamed for spreading the virus.

The spread of harmful online conduct and content is exacerbated by the unique features of the online environment, namely the scope and pace with which harmful content can spread, the ability to be anonymous online and the disinhibition effect that emboldens internet users to behave in ways that they would not in offline settings.

Australia is an international leader in responding to harmful online conduct and content. The Office of the eSafety Commissioner was established in 2015 and is the only government agency solely committed to keeping citizens safe online globally. The Online Safety Bill 2020 is in development and proposes a new cyber-abuse scheme for adults to be regulated by the Office of the eSafety Commissioner. When passed it will complement other Australian laws that capture harmful conduct and content online, including Victoria's anti-vilification laws.

The Committee is aware that effectively responding to online vilification requires the implementation of further accountability measures by SMPs, combined with greater government regulation. There was widespread scepticism among inquiry stakeholders about the capacity of SMPs to self-regulate. However, the Committee acknowledges that despite previously resisting any form of regulation, SMPs have started to strengthen their policies and responses to online harms.

In the Victorian context, the Committee considers that its recommendations to enhance the State's anti-vilification laws will help the Victoria Government to specifically address online vilification. For example, granting VEOHRC the power to compel information and documents relevant to vilification complaints will assist to deal with online vilification conduct by anonymous perpetrators, plus the establishment of a positive duty to eliminate vilification will require SMPs to more proactively address online harms. The Committee also recommends that Victorian Government develop a specific online vilification strategy that focuses on preventing and reducing harmful online conduct and content using Victoria's anti-vilification laws and other steps to build the community's digital literacy and online safety skills.

As the Commonwealth Government is essential to considering how SMPs can be better regulated in Australia, it is essential that national and state jurisdictions work more collaboratively in this area. Accordingly, the Committee recommends that the Victorian Government explore options, in coordination with the Commonwealth and other states and territories, to address online vilification, including reporting and referral tools between the Office of the eSafety Commissioner and anti-discrimination and human rights agencies throughout Australia; and a legal framework for law enforcement authorities to handle online vilification issues.

Recommendations

3 Experiences of vilification among Victorian communities

RECOMMENDATION 1: That the Victorian Government extend anti-vilification provisions (in both civil and criminal laws) to cover the attributes of:

a. race and religion

b. gender and/or sex

c. sexual orientation

d. gender identity and/or gender expression

e. sex characteristics and/or intersex status

f. disability

g. HIV/AIDS status

h. personal association. 58

RECOMMENDATION 2: That the Victorian Government amend anti-vilification laws to ensure people can make complaints on the basis of more than one attribute. 60

4 Preventing vilification in Victoria

RECOMMENDATION 3: That the Victorian Government fund ongoing research on the drivers behind vilification conduct and prejudice, and effective strategies to prevent this conduct. 65

RECOMMENDATION 4: That the Victorian Government advocate to the Commonwealth Government to implement the Australian Competition and Consumer Commission's recommendation six of its *Digital Platforms Inquiry Final Report* to establish a national regulatory framework for all forms of media. 76

RECOMMENDATION 5: That the Victorian Government implement programs within primary schools to strengthen respect, diversity and cohesion among all students. 79

RECOMMENDATION 6: That the Victorian Government promote clearer understanding among educators and school leadership on preventing and responding to hate conduct within schools, including through professional development, policies and strategies. Topics to cover may include:

- the role of school-based interventions, at both primary and secondary levels, to reduce discriminatory views and attitudes and prevent systemic prejudice
- the impact of broader societal and structural influences on schools' responses to alleged incidents of vilification or harassment
- appropriate responses of teachers, principals and school bodies to incidents of alleged vilification and harassment between students
- possible expansion of the Report Racism hotline to include other groups who experience serious harassment at school, such as LGBTIQ+ youth. 84

RECOMMENDATION 7: That the Victorian Government work with relevant organisations (such as the Victorian Equal Opportunity and Human Rights Commission and the Victorian Multicultural Commission) to develop community education campaigns on vilification and hate conduct. Such education should be both broad to the public and also tailored to specific groups that are protected under amended anti-vilification laws. Topics addressed should include creating awareness about vilification laws, hate conduct, responding to incidents, online vilification and strengthening social cohesion. 98

5 Civil anti-vilification protections

RECOMMENDATION 8: That the Victorian Government lower the civil incitement test from 'conduct that incites' to 'conduct that is likely to incite'. 118

RECOMMENDATION 9: That the Victorian Government introduce a new civil harm-based provision to assess harm from the perspective of the target group. 120

RECOMMENDATION 10: That the Victorian Government formulate the harm-based provision to make unlawful conduct that 'a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons'. 123

RECOMMENDATION 11: That the Victorian Government explore, in consultation with LGBTIQ+ and religious organisations, narrowing the religious purpose exception in section 11(2) to align with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). 126

RECOMMENDATION 12: That the Victorian Government amend the public interest exception in section 11(1)(b)(ii) to include the word 'genuine': any *genuine* purpose that is in the public interest. 126

RECOMMENDATION 13: That the Victorian Government adopt the definition of 'public act' in s93Z(5) of the *Crimes Act 1900* (NSW), and ensure it apply to civil and criminal incitement-based and harm-based provisions in Victoria's anti-vilification laws. 128

6 Improving accessibility and enforcement

RECOMMENDATION 14: That the Victorian Government streamline anti-vilification legislation by moving provisions to the *Equal Opportunity Act 2010* (Vic) and review the operation and effectiveness of the laws, as described in this report, in five years. 134

RECOMMENDATION 15: That the Victorian Government extend current powers of the Victorian Equal Opportunity and Human Rights Commission under the *Equal Opportunity Act 2010* (Vic) to vilification regulation. These powers relate to practice guidelines, research, legal interventions, compliance reviews, action plans and conducting investigations. 137

RECOMMENDATION 16: That the Victorian Government consider reinstating the powers removed from the Victorian Equal Opportunity and Human Rights Commission in 2011 and extend these powers to vilification. 141

RECOMMENDATION 17: That the Victorian Government enable the Victorian Equal Opportunity and Human Rights Commission to direct a person to provide information or produce a document needed for a complaint and enforce such a direction by filing it with the Victorian Civil and Administrative Tribunal. 142

RECOMMENDATION 18: That the Victorian Government implement a positive duty for organisations to take reasonable and proportionate steps to prevent vilification, as is currently the case for discrimination, sexual harassment and victimisation matters under the *Equal Opportunity Act 2010* (Vic). 144

RECOMMENDATION 19: That the Victorian Government fund the Victorian Equal Opportunity and Human Rights Commission based on the reforms to the anti-vilification legislative framework. 146

7 Criminal anti-vilification protections

RECOMMENDATION 20: That the Victorian Government reform the current criminal offences of serious vilification to simplify and lower the thresholds, and in particular, to specify that: A person must not, *on the ground of one of the protected attributes, intentionally or recklessly* engage in conduct that—

a. is likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons; or

b. to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons. **166**

RECOMMENDATION 21: That the Victorian Government review the requirement for the written consent of the Director of Public Prosecutions before commencing a prosecution for serious vilification. **168**

RECOMMENDATION 22: That the Victorian Government review maximum penalties for serious vilification offences. **170**

RECOMMENDATION 23: That the Victorian Government duplicate criminal anti-vilification offence provisions in the *Crimes Act 1958* (Vic). **172**

RECOMMENDATION 24: That the Victorian Government establish a criminal offence that prohibits the display of symbols of Nazi ideology, including the Nazi swastika, with considered exceptions to the prohibition. **181**

RECOMMENDATION 25: That the Victorian Government, in addition to implementing recommendation 24, monitor the public display of other hateful symbols to determine whether they should also be prohibited. **181**

RECOMMENDATION 26: That the Victorian Government investigate issues related to prejudice-motivated crime such as:

- the test for motivation under section 5(2)(daaa) of the *Sentencing Act 1991* (Vic)
- international models such as the United Kingdom's approach to hate crimes. **185**

8 Reporting and data

RECOMMENDATION 27: That the Victorian Government fund services to provide support to impacted communities who experience vilification including:

a. services and programs that provide counselling and other support; and

b. services and programs providing legal information and assistance to navigate the system for reporting vilification. 194

RECOMMENDATION 28: That the Victorian Government fund organisations such as Victorian Legal Aid and the Victorian Aboriginal Legal Service to engage in strategic litigation on vilification matters to develop practice in this area. 195

RECOMMENDATION 29: That the Victorian Government enable a representative complaint to be made to the Victorian Equal Opportunity and Human Rights Commission without the need to name an individual complainant. 199

RECOMMENDATION 30: That the Victorian Equal Opportunity and Human Rights Commission and Victoria Police strengthen working relationships, information sharing and cooperation to ensure all reports or complaints about vilification are appropriately addressed. This should also include relevant peak and community organisations where appropriate to share research, data and information. 207

RECOMMENDATION 31: That the Victorian Government make the recording of prejudice-motivated crime mandatory by Victoria Police officers. This requirement should be accompanied by sufficient training, resources and procedures, as well as the establishment of relevant guidelines and standards to ensure standardization of record keeping processes. 211

RECOMMENDATION 32: That the Victorian Government strengthen education and training on responding to vilification and prejudice-motivated crime. This could include comprehensive and ongoing education and training for police officers as well as members of the judiciary on serious vilification offences, sentencing provisions and investigating and prosecuting prejudice-motivated crimes. 213

RECOMMENDATION 33: That the Victorian Government implement third party (community-led) reporting mechanisms in trusted community organisations as an additional avenue to report vilification and hate crimes to relevant authorities—the Victorian Equal Opportunity and Human Rights Commission and Victoria Police. 215

RECOMMENDATION 34: That the Victorian Government work with agencies—including the Victorian Equal Opportunity and Human Rights Commission, Victoria Police, Victorian Crime Statistics Agency and the Victorian Civil and Administrative Tribunal—to develop a strategy to collect, monitor and regularly report government data on vilification conduct and prejudice-motivated crime. Data should refer to outcome measures and indicators to monitor the effectiveness of legislation, programs and services in reducing vilification. **220**

9 Online vilification

RECOMMENDATION 35: That the Victorian Government work with relevant agencies, community organisations and stakeholders (such as the Victorian Equal Opportunity and Human Rights Commission, Office of the eSafety Commissioner, the Online Hate Prevention Institute and others) to develop a strategy to reduce and prevent vilification online. The strategy should include steps to build digital literacy and online safety skills, data collection and publication and raising awareness of the application of the anti-vilification laws to online settings. **250**

RECOMMENDATION 36: That the Victorian Government explore options, in coordination with the Commonwealth and other states and territories, to address online vilification such as:

- reporting and referral tools between the Office of the eSafety Commissioner and anti-discrimination and human rights agencies throughout Australia
- encourage social media platforms to adopt jurisdiction verification tools
- collecting and publishing information and data on social media platforms and vilification, including policies and processes for reducing vilification
- a legal framework for law enforcement authorities to handle online vilification issues. **254**

Acronyms and terms

ACT	Australian Capital Territory
ACLO	Aboriginal Community Liaison Officer
AHRC	Australian Human Rights Commission
ADA	*Anti-Discrimination Act 1977* (NSW)
ADA	*Anti-Discrimination Act 1992* (NT)
ADA	*Anti-Discrimination Act 1998* (Tas)
ADLEG	Australian Discrimination Law Experts Group
AJA	Australian Jewish Association
ASIO	Australian Security Intelligence Organisation
ASRC	Asylum Seeker Resource Centre
AMWCHR	Australian Muslim Women's Centre for Human Rights
BSC	Brighton Secondary College
CAG	Australian Council of Attorneys-General
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CCA	*Criminal Code Act 1995* (Cth)
CMY	Centre for Multicultural Youth
COVID-19	Coronavirus Pandemic
CSA	Crime Statistics Agency
DET	Department of Education and Training
DPC	Department of Premier and Cabinet
DPP	Director of Public Prosecutions
ECAJ	Executive Council of Australian Jewry
ECCV	Ethnic Communities' Council of Victoria
EOA	*Equal Opportunity Act 2010* (Vic)
EOSA	*Enhancing Online Safety Act 2015* (Cth)
HRLC	Human Rights Law Centre
HRLC et al.	Human Rights Law Centre, GetUp!, Anti Defamation Commission, Victorian Trades Hall Council and the Asylum Seeker Resource Centre
ICCPR	International Covenant on Civil and Political Rights
ICV	Islamic Council of Victoria
IHRA	International Holocaust Remembrance Alliance
JCCV	Jewish Community Council of Victoria
J-Lunch	United Jewish Education Board Jewish lunch program
J-Voice	United Jewish Education Board Jewish voice program
LGBTIQ+	Lesbian, Gay, Bisexual, Trans and gender diverse, Intersex and Queer

LEAP	Law Enforcement Assistance Program
LIV	Law Institute of Victoria
MEAA	Media, Entertainment & Arts Alliance
NCSR	National Crime Recording Standard
NEA	Netzwerkdurchsetzungsgesetz/Network Enforcement Act 2016 (DE)
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
OHPI	Online Hate Prevention Institute
PALO	Police Aboriginal Liaison Officer
QLD	Queensland
RDA	*Racial Discrimination Act 1975* (Cth)
RRTA	*Racial and Religious Tolerance Act 2001* (Vic)
SA	South Australia
SMPs	Social Media Platforms
SSA	Safe Space Alliance (Brighton Secondary College)
SSASGD	Same Sex Attracted and Sex and Gender Diverse
ToR	Terms of Reference
UJEB	United Jewish Education Board
UK	United Kingdom
UKICO	United Kingdom Information Commissioner's Office
UPJ	Union for Progressive Judaism
UN	United Nations
VAEAI	Victorian Aboriginal Education Association Incorporated
VALS	Victorian Aboriginal Legal Service
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VGLRL	Victorian Gay and Lesbian Rights Lobby
VLA	Victorian Legal Aid
VMC	Victorian Multicultural Commission
VTHC	Victorian Trades Hall Council
WA	Western Australia

1 Introduction

On 12 September 2019, the Legislative Assembly's Legal and Social Issues Committee received Terms of Reference (ToR) to inquire into Victoria's *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) and its role in addressing vilification and conduct in Victoria. The Committee was asked to examine the effectiveness of the Act in delivering upon its purpose, and the possible expansion of protections under the Act beyond the existing attributes of race and religion. The ToR also required the Committee to consider similar legislative frameworks in other jurisdictions and interactions between the RRTA and Commonwealth legislation. Lastly, the Committee was asked to explore the effectiveness of the current approach to address online vilification at the state level and how to improve this.

The RRTA is one of the three pieces of Victoria's human rights framework, alongside the *Equal Opportunity Act 2010* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). As stated by Jacinta Lewin, the Chair of the Human Rights Committee at the Law Institute of Victoria, Victorians can be proud of this framework, which provides the 'language, law, skills and potential for education' around many of the values encapsulated in a democratic society.[1] The RRTA was enacted in January 2002 with the purpose of promoting racial and religious tolerance and to provide a means of redress for victims of vilification.[2] This was in recognition of Victoria's multiculturalism and the benefit that diversity brings to the community.

While symbolically the RRTA espouses the standards of appropriate behaviour for a harmonious and multicultural society, its ability to address racial and religious vilification is questionable. Complaints of vilification under the Act have been consistently low since its inception, however, the incidence of vilification and hate conduct are on the rise and have moved into online environments. Professor Katharine Gelber and Professor Luke McNamara, two researchers who have studied anti-vilification laws across Australia over 20 years, wrote in a 2018 article:

> Unfortunately, as our research confirms, there has been little to no change in the incidence of vilification in public places – on the street, on trains and buses, or in shopping centres, for example. The only shift that has occurred is in who is targeted, with more recent waves of migrants newly targeted. There has been a shift, for example, towards people of African heritage and from the Middle East.
>
> On this level, anti-vilification laws do not seem to have reduced the overall incidence of hate speech.[3]

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1 Jacinta Lewin, Chair, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 38.

2 *Racial and Religious Tolerance Act 2001* (Vic) s s 1.

3 Katharine Gelber and Luke McNamara, 'Why Australia's anti-vilification laws matter', *The Conversation*, 30 November 2018, <https://theconversation.com/why-australias-anti-vilification-laws-matter-106615> accessed 19 September 2019.

During the time of the inquiry, several local and international events occurred that reaffirmed the Committee's need to examine Victoria's anti-vilification laws. Some events were directly related, including an increase in the public display of Nazi symbolism and a rise in racially motivated incidents resulting from the Coronavirus Pandemic (COVID-19). Further, it was revealed in 2020 that the Australian Security Intelligence Organisation was directing up to 40% of its countersurveillance at far-right extremist activities. It further advised that far-right extremism is an 'enduring threat' that is 'real and growing'.[4] Other events, such as the one-year anniversary of the Christchurch terror attacks and the global Black Lives Matter demonstrations, highlighted that the impacts of vilification, prejudice and hate conduct are wide-ranging, and, if left unchecked, can lead to devastating crimes.

Further, the storming of the United States Capitol and the subsequent removal of former President Donald Trump's account from some social media accounts, resulted in media and political commentary about freedom of speech and whether it is an absolute right. In the inquiry, some stakeholders identified the RRTA as 'an illiberal and antidemocratic restriction on freedom of speech'.[5] However, this simplistic understanding of free speech is held by a small minority only. It is widely accepted that limitations on freedom of speech are justified when it impinges on the human rights of others. This is a view shared by the Committee.

Through the evidence received, the Committee determined the need to strengthen Victoria's anti-vilification framework. For Aboriginal and Torres Strait Islander people, the destructive impacts of colonisation and systemic racism continue to be felt. Antisemitism appears to be on the rise in recent years, for example, with Victorian students victim to antisemitic bullying at school. There has been a similar rise in Islamophobia, with a reported spike in threats towards Muslims following the Christchurch terror attack. Other groups not currently protected under the RRTA also experience vilification, harassment and violence at significant levels, including women; lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) people; people with disability and other minority groups. In her evidence to the Committee, Kristin Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, stated that all Victorians should live free from hate:

> Hate conduct impacts people's dignity, their sense of self-worth, their belonging in a community and, as we have seen recently, their ability even to participate in employment. Two decades ago the Victorian Parliament acknowledged the public benefit of a culturally diverse and cohesive society. There is much that we have in Victoria to be proud of, and today we have the benefit of seeing how the RRTA has operated in practice and where it falls short. This is a golden opportunity to really seize an opportunity to respond proactively to the rise in hateful behaviour that we are seeing

4 Katherine Murphy, 'Antisemitism and Holocaust denial on the rise in Australia, Josh Frydenberg warns', *The Guardian*, 27 January 2021, <https://www.theguardian.com/australia-news/2021/jan/27/antisemitism-and-holocaust-denial-on-the-rise-in-australia-josh-frydenberg-warns> accessed 1 February 2021.

5 Institute of Public Affairs, *Submission 18*, received 19 December 2019, p. 1.

> right now and to send a strong message that hate conduct is not only harmful but against the law.[6]

The Committee strongly agrees with this sentiment.

1.1 A note about language

The RRTA is an incitement-based vilification regime that prohibits a person from engaging in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons based on race or religion.[7] A common criticism of the RRTA is that its definition of vilification is divorced from the reality of how people experience vilification and the everyday terms they use to describe it. Rather, people commonly use terms such as hate speech, trolling or cyberbullying and often describe experiences of harassment, hate or prejudice, some of which could amount to vilification under the RRTA.

Throughout the report, the Committee shares and discusses these various experiences, some of which might not be currently deemed unlawful. Consideration of these experiences allowed the Committee to examine the various, complex and interrelated harms experienced by communities, and it also provides a useful insight into the types of conduct that could be addressed through reforms to the anti-vilification provisions.

1.2 Inquiry process

The Committee commenced its formal call for submissions in October 2019 through advertising in The Age and an extensive stakeholder mailout. The inquiry was also promoted through Parliament of Victoria's social media, including Facebook and Instagram.

The Committee received 62 submissions from a broad range of stakeholders, including government departments and agencies, community and social service organisations, community legal centres and experts, multicultural and religious organisations, academics and individual members of the community. A list of stakeholders that made submissions is provided in Appendix A.

At the time that the Committee was accepting evidence for the inquiry, COVID-19 was unfolding. With a reported rise in racially motivated incidents resulting from the pandemic, the Committee decided to explore this as part of the inquiry and invited stakeholders to make a supplementary submission on the matter. In response, a further 11 submissions were received, with a list of whom also detailed in Appendix A.

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6 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 27.

7 *Racial and Religious Tolerance Act 2001* (Vic) ss 7,8.

The Committee held seven days of public hearings, commencing in March 2020 and ending in June 2020. Public hearings were held in Melbourne and remotely via video link due to COVID-19 restrictions. All hearings were live broadcast. A list of public hearing participants is provided in Appendix A.

The Committee is grateful to all stakeholders who generously shared their time, expertise and ideas during the inquiry, and those individuals who bravely shared their personal experiences of vilification and abuse.

1.3 Outline of report

The report is divided into the following nine chapters:

- Chapter 1 introduces the inquiry's ToR and outlines the inquiry process.
- Chapter 2 provides an overview of relevant international, federal and state and territory mechanisms.
- Chapter 3 explores how racial and religious vilification manifests in different communities, in addition to the experiences of other groups targeted by hate, in particular women, LGBTIQ+ community and people with a disability.
- Chapter 4 discusses the drivers and root causes of vilification and highlights some of the areas where it is prevalent. The chapter also considers ways to combat vilification and systemic prejudice.
- Chapter 5 examines the current civil provisions in the RRTA and the reforms proposed throughout the inquiry to address ongoing issues.
- Chapter 6 explores how to improve accessibility of Victoria's anti-vilification laws in order to facilitate more complaints and resolution of disputes, in addition to shifting the burden of enforcement from individuals to the Victorian Equal Opportunity and Human Rights Commission.
- Chapter 7 examines the current criminal provisions in the RRTA and the reforms proposed throughout the inquiry to address ongoing concerns, in addition to issues relating to prejudice-motivate crime and the display of hateful materials.
- Chapter 8 provides an overview of the barriers for individuals to report vilification, including limited awareness of the RRTA and availability of culturally appropriate support services. The chapter discusses the role of Victoria Police in building trust with communities to encourage reporting of offences, and the importance of comprehensive data collection to inform future policy and policing.
- Chapter 9 explores the risks and harms associated with the increased digitisation of everyday life and different examples of how the online environment is being regulated. It also discusses how strengthening Victoria's anti-vilification laws will contribute to addressing online vilification and the need for greater collaboration across Australian governments to regulate social media platforms and respond to online abuse.

2 Context of anti-vilification laws in Victoria

Victoria's rich cultural and linguistic diversity is promoted and protected in many ways. This includes through a variety of legislative and non-legislative measures at state, federal and international levels that are aimed at promoting tolerance and mutual respect on the basis of race, ethnicity and religion.

Anti-vilification laws were first considered in the Australian context during debate on the domestic implementation of obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which was ratified by Australia in 1975.[1] This treaty was developed by the international community in order to confirm its commitment to combating the many and systemic forms of racial discrimination prevalent around the world, such as segregation and policies based on concepts of racial superiority.[2]

Today, anti-vilification legislation is complemented by anti-discrimination, human rights and criminal laws. These overlapping bodies of law create a comprehensive framework of protections that, while wide-ranging, can be complex and difficult for many to access. For example, anti-discrimination provisions are enshrined in Commonwealth law as well as in all states and territories, but the attributes protected in each jurisdiction varies, as do the circumstances in which conduct is prohibited. In some circumstances, an individual may need to choose a jurisdiction through which to pursue a complaint. In addition, terminology such as vilification and racial hatred often have different legal meanings to how they are commonly understood.

This chapter provides an overview of relevant international, federal and state and territory mechanisms as context for discussion of Victoria's antivilification framework in subsequent chapters.

2.1 International law and obligations

Australia has obligations under international law to protect freedoms from racial or religious discrimination, hatred and vilification as well as the right to freedom of expression. The right to freedom of opinion and expression is protected under article 19

1 Signed by Australia on 13 October 1966 and ratified on 30 September 1975. The *Racial Discrimination Bill 1973* (Cth), introduced into the Parliament on 21 November 1973, included provisions making unlawful certain acts of racial hatred. However, these provisions were not contained in the final form of the Bill passed by the Parliament and enacted as the *Racial Discrimination Act 1975* (Cth). The first enacted provisions dealing with hate speech in Australia were passed in NSW under the *Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW).*

2 *International Convention of the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), Preamble.

of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, and is crucial to ensuring free, open and robust debate.[3]

Article 20(2) of the ICCPR specifies that states must prohibit 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. In addition, article 4(a) of the CERD requires signatories to introduce offences for the 'dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[4]

With regard to religion, states must protect the right to freedom of thought, conscience and religion in accordance with article 18 of the ICCPR, including the right to manifest one's religion or belief in worship, observance, practice and teaching.

The United Nations (UN) Committee on the Elimination of Racial Discrimination, the body established to monitor implementation and provide interpretive guidance regarding CERD, further defines the conceptual and regulatory limits of incitement:

> Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words.
>
> The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4, States parties should take into account … the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.[5]

Importantly, human rights law recognises that most rights and freedoms can be subject to reasonable limitations, and there are few rights which cannot be limited under any circumstances.[6] All other rights may be justifiably limited in certain situations in order to appropriately balance competing rights and freedoms. For example, the ICCPR sets out that the right to freedom of expression is accompanied by 'special duties and responsibilities' that mean it may be restricted when in accordance with law and necessary to respect the rights or reputations of others, such as for the protection of national security or public order.[7] The UN Committee on the Elimination of Racial Discrimination has issued guidance that freedom of expression 'should not aim at the

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3 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)., art 3.

4 *International Convention of the Elimination of All Forms of Racial Discrimination*., art 4(a).

5 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 35: Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, p. 5. [accessed 26 August 2020]

6 These are known as 'absolute rights', and include the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; and the right to recognition as a person before the law.

7 *International Covenant on Civil and Political Rights*., art 19(3).

destruction of the rights and freedoms of others, including the right to equality and nondiscrimination'.[8]

It is therefore important to recognise that in order to achieve the realisation of both freedom of expression and freedom from racial hatred, a balance between rights must be struck. This is provided for in respect of legislative provisions prohibiting discrimination or vilification where there are exemptions for the purposes of protecting free speech, such as where conduct has occurred in the context of genuine academic or political debate.[9] The balancing of rights is discussed throughout this report in relation to Victoria's antivilification framework.

Australia ratified the CERD in 1975 and the ICCPR in 1980, and some of the obligations contained in these conventions have been directly enacted in domestic law, such as by introduction of the *Racial Discrimination Act 1975* (Cth) (RDA). Australia recorded a declaration on article 20 of the ICCPR upon ratification to state that its existing legislative framework at both state and federal levels is adequate for protecting against racial hatred and that it reserves the right not to introduce further legislation on these matters.[10] Australia also recorded a declaration to article 4(a) of the CERD upon ratification of the treaty, stating that it was not able to immediately criminalise all of the matters covered under the article, but that it would seek to implement legislative provisions through the Australian Parliament as soon as possible.[11]

2.2 Commonwealth regulatory framework

Legislation protecting against unlawful discrimination—unfavourable treatment that occurs either directly or indirectly on the basis of a particular attribute—exists at both the state and federal level in Australia. While protections against vilification—the incitement of hatred or contempt in relation to a particular attribute—are primarily contained in state legislation, some protections are also covered at the federal level. Laws establishing discrimination and vilification protections are intended to be complementary, particularly as some acts may constitute offences under both legislative frameworks.

Commonwealth anti-discrimination law is centred around four pieces of legislation: the RDA; *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). These Acts make it unlawful to discriminate on the basis of race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or

8 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 35: Combating racist hate speech*, p. 7.

9 Ibid.

10 United Nations, *4. International Covenant on Civil and Political Rights: Declarations and Reservations: Australia*, <https://treaties.un.org/Pages/ViewDetails.aspx> accessed 26 August 2020.

11 United Nations, *2. International Convention on the Elimination of All Forms of Racial Discrimination: Declarations and reservations: Australia*, <https://treaties.un.org/pages/ViewDetails.aspx> accessed 26 August 2020.

or family responsibilities, disability and age. In addition, the *Fair Work Act 2009* (Cth) (Fair Work Act) provides for protections in the workplace against discriminatory behaviour on the basis of many of the above attributes.[12]

2.2.1 Racial discrimination

The RDA contains a number of provisions relevant to Victoria's anti-discrimination and antivilification laws. Part II of the Act prohibits discrimination on the basis of race, colour, descent or national or ethnic origin in specified areas of public life.[13] While the RDA does not specifically mention religion, it is considered that the provisions cover religious groups that can establish a common 'ethnic origin', including Jewish and Sikh groups.[14]

In addition, section 18C of the RDA makes it unlawful for a person to do something that is reasonably likely in all the circumstances to 'offend, insult, humiliate or intimidate' another person or group of people on the basis of that person's race, colour or national or ethnic origin.[15] This 'harm-based' test differs from Victorian vilification law in that it focuses on the harm caused by the conduct on the target group, rather than the impact on a third party due to incitement. The prohibition under section 18C applies only to public conduct, and there are a number of exemptions, including for conduct done reasonably and in good faith for the purposes of an artistic work; in debate or discussion for a genuine academic, artistic or scientific purpose; or another purpose in the public interest. In addition, conduct may be exempt if it constitutes a fair and accurate report of an event or matter, or a fair comment on a matter if the person is expressing their genuine belief.[16]

The RDA further makes it unlawful to incite another person or persons to commit an offence that is established under the Act.[17]

Unlike the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), the RDA does not establish criminal liability for any act and offences are civil in nature. Individuals who have experienced unlawful conduct under the Act can make a complaint to the Australian Human Rights Commission (AHRC) for investigation and resolution by conciliation.[18] The Commission can terminate investigation of a complaint for a number of reasons, including where the complaint is 'trivial, vexatious, misconceived or lacking in substance' or where there is low chance of success in conciliation processes.[19] If a

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12 The protected attributes are race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. See, *Fair Work Act 2009* (Cth) s 153 and 351.

13 *Racial Discrimination Act 1975* (Cth).Pt II

14 The Hon Philip Ruddock (chair), *Religious freedom review: Report of the Expert Panel*, report for Australian Government, Canberra, 2018, p. 92.

15 *Racial Discrimination Act 1975* (Cth) s 18C.

16 Ibid.s 18D

17 Ibid.s 17

18 *Australian Human Rights Commission Act 1986* (Cth) s 46P.

19 Ibid.s 46PH(1B)

dispute is unresolved following this process, a complainant can take the matter to the Federal Court of Australia.

Table 2.1 Complaints made under the RDA, 2015–16 to 2019–20

Year	Total number	Terminated before or after inquiry[a]	Discontinued	Withdrawn	Conciliated	Administrative closure	Percentage conciliated
2019–20	476	111	77	18	254	16	55%
2018–19	371	85	68	43	165	10	44%
2017–18	364	98	74	45	137	10	40%
2016–17	474	74	95	63	228	14	48%
2015–16	396	55	29	30	268	14	68%

a. The President of the AHRC may terminate a complaint in accordance with mandatory and discretionary grounds set out in s 46PH of the Australian Human Rights Commission Act 1986 (Cth), including where the complaint is trivial, vexatious, misconceived or lacking in substance or there is no reasonable prospect of the matter being settled by conciliation.

Source: Australian Human Rights Commission, *Complaints statistics for the years 2013–14 to 2019–20*.

The AHRC also receives and conciliates complaints about unlawful sex, disability and age discrimination made under the other anti-discrimination laws discussed above.[20]

The RDA's protections are aimed at preventing a range of harmful behaviour on the basis of racial hatred and go beyond purely discriminatory conduct. However, in providing broad exemptions to the racial hatred offences, it also seeks to balance the right to freedom of expression. Section 18C has been subject to significant debate in recent years around its reach and whether it adequately balances protections from racial hatred with freedom of speech. In particular, it has been contested that the terms 'offend' and 'insult' are highly subjective and constitute a relatively low harm threshold.[21] However, the judicial threshold for conduct captured under section 18C was established by Kiefel J in *Creek v Cairns Post Pty Ltd*,[22] as conduct with 'profound and serious effects, not to be likened to mere slights'. A 2017 Commonwealth parliamentary inquiry into the operation of Part IIA of the RDA noted in its report that the legal meaning of 'offend, insult, humiliate or intimidate' does not wholly correspond with ordinary understandings of the terms, and that 'only more serious forms of conduct' are captured by the provisions.[23]

20 Ibid., s 3–Definitions, 'unlawful discrimination' and Part IIB—Redress for unlawful discrimination.

21 Institute of Public Affairs, *The Case for the Repeal of Section 18C*, submission to Parliament of Australia, Parliamentary Joint Committee on Human Rights, Inquiry into freedom of speech in Australia, 2016, p. 19.

22 *Creek v Cairns Post Pty Ltd* (2001) 1007 FCA 16.

23 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Parliament of Australia, February 2017, p. 10.

In March 2014, the then Attorney-General, Senator the Hon George Brandis QC, announced the Government's intention to repeal section 18C and introduce a new provision prohibiting vilification and intimidation on the basis of race, colour or national or ethnic origin. However, the then Prime Minister, the Hon Tony Abbott MP, announced in August of the same year that this proposal had been taken 'off the table'.[24]

In the current inquiry, the Committee received a number of submissions that advocate for the introduction of a harm-based test in Victoria similar to that in section 18C, that focuses on harm experienced by the target group. This proposal is discussed further in Chapter 5.

As noted above, anti-discrimination law is particularly complex in that similar protections are established at both state and federal levels. The racial hatred provisions in the RDA are not intended to exclude or limit the concurrent application of state and territory laws.[25] However, in some instances a complainant is required to choose a jurisdiction before lodging a complaint and may be prevented from changing jurisdictions after proceedings begin.[26] The Victorian Law Handbook also notes:

> The overlap between Commonwealth and Victorian laws can be complex. Generally, a complaint of discrimination cannot be made under both Commonwealth and state legislation at the same time, so it is important to choose the appropriate avenue to make a complaint.[27]

2.2.2 Religious discrimination

Although the RDA's protections have been interpreted to extend to particular religious groups that can establish a common 'ethnic origin', there is no comprehensive framework prohibiting religious discrimination at the federal level.[28] In 2017, following passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), the Commonwealth Government appointed an expert panel to assess whether Australian law adequately protected the right to freedom of religion.[29] The Panel's final report made wide-ranging recommendations across various areas of law, including anti-discrimination law. In particular, the report recommended that the Commonwealth Government introduce provisions, either through the RDA or a standalone Religious Discrimination Act, to make it unlawful to discriminate on the basis of a person's 'religious belief or activity', and that relevant state and territory laws be

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24 Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws: Final Report*, ALRC Report 129, December 2015, p. 113.

25 *Racial Discrimination Act 1975* (Cth).s 6A. See, also, *Sex Discrimination Act* (Cth) s 10; *Disability Discrimination Act 1992 (Cth) s 13;* and *Age Discrimination Act 2004 (Cth) s 12.*.

26 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law: Procedures and evidence*, 28 June 2019, <http://austlii.community/foswiki/VicDiscrimLRes/Proceduresandevidence> accessed 19 September 2019.

27 Fitzroy Legal Service, *The Law Handbook: Disputes about discrimination in Victoria*, 2019, <https://www.lawhandbook.org.au/author/gregdoolan/page/14> accessed 19 September 2019.

28 The Fair Work Act does, however, protect against discrimination on the basis of religion or political opinion in the area of employment. Expert Panel, *Religious Freedom Review: Report of the Expert Panel*, Commonwealth of Australia, 2018, p. 92.

29 Ibid., p. 8.

amended to ensure similar protections at that level.[30] In its response to the report, the Commonwealth Government confirmed its intention to draft a religious discrimination bill to complement the existing suite of federal antidiscrimination legislation.[31]

The Religious Discrimination Bill 2019 (Cth) introduces anti-discrimination provisions and enables complaints to be made to the AHRC. It also aims to create a new office of Freedom of Religion Commissioner, whose functions would include strengthening community understanding and protection of freedom of religion and performing advocacy on issues impacting on the right.[32] The Bill was at the second exposure draft stage at the time of publication of this report.

A number of submissions to this inquiry expressed concern regarding some of the clauses contained in the Bill.[33] In particular, clause 42 specifies that certain statements of religious belief, made by persons in good faith and in accordance with the doctrines of that religion, do not constitute discrimination.[34] An example of this might be 'merely stating a biblical view of marriage or an atheist view of prayer'.[35] This provision would have the effect of overriding state and territory anti-discrimination laws, as it expressly provides that such a statement would not constitute discrimination under any anti-discrimination law.[36] The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) stated in its submission that this clause would have the effect of preventing individuals from making complaints about statements of religious belief (for example, offensive, humiliating or insulting comments targeted at lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) persons) that would otherwise be unlawful in some state and territory jurisdictions.[37] The Committee is aware, however, that this provision would not override the RRTA, as statements of belief are not protected if they are malicious, or are likely to harass, threaten, seriously intimidate or vilify a person or group of persons.[38] In these circumstances, federal, state or territory protections against harassment, vilification and incitement would apply.

The Australian Law Reform Commission is currently undertaking a review of religious exemptions in anti-discrimination legislation, including into the possibility of such exemptions being removed altogether. The review will also consider the removal of any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment Act*,

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30 Ibid., p. 95, recommendations 15 and 16.

31 Australian Government, *Australian Government response to the Religious Freedom Review*, Commonwealth of Australia, December 2018, p. 17.

32 The Bill is accompanied by the *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth).) and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth).

33 See, for example, Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 7; Liberty Victoria and St Kilda Legal Services's LGBTIQ Legal Service, *Submission 39*, received 17 January 2020, p. 10; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 24.

34 *Religious Discrimination Bill 2019* (Cth).cl 42 and definition of 'statement of belief'.

35 Attorney-General's Department, *Religious freedom reforms*, Australian Government, p. 7.

36 This includes each state and territory's anti-discrimination legislation, and specifically clarifies that it also includes section 17(1) of the Tasmanian *Anti-Discrimination Act 1998* (Tas). See *Religious Discrimination Bill 2019* (Cth), cl 42(1).

37 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 24.

38 *Religious Discrimination Bill 2019* (Cth).cl 42(2)

where any such impediments remain following future enactment of religious anti-discrimination legislation. The Commission is due to report within 12 months of passage of the Religious Discrimination Bill 2019.[39]

2.2.3 Criminal offences

The Commonwealth *Criminal Code Act 1995* (Cth) contains offences for intentionally urging violence against groups or members of groups distinguished by race, religion, nationality, national or ethnic origin or political opinion, with penalties up to five years imprisonment.[40] In a background paper on Australia's response to articles 19 and 20 of the ICCPR Professor Katharine Gelber noted that '[t]hese are the only criminal provisions in Australian federal law that relate to racial hatred'.[41] However, she also noted that the introduction of these offences in 2005 was founded on protecting against sedition, terrorism and threats to government, rather than protecting racial minorities.[42]

2.3 Combatting racial hatred and vilification in Victoria

2.3.1 *Racial and Religious Tolerance Act 2001* (Vic)

In 1990, the Victorian Government appointed an independent committee to provide advice on whether any legal or other measures should be undertaken to reduce racial vilification in Victoria.[43] The Committee's 1992 report recommended that legislation be introduced to make unlawful conduct that vilified persons on the basis of their race or religion. This report closely followed two national and high-profile inquiries: the Royal Commission into Aboriginal Deaths in Ccustody and the Human Rights and Equal Opportunity Commission's inquiry into racist violence. While the Victorian Government committed to implementing recommendations of all three inquiries in order to combat racial hatred,[44] its subsequent Racial and Religious Vilification Bill 1992 did not progress past the second reading stage.[45]

The legislative framework aimed at combating racial vilification became a key election commitment of the Victorian Labor Party at the 1999 election.[46] The former Premier Steve Bracks introduced the Racial and Religious Tolerance Bill 2001 (Vic) in the

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39 Australian Law Reform Commission, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation: Terms of Reference*, 2020, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference> accessed 3 September 2020.

40 *Criminal Code Act 1995* (Cth) ss 80.2A-.2B.

41 Katharine Gelber, *Background paper on Australia's response to articles 19 and 20 of the ICCPR*, (n.d.), <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/KathGelber.pdf> accessed 19 September 2019, p. 5.

42 Ibid.

43 Committee to advise the Attorney-General on Racial Vilification, *Racial vilification in Victoria*, July 1990.

44 Attorney-General Jim Kennan, *Government to legislate on racial vilification*, media release, Melbourne, 18 March 1992.

45 Victoria, Legislative Council, 27 May 1992, *Parliamentary debates*, vol. 407, p. 1053.

46 Australian Labor Party, *Brumby unveils new solutions for Victoria: Labor's plan for Victoria in the first decade of the new century*, media release, Melbourne, 18 February 1999.

Legislative Assembly on 16 May 2001 following earlier public release of an exposure draft for comment, with the provisions modelled on the New South Wales (NSW) legislative framework.[47] At the time of introduction, Victoria and the Northern Territory (NT) were the only Australian jurisdictions without legislative protections against racial vilification.[48]

During debate on the Bill, there was significant discussion around the appropriate balancing of rights with regard to freedom of speech and freedom from vilification. While the Government alleged that any impacts on freedom of speech would be 'extremely limited',[49] other contributions considered it would 'unduly impact' the right.[50] Shadow Minister for Multiculturalism, Helen Shardey, added, in relation to finding a balance:

> I believe that most of us understand that freedom of speech does not mean freedom to do everything. Freedom of speech does not mean we are free to defame others or to sexually harass others. Freedom of speech does not mean we are free to speak in an obscene way, and now we are accepting that freedom of speech does not mean that we can invite hatred on the basis of someone's religion or race.[51]

The Bill received Royal Assent on 27 June 2001 and entered into force as the RRTA on 1 January 2002. The purposes of the RRTA are to promote racial and religious tolerance and to provide a means of redress for victims of vilification.[52] Specifically, the Act prohibits public behaviour, rather than personal beliefs, that incites or encourages hatred, serious contempt, revulsion or severe ridicule against another person or group of people because of their race and/or religion. The behaviour may be a single act or multiple acts over time and can occur in or out of Victoria. With regard to online abuse, the provisions cover the use of email or the internet to publish or transmit materials or statements.

In order to balance freedom from vilification with the right to freedom of speech, the Preamble makes specific reference to freedom of expression, stating:

> The Parliament recognises that freedom of expression is an essential component of a democratic society and that this freedom should be limited only to the extent that can be justified by an open and democratic society. The right of all citizens to participate equally in society is also an important value of a democratic society.[53]

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47 Victoria, Legislative Assembly, 16 May 2001, *Parliamentary debates*, Book 5, p. 1164.

48 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law: Racial and religious vilification*, 28 June 2019, <http://austlii.community/foswiki/VicDiscrimLRes/Racialandreligiousvilification> accessed 2 September 2020.

49 Victoria, Legislative Assembly, 17 May 2001, *Parliamentary debates*, Book 5, p. 1285.

50 Victoria, Legislative Assembly, 5 June 2001, *Parliamentary debates*, Book 7, p. 1646.

51 Ibid., p. 1604.

52 *Racial and Religious Tolerance Act 2001* (Vic) s 1.

53 Ibid., p. Preamble.

The Preamble also acknowledges that Victorians have diverse ethnic and Indigenous backgrounds and observe different religious beliefs. It then states:

> However, some Victorians are vilified on the ground of their race or religious belief or activity. Vilifying conduct is contrary to democratic values because of its effect on the people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.[54]

The RRTA contains a number of exceptions to the law. Conduct is not considered unlawful if a person can establish that it was engaged in reasonably and in good faith in the course of creating or distributing an artistic work; if it constituted debate for genuine academic, artistic, religious, scientific purposes, or any purpose that is in the public interest; if it made a fair and accurate report of an event; or if it was intended to be private.[55]

There have not been any major reviews of, or revisions to, the RRTA since its introduction. The *Equal Opportunity Act 2010* (Vic) (EOA) made a number of amendments to the framework, including removal of the VEOHRC's power to investigate alleged vilification incidents under the RRTA.[56] The EOA also amended the dispute resolution process so that a complainant could bring a matter to the Victorian Civil and Administrative Tribunal without first seeking leave of the Tribunal.[57]

The core provisions of the RRTA and the anti-vilification legislative framework are discussed further in Chapter 5. The adequacy of civil provisions relating to vilification incidents is also discussed in Chapter 5, and the adequacy of criminal provisions under the Act is considered in Chapter 7.

Racial and Religious Tolerance Amendment Bill 2019

In 2019, Fiona Patten MLC introduced a private member's bill, the Racial and Religious Tolerance Amendment Bill 2019 (Vic), in the Victorian Legislative Council. The Bill seeks to extend existing protections from vilification under the RRTA to further attributes of gender, disability, sexual orientation, gender identity and sex characteristics, and rename the Act the Elimination of Vilification Act to reflect this broader purpose.[58] The test for establishing an act of vilification is amended from one that 'incites' to 'is likely to incite', while the test for an act of serious vilification is revised to include those conducted either 'intentionally or recklessly' and with the subjective test removed to become an act 'likely to' incite hatred.[59] Further, the Bill seeks to provide VEOHRC with

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54 Ibid.

55 Ibid., pp. 11–2.

56 Explanatory Memorandum, *Equal Opportunity Bill 2010* (Vic). p. 57.

57 Explanatory Memorandum, ibid. p. 77.

58 *Racial and Religious Tolerance Amendment Bill 2019* (Vic).cls 4, 8

59 Ibid.cls 10(2)(b) and 18

powers to request information in order to identify otherwise anonymous or unknown respondents to a complaint.[60] This is intended to target online hate in particular.

At the time of this report's publication, the Bill remained at the second reading stage.

2.3.2 Other legislative provisions

Equal Opportunity Act 2010

There are a number of laws that complement the RRTA in Victoria. The EOA codifies Victoria's anti-discrimination framework and aims to eliminate discrimination and promote and protect the right to equality.[61] Specifically, the Act prohibits unlawful discrimination on the basis of protected attributes that occurs in certain areas of public life, such as employment, education, in the provision of goods and services or accommodation, club membership and sporting activities, and local government.[62] This differs from protections from vilification, which apply to conduct occurring in any public place, for example in the street, at a community event, in the media, or online.[63]

The protected attributes from discrimination are: age; breastfeeding; employment activity; gender identity; disability; industrial activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; an expunged homosexual conviction; and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.[64]

Discrimination can be either direct or indirect. Direct discrimination occurs when a person treats another person with a particular attribute unfavourably because of that attribute. For example, where a person is denied retail service on the basis of their race. Indirect discrimination, on the other hand, focuses on the *effect* rather than the *intent* of the action. Indirect discrimination occurs when an act appears on its face to be impartial but has the effect of disadvantaging persons with a particular attribute. For example, it may be indirect discrimination when a workplace requires all staff to work full-time during business hours where unnecessary for the work itself, as this may disadvantage women, who are more likely to have family responsibilities.

As with Victoria's anti-vilification laws, exemptions apply to the antidiscrimination framework, including for some actions by religious bodies and schools.[65]

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60 Ibid.cl 16–17

61 *Equal Opportunity Act 2010* (Vic) s 3.

62 Ibid.pt 4.

63 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law*.

64 *Equal Opportunity Act 2010* (Vic) s 6.

65 Ibid.pt 5.

The EOA also establishes VEOHRC, including its functions, structure and board. VEOHRC has roles in relation to both the EOA and the RRTA, although these functions are broader in relation to discrimination and harassment than they are for vilification matters.[66] For vilification, functions are found in both Acts and are limited to:

- dispute resolution[67]
- public education, which includes disseminating information and educating the public on the objectives of the RRTA[68]
- reporting to the Attorney-General on issues arising from its education functions.[69]

In contrast, VEOHRC's range of functions regarding discrimination and harassment matters include those above, as well as:

- undertaking investigations into serious and systemic discrimination issues[70]
- issuing practice guidelines and action plans and conducting reviews of programs and practices for compliance with the Act[71]
- intervening in legal proceedings on issues of equality, discrimination, sexual harassment or victimisation[72]
- undertaking research in relation to the Act.[73]

The role and function of VEOHRC in relation to the RRTA and vilification matters are discussed in more detail in Chapter 6.

Charter of Human Rights and Responsibilities Act 2006

Another complementary piece of legislation is the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The Charter sets out human rights that are protected in Victoria and specifies the obligations of public authorities in order to respect these rights. Both state and local government departments and agencies must act consistently with the enshrined rights and take human rights into consideration when making decisions.[74] In addition, proposed legislation introduced into the Victorian Parliament must set out the compatibility with human rights of that legislation;[75] and courts and tribunals must seek to interpret laws in a way that is consistent with the rights.[76]

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66 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 80.

67 *Racial and Religious Tolerance Act 2001* (Vic).pt 3 div 1.

68 *Equal Opportunity Act 2010* (Vic) s 156.

69 Ibid., s 158.

70 Ibid., s 127.

71 Ibid., ss 148, 151–152.

72 Ibid., ss 159–160.

73 Ibid., s 157.

74 *Charter of Human Rights and Responsibilities Act 2006* (Vic), pt 3 div 4.

75 Ibid., pt 3 div 1

76 Ibid., pt 3 div 3

The 20 human rights contained in the Charter are derived from the ICCPR. These include the right to recognition and equality before the law;[77] right to thought, conscience, religion and belief;[78] right to freedom of expression;[79] and cultural rights.[80] Similarly to the provisions under international law discussed earlier in this chapter, the Charter provides that these rights can be subject to reasonable limitations, taking into consideration the nature of the right, the objective being pursued and whether there are any less restrictive ways of pursuing the same objective.[81]

Section 15 of the Charter establishes the right to freedom of expression and provides that it may be subject to lawful restrictions if reasonably necessary to respect the rights and reputation of other persons; or for the protection of national security, public order, public health or public morality.[82] As discussed earlier, this is specifically reflected in the Preamble to the RRTA, which aims to balance the right to freedom of expression with protections against racial and religious intolerance.[83]

Sentencing Act 1991

In 2009, following advice given by the Sentencing Advisory Council on sentencing for offences motivated by hatred or prejudice, the *Sentencing Act 1991* (Vic) was amended to include the following factor that must be considered by a court in determining an offender's sentence for any offence (for example, assault or murder):

> 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.[84]

This is commonly known as a hate crime.[85] In introducing the amendment, the then AttorneyGeneral, Rob Hulls MLA, stated:

> These crimes cause serious, significant and far-reaching harms:
>
> hate crimes have a tremendous impact on the individuals who are victimised. In addition to the emotional harms, the degree of violence involved in hate-motivated offences is often more extreme than in non-hate crimes;
>
> hate crime makes members of the target group feel vulnerable to victimisation and has a general terrorising effect on the entire group. This creates negative impacts on other vulnerable groups that share minority status or identify with the targeted group;

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77 Ibid., s 8.

78 Ibid., s 14.

79 Ibid., s 15.

80 Ibid., s 19.

81 Ibid., s 7.

82 Ibid., s 15(3)

83 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law*.

84 *Sentencing Act 1991* (Vic) s 5.

85 Judicial College of Victoria, *Victorian Sentencing Manual: Hate crimes*, 2011, <http://www.judicialcollege.vic.edu.au/eManuals/VSM/5331.htm> accessed 19 September 2019.

> equally abhorrent is the impact on the community. In a multicultural society, which celebrates diversity and encourages all groups to live together in harmony and equality, hate crime is a negation of the fundamental values of the community.[86]

Where offending includes an element of hatred or prejudice, the aggravating factor is designed to increase the seriousness of the offence, elevate the importance of denouncing the type of conduct the offender engaged in, and elevate the importance of deterrent sentencing.[87]

While not specifically related to a hate or prejudice-motivated crime, section 17 of the *Summary Offences Act 1966* (Vic) prohibits a person from using threatening, abusive or insulting words or behaving in an offensive or insulting manner in public. The maximum penalty is 10 penalty units or two months imprisonment for a first offence, 15 penalty units or three months' imprisonment for a second offence, and 25 penalty units or six months' imprisonment for third and subsequent offences.[88] There are also offences in relation to bullying, harassment and telecommunications.

2.3.3 Policies and strategies

The Victorian Government has numerous policies and strategies that aim to improve equality, multiculturalism and diversity and eradicate various forms of discrimination, underpinned by the *Multicultural Victoria Act 2011* (Vic).

The Act establishes the Victorian Multicultural Commission as well as the framework for a whole-of-government approach to multicultural affairs. A key element of the Act is the inclusion of core principles of multiculturalism, such as mutual respect and understanding; the promotion of diversity within the context of shared laws, values, aspirations and responsibilities; equal access to opportunities and recognition of diversity as an asset and a resource.[89] The Act also creates annual reporting requirements for government departments on their work to promote and respect multiculturalism. These requirements cover the use of interpreting and translating services, communications in languages other than English and in multicultural media, multicultural representation on public boards and committees, progress under a cultural diversity plan and many major initiatives or programs that promote multiculturalism.[90]

The Victorian Multicultural Policy Statement sets out the Government's vision for the protection and promotion of multiculturalism across the state. It is underpinned by a values statement that enshrines equality, non-discrimination, freedom of expression, equality before the law and social and cultural cohesion.[91] The Statement also sets out five outcomes to which activities, programs and funding are dedicated:

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86 Victoria, Legislative Assembly, 17 September 2009, *Parliamentary debates*, Book 12, p. 3358.

87 Judicial College of Victoria, *Victorian Sentencing Manual*.

88 *Summary Offences Act 1966* (Vic).

89 *Multicultural Victoria Act 2011* (Vic) s 4.

90 Ibid., s 26.

91 Victorian Government, *Victorian. And proud of it.: Victoria's Multicultural Policy Statement*, 2017.

- A safe and secure Victoria—incorporating law and order, social cohesion and responses to family violence and extremist ideology.
- Good health and wellbeing—investment in holistic healthcare with consideration of diverse communities.
- Full participation in society—meaningful economic inclusion through education, employment and training initiatives, as well as settlement services for refugees and asylum seekers.
- Cultural connection—provision of culturally accessible services, support for events and celebrations, engagement with youth and policy consultation with diverse communities.
- Genuine equality—promotion of anti-discrimination legislation and supporting measures, development of an Anti-Racism Action Plan and development of a Victorian Gender Equality Strategy.

Further, the Anti-Racism Action Plan is currently in development and will include measures aimed at improving legal equality; empowering community responses to racism; developing school and early childhood educational materials; improving public transport safety; targeting race-based discrimination in rental and other accommodation and improving the reporting of racist incidents.[92]

Aboriginal and Torres Strait Islander people

More broadly, the Victorian Government is progressing the initial stages of treaty processes with Aboriginal and Torres Strait Islander groups to facilitate reconciliation and truth-telling and advance the right to selfdetermination. A future treaty, or treaties, will complement other existing state and federal mechanisms, including native title and state-based recognition and settlement agreements. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) was enacted to provide for the establishment of an Aboriginal Representative Body to work with Government on a negotiation framework and other necessary mechanisms; as well as to enshrine a number of guiding principles for the treaty process.[93] Following an election process in late 2019, the First Peoples' Assembly of Victoria met for the first time in December 2019. As of August 2020, the Assembly was moving forward with development of a Treaty Negotiation Framework with the Victorian Government.[94]

In addition, the new National Agreement on Closing the Gap was released in July 2020, as agreed by the Commonwealth and state, territory and local governments in partnership with Aboriginal and Torres Strait Islander peak organisations. This is the first time that Aboriginal and Torres Strait Islander organisations have been parties to the Agreement, and the Preamble affirms the importance of shared decision-making

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92 Ibid., p. 37.

93 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 1.

94 First Peoples' Assembly of Victoria, *Historic first meeting between First Peoples' Assembly and Victorian Government*, media release, 3 August 2020.

in the design, implementation, monitoring and evaluation of policies and programs. The Preamble also acknowledges that Aboriginal and Torres Strait Islander people and cultures have 'prevailed and endured despite too many experiencing entrenched disadvantage, political exclusion, intergenerational trauma and ongoing institutional racism'.[95]

The Agreement includes four priority reform areas: formal partnerships and shared decision-making; building the community-controlled sector; transforming government organisations to improve accountability and respond to the needs of Aboriginal and Torres Strait Islander people; and shared access to data and information at a regional level. Priority reform area three has particular relevance to this inquiry's terms of reference. Government parties have agreed to a number of 'transformation elements' within mainstream government institutions and agencies that include:

- identifying and eliminating institutional racism, discrimination and unconscious bias
- embedding high-quality, meaningful approaches to promoting cultural safety
- delivering services in partnership with Aboriginal and Torres Strait Islander organisations, communities and people
- increasing accountability through transparent funding allocations
- ensuring government organisations identify their history with Aboriginal and Torres Strait Islander people and facilitate truth-telling to enable reconciliation and active, ongoing healing
- improving engagement with Aboriginal and Torres Strait Islander people in policy and program development or reform.

These elements are referenced throughout the report where relevant to particular recommendations.

Gender equality

Gender equality laws are a key component of Victoria's gender equality strategy, *Safe and strong* (2016). The strategy establishes a number of significant reform areas, including reduction of violence against women through implementing recommendations of the Royal Commission into Family Violence. It also sets targets to promote equality in leadership, including a target of 50% women executives in the Victorian public service and 50% women councillors and Mayors in local government.[96] Other reform areas are the introduction of gender ethical procurement policies; and gender responsive budgeting through inclusion of Gender Budget Statements in annual

95 Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments, *National Agreement on Closing the Gap*, July 2020, p. 2.

96 Victorian Government, *Safe and strong: A Victorian gender equality strategy*, Melbourne, 2016, p. 17.

budget documents.[97] The strategy also specifies that a review will be undertaken of laws relating to gender-based hate speech.[98]

The recently-enacted *Gender Equality Act 2020* (Vic) aims to improve workplace gender equality in specified areas, including public sector bodies, local government and universities. Each organisation is required to develop a four-year Gender Equality Action Plan that specifies strategies to improve gender equality in the workplace.[99] In the development or review of a program, service or policy, organisations must undertake a gender impact assessment to identify any adverse potential gender impacts.[100] The Act also established the Public Sector Gender Equality Commissioner to oversee implementation of the provisions.[101]

A whole-of-government strategy for LGBTIQ+ Victorians is in development and is scheduled to launch in 2021. The strategy will contain key priorities for targeting discrimination and inequalities, such as identifying gaps in the provision of safe learning environments; economic security; health and wellbeing; inclusive services and personal safety and violence.[102]

Disability

The Victorian Government is in the process of consulting on the next iteration of the State Disability Plan, which will be in operation from 2021 to 2024. The plan identifies priorities for targeting barriers, discrimination and exclusion for persons with a disability. A consultation paper for the next state plan highlighted potential areas of focus based on analysis of the previous iteration, including testing what is meant by 'disability'; ensuring policy design incorporates the views of those affected; and legislative reform of the *Disability Act 2006* (Vic) to promote disability inclusion.[103]

2.4 Anti-vilification in other states and territories

Anti-vilification laws vary in content and extent across Australian jurisdictions, particularly in terms of the attributes that are protected and the form of offence.

Incitement to racial hatred is prohibited in every state and territory other than NT. Similarly to Victoria's framework, the Australian Capital Territory (ACT), NSW, South Australia (SA) and Queensland have enacted both civil and criminal vilification offences. Both NSW and the ACT establish civil offences in relevant anti-discrimination

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97 Ibid., p. 18.

98 Ibid., p. 17.

99 *Gender Equality Act 2020* (Vic).pt 4 div 1.

100 Ibid.pt 3

101 Ibid.pt 7

102 Victorian Government, *Discussion Paper for the Victorian LGBTIQ Strategy*, Department of Premier and Cabinet, Melbourne, 2020, p. 6.

103 Victorian Government, *Consultation paper for state disability plan 2021–2024*, Department of Health and Human Services, Melbourne, 2019, p. 8.

legislation, with criminal offences contained in the relevant criminal code or Crimes Act.[104] A number of inquiry stakeholders recommended adoption of this approach for Victoria, in order to increase accessibility of vilification laws to members of the public and to more effectively prosecute serious vilification offences.[105]

Western Australia (WA)is the sole jurisdiction to comprise only criminal offences for incitement to racial hatred. The *Criminal Code Act Compilation Act 1913* (WA) prohibits conduct that is either intended to, or likely to, create, promote or increase animosity towards, or harassment of, a racial group or a person as a member of a racial group.[106] Conduct that is intended or likely to racially harass is also prohibited.[107] In addition, WA is the only jurisdiction to establish criminal offences for possession of materials that are intended or likely to racially harass, or for possession for dissemination that is intended or likely to incite racial harassment.[108]

There are substantial differences in the criminal penalties that apply across jurisdictions. Under the RRTA, the maximum penalty for a serious vilification offence is 60 penalty units ($9,913.20 as at 1 July 2020) for an individual and/or 6 months' imprisonment, and 300 penalty units ($49,566 as at 1 July 2020) for a body corporate.[109] In comparison, the NSW penalty for inciting violence is 100 penalty units ($11,000) for individuals and/or three years' imprisonment, and 500 penalty units ($66,000) for a body corporate.[110] The WA incitement offences carry maximum penalties of five to 14 years' imprisonment (or two years and a fine of $24,000 for a summary conviction under section 78). SA has lower financial penalties than Victoria ($5,000 for an individual and $25,000 for a corporation) but more stringent jail terms (three years' imprisonment for an individual).[111] Queensland is the only jurisdiction whose criminal incitement offences incur similar penalties to Victoria's.[112]

Harm-based laws, that focus on the harm caused by conduct or is likely to cause to the target group, exist at the Commonwealth level as well as in Tasmanian anti-discrimination legislation. The *Anti-Discrimination Act 1998* (Tas) (ADA) prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a prohibited attribute. This test is modelled off section 18C of the RDA,

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104 *Anti-Discrimination Act 1977* (NSW) s 20C; *Crimes Act 1900* (NSW) s 93Z; *Discrimination Act 1991* (ACT) s 67A; *Criminal Code 2002* (ACT) s 750.

105 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 62–3, 78–9; Jacinta Lewin, Chair, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 40; Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 10; Victorian Multicultural Commission, *Submission 48*, received 31 January 2020, p. 11; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, received 20 December 2019, p. 3; Bill Swannie, Senior Lecturer, Victoria University College of Law and Justice, *Submission 22*, received 20 December 2019, p. 1; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 16.

106 *Criminal Code Act Compilation Act 1913* (WA) ss 77–8.

107 Ibid., s 80A-80B.

108 Ibid., ss 79–80; 80C-80D.

109 *Racial and Religious Tolerance Act 2001* (Vic) ss 24–5.

110 *Crimes Act 1900* (NSW) s 93Z.

111 *Racial Vilification Act 1996* (SA) s 4.

112 For individuals: 70 penalty units ($9,341.50) or six months imprisonment. For corporations: 350 penalty units ($46,707.50). See, *Anti-Discrimination Act 1991* (Qld) s 131A.

with the additional ground of 'ridicules'.[113] While section 18C of the RDA applies to any public act (subject to exemptions), section 17 of the ADA (Tas) is limited to specified areas of employment; education and training; provision of facilities, goods and services; accommodation, membership and activities of clubs; the administration of any state laws or programs; and awards, enterprise agreements or industrial instruments.[114]

In addition to race and/or religion, a number of attributes are protected under other jurisdictions' antivilification laws. For example, gender identity and sexual orientation are protected in NSW, the ACT, Queensland and Tasmania;[115] disability is protected in the ACT and Tasmania;[116] and HIV/AIDS status is protected in NSW and the ACT.[117]

The process for making a civil complaint of vilification is relatively similar between jurisdictions. Like Victoria, NSW,[118] the ACT[119], Queensland[120], Tasmania[121] and Commonwealth[122] all provide for civil complaints to be made to the relevant anti-discrimination or human rights body, followed by an opportunity for response from the respondent and conciliation where a matter cannot be resolved. Complainants in these jurisdictions are also able to have their matter heard by a court or tribunal. However, Victoria is the only jurisdiction with a civil complaints mechanism where the relevant Commissioner does not have the power to compel information and documents in relation to a complaint.[123]

SA does not have a complaints mechanism for vilification, and persons who have experienced vilifying behaviour can report a criminal matter to police or sue for damages under the racial victimisation tort established by the *Civil Liability Act 1936* (SA).[124]

The most recent major reform of anti-vilification laws in Australia occurred in June 2018 in NSW. The *AntiDiscrimination Act 1977* (NSW) was amended to move serious vilification offences to the *Crimes Act 1990* (NSW) to form a new offence of 'publicly threatening or inciting violence' on various grounds and to increase the applicable penalties. The changes broadened the grounds applicable for criminal prosecution to

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113 *Anti-Discrimination Act 1998* (Tas) s 17(1).

114 Ibid., p. 22.

115 *Crimes Act 1900* (NSW) s 93Z(1); *Criminal Code 2002* (ACT) s 750(1)(c); *Anti-Discrimination Act 1991* (Qld) s 131A(1); *Anti-Discrimination Act 1998* (Tas) s 19.

116 *Criminal Code 2002* (ACT) s 750(1)(c); *Anti-Discrimination Act 1998* (Tas) s 19.

117 *Crimes Act 1900* (NSW) s 93Z(1); *Criminal Code 2002* (ACT) s 750(1)(c).

118 Anti-Discrimination NSW, *Making a complaint*, 2020, <https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_makingacomplaint/adb1_makingacomplaint.aspx> accessed 29 October 2020.

119 ACT Human Rights Commission, *Information for people making complaints*, 2020, <https://hrc.act.gov.au/complaints/information-for-people-making-complaints> accessed 29 October 2020.

120 Queensland Human Rights Commission, *Making a complaint*, 2019, <https://www.qhrc.qld.gov.au/complaints/making-a-complaint> accessed 29 October 2020.

121 Equal Opportunity Tasmania, *Complaints*, <https://equalopportunity.tas.gov.au/complaints> accessed 29 October 2020.

122 Australian Human Rights Commission, *Complaints under the Racial Discrimination Act*, <https://humanrights.gov.au/our-work/complaint-information-service/complaints-under-racial-discrimination-act> accessed 29 October 2020.

123 See, for example, *Australian Human Rights Commission Act 1986* (Cth) s 21; *Anti-Discrimination Act 1998* (Tas) s 97; *Anti-Discrimination Act 1977* (NSW) s 90B; *Anti-Discrimination Act 1991* (Qld) s 156; *Human Rights Commission Act 2005* (ACT) s 73.

124 See, *Civil Liability Act 1936* (SA).div 10—Racial victimisation.

include intersex status and religious belief/affiliation, and to change the language in relation to transgender status (now referred to as 'gender identity'), homosexual status (now referred to as 'sexual orientation') and retained both race and HIV/AIDS status grounds. However, the changes produced inconsistences among groups protected by the criminal offence compared to those who can make civil complaints about vilification to the Anti-Discrimination Board of NSW. For example, while religious belief/affiliation and intersex status are grounds protected by the criminal offence, they are not grounds on which to make civil complaints of vilification.[125]

NT is the only jurisdiction that does not have any form of antivilification law. The Department of the Attorney-General and Justice conducted a review of the *Anti-Discrimination Act 1992* (NT) in 2018, including the potential for inclusion of anti-vilification provisions prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status.[126] The outcomes of the review are not yet clear.

The WA Law Reform Commission is also conducting a review of its *Equal Opportunity Act 1984* (WA), with one consideration being the potential inclusion of civil vilification offences for attributes of race, religion, sexual orientation and impairment.[127]

Further information on different jurisdictions' anti-vilification legislative frameworks is available at Appendix B.

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125 Public Interest Advocacy Centre, *NSW Reforms Vilification Offences*, 2018, <https://www.piac.asn.au/2018/06/22/nsw-reforms-vilification-offences> accessed 19 September 2019.

126 NT Department of the Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act*, 2019, <https://justice.nt.gov.au/attorney-general-and-justice/law-reform-reviews/published-reports-outcomes-and-historical-consultations/historical/2018/discussion-paper-modernisation-of-the-anti-discrimination-act> accessed 7 September 2020.

127 Law Reform Commission of Western Australia, *Project 111 – Review of the Equal Opportunity Act 1984 (WA)*, 2020, <https://www.lrc.justice.wa.gov.au/P/project-111.aspx> accessed 7 September 2020.

3 Experiences of vilification among Victorian communities

The Committee heard throughout the inquiry that vilification takes many forms and is experienced differently by (and within) communities. Some groups experience frequent, repeated exposure to vilifying conduct. For many, hate has become systemic and reverberates over generations. Importantly, the nature of hate continues to evolve. In particular, since enactment of the *Racial and Religious Tolerance Act 2001* (RRTA), growth in social media and other online forums has provided new platforms for mass-scale, often anonymous, vilification.

The impacts of vilification are wide-ranging and severe, as acknowledged in the preamble to the RRTA:

> Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.[1]

The purpose of Chapter 3 is to highlight some of the ways that racial and religious vilification manifests in different communities, in addition to the experiences of other groups targeted by hate—in particular, women, the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) community and people with disability. This chapter also provides an overview of the harms arising from vilifying conduct, including those experienced directly by individual targets, as well as broader community impacts such as the normalisation of prejudicial behaviour.

It is important to acknowledge that the experiences discussed throughout this chapter explore a somewhat broader range of conduct than is currently deemed unlawful under the RRTA. The Committee believes this is essential to ensure meaningful consideration of the various, complex and interrelated harms experienced by communities, much of which stems from serious prejudice or hatred, rather than solely incitement of a third party.

3.1 Experiences of racial and religious vilification

Victoria is a diverse and multicultural state. Almost half of its residents were born overseas, or have at least one parent born overseas, from 247 different countries of birth. Approximately a quarter of Victorians speak a language other than English at home, with 234 different languages and dialects spoken across the state. Religious

1 *Racial and Religious Tolerance Act 2001* (Vic) s preamble.

observance is similarly diverse, with 135 faiths observed and practiced.[2] When looking at Melbourne in particular, this diversity further increases—57% of residents were either born overseas or have at least one parent born overseas, and 33% speak a language other than English at home.[3]

Despite this, the Committee heard throughout the inquiry that religious and racial discrimination, harassment and hatred remain prevalent throughout the State. Importantly, it does not thrive only in what could be perceived to be fringe or extremist groups, but also more broadly across the community.[4]

There is limited quantitative data around the prevalence and extent of racial and religious vilification in Victoria, and this is largely restricted to reports of incidents to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), Victorian Civil and Administrative Tribunal (VCAT), police and community bodies. However, vilification is broadly under-reported by those who experience it. In addition, the threshold of incitement established under the RRTA means that other incidents of serious hate speech or conduct are not captured in data reported by the VEOHRC, VCAT or Victoria Police. It is therefore difficult to establish a broader picture of hate in Victoria.

Other research provides helpful insight into prejudicial social attitudes towards multiculturalism and diversity that influence discriminatory and vilifying conduct. The Scanlon Foundation's Mapping Social Cohesion national survey is an annual study that aims to map public opinion on social cohesion, immigration and population issues, and which can provide a picture of the prevalence of prejudicial views across Australia. In the 2019 report, 28% of respondents disagreed or strongly disagreed with the notion that immigrants from many different countries make Australia stronger. In addition, 41% of respondents indicated that they thought the number of immigrants accepted into Australia is 'too high'.[5] When asked whether it should be possible to reject an application for migration to Australia on the basis of race, ethnicity or religion, approximately 15–23% agreed (or strongly agreed) in relation to race or ethnicity, and 17–29% agreed in relation to religion.[6] Overall, the 2019 Scanlon report states that the survey findings 'establish that in contemporary Australia racist values are held by a small minority'.[7]

The 2019 report also indicated that 19% of respondents experienced discrimination on the basis of skin colour, ethnic origin or religion, up from 10% in 2009.[8] This percentage increased for people from a non-English speaking background, with 29% experiencing discrimination.[9]

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2 Victorian Multicultural Commission, *Annual Report 2018–2019*, Victorian Government, Melbourne, 2019, p. 6.

3 Vivienne Nguyen, Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, pp. 1–2.

4 Eddie Micallef, Chairperson, Ethnic Communities' Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 8.

5 Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys*, Monash University, Melbourne, 2019, p. 3.

6 Ibid., p. 56.

7 Ibid., p. 82.

8 Ibid., p. 26.

9 Ibid., p. 73.

Throughout the inquiry, the Committee received evidence of numerous examples of significant public vilification incidents in recent years. Julie Nathan, Co-Convenor of the Australian Hate Crime Network, highlighted campaigns that have taken place in Australia that sought to vilify or incite hatred towards particular groups:

> From 2015 to 2017 we saw the campaign to vilify Muslims and Islam, especially here in Victoria. From 2016 to 2018 we saw the rise of the Neo-Nazi group Antipodean Resistance, which was very active in publicly promoting hatred, especially of Jews and homosexuals as well as those of African, Asian and Arab ethnicity. During 2018 the 'white replacement' ideology took root amongst extremists in Australia. This ideology promotes the killing of Jews and the deportation of all those of non-European ethnicity and of Muslims, except for Indigenous Australians. This is the ideology that is behind the murders of Jews in synagogues in the US and of Muslims in Christchurch and the two deadly attacks in Germany—all over the last two years. In 2020 we have seen COVID-19—related street attacks on people of Chinese and other East Asian ethnicities, including verbal abuse, assault, graffiti and general vilification.[10]

The following section discusses the experiences of different communities that continue to be subjected to significant racial and religious hatred and vilification—Aboriginal and Torres Strait Islander, African, Muslim and Jewish communities. This is provided to highlight the nature and extent of vilification for these groups and is not intended to be comprehensive, or indicative of the experiences of all members of these communities. The Committee received a breadth of evidence on the varying and complex forms of racial and religious hatred for many other groups, and further case studies of vilification in different contexts are also provided in Chapter 4. The Committee is grateful to each individual and organisation for sharing their experiences.

3.1.1 Aboriginal and Torres Strait Islander people

As noted by the Victorian Government in its submission, the experiences of Aboriginal persons in Victoria are shaped by the impacts of colonisation and dispossession. It stated:

> The structures and systems established during colonisation had the specific intent to exclude Aboriginal people and their laws, customs and traditions, resulting in entrenched systemic and structural racism.[11]

Similarly, Monique Hurley, Senior Lawyer with the Human Rights Law Centre (HRLC), told the Committee that racist laws and policies have played a role in shaping Victoria:

> Aboriginal and Torres Strait Islander people have been subjected to colonisation, land dispossession, the frontier wars, stolen generations and mass imprisonment and live with the ongoing impact of these laws and policies. Racism and its application in the form of hateful conduct continues to be a serious and ongoing problem today.[12]

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10 Julie Nathan, Co-Convenor, Australian Hate Crime Network, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 25.

11 Victorian Government, *Submission 13*, received 19 December 2019, p. 10.

12 Monique Hurley, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 29.

This racism has resulted in intergenerational trauma, systemic and structural exclusion and serious, multiple and ongoing harms. Marsha Uppill, Co-founder and Director of Arranyinha, shared her story of how devastating historical harms experienced by her family have transcended into her daily life:

> My mum was part of the stolen generations. She was forcibly removed from country, culture and community at around seven years of age. Because she knew she was not an orphan, she spent the rest of her childhood and early teen years in children's homes with her sisters, and her brothers were taken to another home for the boys. There were times within that period where Mum was placed with non-Aboriginal families for a weekend or something like that, but she would always end up back at the children's home because she would continually say, 'I'm not an orphan. I have a family. I want to go home'. Because Mum knew where she came from, when she was around 14 years of age she was able to reconnect with country, community and culture, but obviously the implications of the stolen generations are longstanding.
>
> I still feel those ramifications now. I recall when I was pregnant with my first child, for example, and I had given birth to him, I had a mother care nurse or someone from the health system come and visit me at home and ask me this series of questions that were there to support me as a mum. They actually made me feel shame and embarrassed. The question that said, 'Do you need any support from us?', actually triggered a response in me: 'If I say yes to this, you're going to take my child away'. They are the sort of impacts that happen to a person and Aboriginal people in terms of systemic failure. You do not know what systems to trust. You do not know where you can actually say, 'I need some support in this', because the lived experience of my community, my people, my family has obviously been one where we have constantly been failed by systems.[13]

Discrimination, harassment and vilification continue to be commonplace for Aboriginal communities. A major 2012 VicHealth report into the mental health impacts of discrimination in Victorian Aboriginal communities found that 97% of the 755 Aboriginal Victorians surveyed had experienced racism in the previous 12 months. Over 70% had experienced eight or more racist incidents, and many reported experiencing serious vilification. A total of 67% reported being spat at, having an object thrown at them, being hit or threatened to be hit on the basis of their race.[14] More recently, a 2019 study undertaken at the School of Public Health and Preventive Medicine at Monash University found that Aboriginal Victorian adults were four times more likely to have experienced racism in the preceding 12 months than the broader public, and seven times more likely in comparison to adults of Anglo-Celtic origin.[15]

In considering the impacts of systemic racism, the Department of Health and Human Services concluded in its 2017 report, *Racism in Victoria and what it means for the health of Victorians*, that 'racism may go a long way in explaining the gap between the health of Aboriginal and non-Aboriginal people in Australia'.[16]

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13 Marsha Uppill, Co-founder and Director, Arranyinha, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 10.

14 VicHealth, *Mental health impacts of racial discrimination in Victorian Aboriginal communities: Experiences of Racism survey: a summary*, 2012, p. 2.

15 Department of Health and Human Services, *Racism in Victoria and what it means for the health of Victorians*, Victorian Government, Melbourne, 2017, p. 25.

16 Ibid.

Australians who identify as Aboriginal and/or Torres Strait Islander make up approximately 2.8% of the population.[17] However, in 2017–18, approximately one in four complaints raised with the Australian Human Rights Commission in relation to offences under the *Racial Discrimination Act 1975* (Cth) (RDA) were made by complainants who identified as Aboriginal or Torres Strait Islander.[18] In Victoria, the Victorian Aboriginal Legal Service (VALS) stated in its submission that it frequently advises clients on their rights in relation to racial discrimination and vilifying conduct.[19] Despite these numbers, under-reporting of incidents is common for a number of reasons, including distrust or lack of confidence in police and other public authorities.

Charmaine Clarke, Senior Practitioner of the Aboriginal Family Violence Primary Prevention Innovation Project, told the Committee about her personal experiences with structural racism:

> As an Indigenous person, the experience of racism in Australia is effectively a lifelong burden. Australians would like to think this is an egalitarian society, but the reality is racism is so deeply woven into its social fabric … The various experiences of racism [in the 2012 VicHealth report] were name-calling or racist remarks, ignored in service, spat at or had objects thrown at them or hit or threatened to be hit because of their race, told they did not belong here or had their property vandalised because of their race. Some of these accounts reflect my own personal experiences where I was spat on, almost run over by a car, refused service on numerous occasions and exposed to predatory behaviour and sexual assault due to my gender and race.[20]

Charmaine Clarke also shared a story of one particular experience of racial hatred, which she was unsuccessful in seeking justice for under the RRTA:

> My racist incident: in December last year I was having lunch at my favourite bistro. I heard a young man at a table near me making a litany of racist remarks about Indigenous people. It was partially fuelled by the closing of Uluru to climbing. He was a teenager and was in the company of his adult brother, mother and two other adults and their son. It was not hard to hear him, as most of the service had finished and I and another lone individual were the only other diners in the lounge area. In my community I am considered an elder, and I actively advocate for reconciliation in my town, giving talks and welcome ceremonies, and I participate on a number of committees as an Indigenous voice. I therefore felt compelled to approach the table and politely educate the young man and his company on the misconceptions he was saying about Indigenous people. I simply conveyed the connection to country that we feel, how we have lived here for thousands of years as nations and that some places are sacred to us, like churches or your memorials.

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17 Australian Bureau of Statistics, Aboriginal and Torres Strait Islander Population, *2071.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* 28 June 2017, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10> accessed 1 October 2020.

18 Australian Human Rights Commission, *2017 – 2018 Complaint statistics*, 2018., Table 12: Indigenous status of complaints

19 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 4.

20 Charmaine Clarke, Senior Practitioner, Aboriginal Family Violence Primary Prevention Innovation Project, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 22.

> I felt that I had dutifully shared my knowledge in a respectful manner, but as I was leaving their table his mother said to him, 'Don't listen to those people'. The young man then became aggressive towards me, calling me an Abo—'A stupid Abo'—and told others that he wished the Abo would just shut up. The group reacted in various ways, including smirks and scoffing, and some sat in silence. I was alone. There were four adults and two teenagers. I felt fear, humiliation, I was shaking, embarrassed and deeply ashamed—a proud, proactive and university-educated Gunditjmara woman reduced to just being 'a stupid Abo'.[21]

The Committee heard that online abuse towards Aboriginal groups was widespread. Victoria Legal Aid (VLA) and VALS' joint submission provided a story of the types of common abuse experienced by a young Aboriginal man on online chat rooms:

> I get teased a lot because I'm Aboriginal. In both the chat rooms I'm on Aboriginal people and African-Americans cop it. They put down Aboriginals and they tease African-American people as well. I get called a "coon" and people attack my Aboriginality. I get upset when other cultures attack my nationality. There is an American guy who attacks me and call me the "missing link". People have called me an ape or a monkey and have posted that they hate "blackys". People have said that I have no teeth, that I'm broke, and I'm homeless just because I'm Aboriginal.[22]

This abuse also occurs in response to truth-telling and reconciliation efforts. Diana David, Chief Executive Officer of Reconciliation Victoria, shared a quote from one reconciliation group who use social media to communicate their messages, but experience fear and anxiety when posting due to the likelihood of negative responses:

> You post because the truth needs to be told, but it takes a personal toll. You expect abuse, and unfortunately you receive it.[23]

3.1.2 African Australians

African Australians have been exposed to an increase in racially-motivated prejudice and discrimination in Victoria in recent years, in no small part as a result of media and political focus on perceived issues of 'African gangs'. A research report undertaken by the Centre for Multicultural Youth(CMY), Monash University and University of Melbourne examined the experiences of South Sudanese youth in Victoria in the period following the 2016 Moomba 'riot'. One participant in the study shared the widespread racism they had observed on online forums, particularly in comments sections of news stories posted by conventional media outlets:

> And then when I go into a comments section on Facebook, for example, like and it's, like, all of a sudden all of these people, who had problems with, African youth, Sudanese people, they just emerged out of nowhere and it just seemed like the whole wider community were on the same page. There was not a single person, like on

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21 Ibid., pp. 22–3.

22 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 19.

23 Diana David, Chief Executive Officer, Reconciliation Victoria, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 27.

> our side trying to defend and say, 'Okay, it's not all of them there.' It's just everyone agreeing, 'Oh, send them back.' Um, 'These dogs, deport them,' and all these things. So, the comments really hurt me more than when I saw the photos, so that's what I can remember from the media coverage of Moomba. It was pretty awful.[24]

The role of negative media and political commentary in framing and exacerbating this issue is discussed further in Chapter 4.

The Australia@2015 Scanlon Foundation Survey, undertaken in collaboration with Monash University, examined experiences of discrimination by different sub-groups of the population. It found that of all surveyed groups, South Sudanese respondents reported the highest levels of discrimination:

> The highest level of discrimination, at 77%, is reported by the South Sudanese, 166 of whom completed the survey. Of these, more than 90% (153) live in Victoria...
>
> Analysis of South Sudanese respondents by sub-group (gender, age, region of residence and faith) finds the lowest reported experience of discrimination at 58%. By gender, reported experience ranged from 75% of men, 79% of women; by age, with reference to age groups with the largest number of respondents, the range was from 84% to 94%; by regions of Victoria, from 58% in the western suburbs of Melbourne to 96% in regional centres, and by faith group, from 64% of Roman Catholics to 100% of Baptists. For no other birthplace group with at least 50 respondents does experience of discrimination reach the level reported by South Sudanese.[25]

VEOHRC's submission stated that consultations with African community leaders had brought concerns about the frequent and commonplace nature of this abuse, in a variety of public settings. The submission included the report of one participant:

> Racism comes up regularly with these young people, in particular for young people from African backgrounds and who are Muslim. Its systemic racism and everyday racism, and a general feeling of "otherness". It is occurring in the education sector, on public transport, young people are being stopped in stores, stopped on trains, stopped at airports.[26]

VEOHRC also provided an example of a Victorian case where racial prejudice had played a role in the murder of a young man of South Sudanese origin, but where it was ultimately determined by Curtain J to not be satisfied beyond reasonable doubt that 'racism per se was a motive for the attack':

> The Victorian Supreme Court's decision in R v Rintoull [2009] VSC 617 demonstrates the challenge where offenders have mixed motivations. In that case, two offenders killed a young Sudanese man. Three days before the attack, Rintoull told police that if they would not do something about the Sudanese men causing problems in the area,

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24 K. Benier, et al., *'Don't drag me into this': Growing up South Sudanese in Victoria after the 2016 Moomba 'riot'*, Centre for Multicultural Youth, Melbourne, 2018, p. 19.

25 Professor Andrew Markus, *Australians Today: The Australia@2015 Scanlon Foundation Survey*, Monash University and the Scanlon Foundation, 2016, pp. 62–3.

26 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 37.

> he would. On the day of the attack, Rintoull spray painted '[f]uck da niggas' on the wall. He was also overhead saying he was going to 'take his anger out on some niggers' and 'I am going to take my town back, I'm looking to kill the blacks'.[27]

In evidence to the Committee, M.Y., Young Women's Program Coordinator with the Australian Muslim Women's Centre for Human Rights (AMWCHR), described the over-policing of areas with higher African populations in Melbourne:

> I live in Heidelberg West, which is a largely African-Somali community, and the amount of times that I have been stopped in my little Suzuki—the amount of times that mums who are driving their mum van have been stopped by police; there is just something that police officers see as inherently criminal about Africans and about black people, and then that becomes even more exacerbated when you are wearing a hijab or when they can see that your name is Muslim.[28]

This similarly reflects VEOHRC's evidence that vilification experienced by African Australians is often intersectional in that it is compounded by other forms of abuse, such as for Muslim Africans, and in particular, for women.[29]

3.1.3 COVID-19

The Committee has received a large amount of evidence on the increase in racist violence and vilification throughout the Coronavirus Pandemic (COVID-19). Importantly, this conduct is not new, but rather, an exacerbating factor—in guidance materials on countering COVID-19 related hate speech, the United Nations (UN) noted that the pandemic has 'amplified existing concerns related to the spread and use of hate speech globally'.[30] During major emergencies or events, where vilification incidents may increase, legislative anti-vilification frameworks serve as an important safeguard for targeted communities.

The Victorian Multicultural Commission (VMC) reported an increase in 'anecdotal evidence of racial slurs, hate and vilification particularly against people from Australian-Chinese and Asian backgrounds,' which impacted feelings of safety and sense of belonging, leading to isolation, distress and fear.[31] The Victorian Government similarly informed the Committee of a rise in incidents of racism and faith-based discrimination during the pandemic, as reported by community leaders, peak bodies and settlement and service providers who work directly with Victoria's culturally and linguistically diverse communities.[32] Incidents manifested as verbal threats and taunts,

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27 Ibid., p. 60.

28 M.Y. , Young Women's Program Coordinatior, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*.

29 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 37.

30 United Nations, *Guidance Note on Addressing and Countering COVID-19 related Hate Speech*, 2020, p. 7.

31 Victorian Multicultural Commission, *Victorian Multicultural Commission: Supplementary submission to the inquiry into anti-vilification protections*, supplementary evidence received 15 June 2020, p. 2.

32 Victorian Government, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, supplementary evidence received 24 June 2020, p. 3.

graffiti and vandalism, and physical abuse, and occurred in public places, online and in vandalism of private property.[33] In some circumstances, they manifested as death threats.[34]

The Victorian Government provided examples of incidents:

> In April 2020, two Chinese international students were verbally abused and physically attacked by two strangers in Melbourne CBD, told to 'get out of the country' and reportedly taunted about COVID-19.
>
> In a separate incident, a Chinese-Australian family's home in Knoxfield was targeted by vandals in two separate attacks. Racist graffiti with the words "COVID-19 China die" was spray painted on their garage and a rock thrown through the window.[35]

HRLC similarly shared stories of the types of violent and extremely serious conduct experienced by Asian Australians throughout the pandemic:

> On 1 April 2020, a woman was recorded hurling racist abuse at another woman serving customers, including footage showing her saying: "fucking germ, fuck off" and "why don't you fucking go back to China and keep your disease over there, you fucking idiot". While the woman targeted by the abuse was recording it on her phone, she also captured footage that showed a man physically assaulting her by shoving her and taking her phone. The woman alleges that the man threatened to smash her windows, and in the days following the incident, she received "anonymous phone calls, harassing text messages and threatening voicemails".
>
> a Melbourne City councillor being harassed while carrying boxes of donated face masks into Town Hall. He reported a lady said "who did you steal those off... That'd be right, stealing and sending it back to China". The masks had been donated by Chinese businesses for distribution to city charities...
>
> an elderly woman of Asian heritage was "mock punched" and called an "illegal, germspreading cunt"...
>
> a man working in community services says he is no longer referred to by his name at work, but simply called "Coronavirus".[36]

VEOHRC reported an increase in reports of racism through its enquiries and complaints functions, with a particular focus on racism towards people from east-Asian backgrounds. In particular:

- enquiries regarding racial vilification in April 2020 constituted approximately 8.4% of all enquiries, compared to only one per cent in April 2019

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33 Ibid.

34 Human Rights Law Centre, et al., *Stopping hate in its tracks (Part II): Supplementary joint submission to the Victorian government's anti-vilification protections inquiry in response to the rise in racially motivated incidents during the COVID-19 pandemic*, supplementary evidence received 12 June 2020, p. 2.

35 Victorian Government, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, p. 3.

36 Human Rights Law Centre, et al., *Stopping hate in its tracks (Part II)*, pp. 4–5.

- use of the online Community Reporting Tool had approximately doubled since March 2020, with half of all reports in relation to racial vilification
- complaints of racial vilification were three times higher in April 2020 than they were in April 2019.37

At a public hearing, Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, described the increase in reported incidences:

> What I can say is that we are seeing, every day, more and more inquiries about racial vilification coming through to our complaints and inquiries line. I imagine that we are only capturing a very small percentage of what is happening out there. And also, as we start to ease restrictions and people are starting to move around again and perhaps use public transport and occupy public spaces, I worry that there will be an increase again of that sort of behaviour, which is predominantly, I think, motivated by fear, ignorance and very base prejudice.[38]

In addition to an increase in racist incidents, All Together Now, a not-for-profit organisation that promotes racial equality, reported that through its monitoring of various online platforms—including Facebook, Instagram, YouTube and Twitter as well as alternative platforms—it identified other concerning trends during the COVID-19 pandemic. These include:

- Young people experiencing disconnection or isolation from friends, family and society due to the pandemic are increasingly being recruited by right-wing extremist groups online. These groups manipulate feelings of isolation, loneliness and depression to offer a sense of connection and belonging.
- Conspiracy theories are increasing in popularity and emerging alongside heightened distrust in government responses to the pandemic, predominantly as a source of blame for difficult social and economic circumstances. In addition, some right-wing extremists have discussed using COVID-19 as a weapon or tool (such as through infecting first responders) to create fear in the general public.[39]

In response, All Together Now have advocated for immediate support for a national anti-racism campaign, immediate support for community-focused countering violent extremism programs, and called on all media and social media publishers to 'act swiftly to limit the spread of hateful conspiracy theories'.[40] It further advocated for the establishment of an independent fact-checking organisation that offers publicly-available and widely-supported analysis of common theories, conspiracies, social commentary and political statements.[41]

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37 Catherine Dixon, Executive Director, Victorian Equal Opportunity and Human Rights Commission, Inquiry into anti-vilification protections hearing, response to questions on notice received 30 June 2020, p. 2.

38 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 29.

39 All Together Now, *Right-Wing Extremism and COVID-19 in Australia*, 2020, pp. 2–3.

40 Ibid., pp. 4–5.

41 Ibid., p. 5.

3.1.4 Muslim community

The Muslim community in Australia continues to face significant discrimination and harassment on the basis of their faith. The 2019 Scanlon survey, in reporting a higher proportion of negative sentiment towards Muslims than other surveyed faith groups, acknowledged:

> The level of negative sentiment towards those of the Muslim faith and by extension to immigrants from Muslim countries, remains a factor of significance in contemporary Australian society.[42]

The Islamophobia Register Australia provides a platform for anonymous reporting of anti-Muslim discrimination, hate speech and other incidents. In 2019, analysis of incidents reported through the register was published by Dr Derya Iner from the Centre for Islamic Studies and Civilisation at Charles Sturt University.[43] Many of these incidents were identified as severe in nature:

> Ordinary citizens occupied in their daily routines received death threats for no reason but being Muslim. Of the reported 202 offline cases 11% included death threats. This opens a wider debate about what being Muslim means to the abusers, how the backdrop of being Muslim is publicly crafted and takes form in the perpetrators' psyche.
>
> The intensity of hate rhetoric in physical cases was another concern. Following the violent extremism scales, the level of hate is scaled as fury, contempt, dehumanising, disgust and wanting to kill/harm. This hierarchy of hate illustrated how wanting to harm can be justified without feeling guilt due to prior preliminary feelings like dehumanising and disgust. It is concerning that in the rhetoric of physical insults, dehumanising came as the second most common feeling (19%) followed by disgust (10%) and wanting to harm/kill (9%).[44]

In particular, Muslim women face heightened risk of public harassment and vilification. The report found that women make up 72% of targets of vilifying behaviour, while perpetrators are predominantly male (71%).[45] This conduct predominantly occurs on the basis of two attributes—perceived religious identity and gender. For this reason, stakeholders recommended introduction of an intersectional approach that would allow individuals to make a complaint on the basis of more than one attribute, in recognition of these compounding harms. This is discussed further in section 3.3.5.

In its submission, AMWCHR stated:

> In addition to the migration and settlement-related issues that affect participation in Australian society, Muslim women are confronted with unique challenges where research shows that racial discrimination contributes to social and economic disadvantage, both

42 Markus, *Mapping Social Cohesion*, p. 61.

43 In collaboration with other Charles Sturt University researchers, as well as academics at the University of Sydney and Western Sydney University.

44 Dr Derya Iner, *Islamophobia in Australia - II (2016–2017)*, Charles Sturt University, Sydney, 2019, p. 9.

45 Ibid., p. 4.

> because of their position in the current political climate and because often their religious identity surpasses cultural identity.[46]

Only 29% of incidents reported through the Islamophobia Register were also reported to police.[47]

Two cases under the RRTA to date, *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[48] and *Cottrell v Ross,*[49] both dealt with religious vilification towards the Muslim community. The Islamic Council of Victoria's (ICV) submission stated that there was disproportionately negative media reporting of these cases, and Muslim Victorians in general, which was likely to have contributed to a subsequent increase in Islamophobia within the community.[50]

The findings of a 2017 study of race-related reporting in Australian mainstream media, undertaken by All Together Now and the University of Technology Sydney, demonstrated a disproportionate focus towards the Muslim community more broadly. Of the 124 opinion-based articles sampled over a six-month period,[51] the highest number about a single identifiable group of people focused on the Muslim community (68 articles). Of these, 63% portrayed Muslim people in a negative light. Commonly-used stereotypes in these articles included a conflation of Islam with terrorism, rejection of the existence of Islamophobia, an 'us versus them' mentality, and other fear-inducing narratives.[52] The role of media commentary in shaping public attitudes and opinions is discussed further in Chapter 4.

Adel Salman, Vice President of the ICV , told the Committee that political rhetoric can similarly impact broad social attitudes towards minority groups:

> there is no shame attached to being anti-Muslim. That is our view. There is no shame in that. If you have got politicians who are indulging in some of the worst anti-Muslim speech, then how can there be any shame? They are supposed to be our public leaders. They have the platform. They are speaking to the public and yet they are repeating some of the most vile speech directed towards Muslims—in many cases spreading conspiracy theories about Muslims as well and Islam. Clearly we have a situation where to be anti-Muslim or to spread Islamophobic speech or to hate and vilify Muslims is not seen as shameful.[53]

Islamophobia is also prevalent online, and on social media platforms in particular. The Islamophobia in Australia report stated that numerous tactics were used to circulate

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46 Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020, p. 8.

47 Iner, *Islamophobia in Australia - II (2016–2017)*, p. 4.

48 *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207.

49 *Cottrell v Ross* (2019) 2142 VCC.

50 Islamic Council of Victoria, *Submission 45*, received 31 January 2020, p. 9.

51 Data was collected from the four most-read online newspapers (The Australian, Daily Telegraph, Sydney Morning Herald and Herald Sun) and the four most-watched TV current affairs programs (A Current Affair, The Project, 60 Minutes, 7:30).

52 All Together Now and University of Technology Sydney, *Who Watches the Media? Race-related reporting in Australian mainstream media: Summary report*, December 2017, pp. 3–4.

53 Adel Salman, Vice President, Islamic Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 41.

hate materials, such as through distributing memes, circulating petitions and far-right campaigns, and directly harassing and intimidating individuals.[54] The report also found that severe online messaging, such as 'massacring, mass murdering, shooting every single Muslim and burning them alive while killing their children', occurred in tandem with overseas terrorist attacks.[55]

3.1.5 Jewish community

The Executive Council of Australian Jewry has published an annual report on antisemitism in Australia since 1989. In November 2020, it reported that 331 antisemitic incidents were logged by volunteer Community Security Groups and affiliate bodies over the period from 1 October 2019 to 30 September 2020. While this constituted a minor decrease in incidents from the previous year, the report stated that 'there was a marked increase in the number of the most serious categories of incident'.[56] This included physical assault, direct verbal abuse, harassment and intimidation. The increase in serious incidents occurred despite reduced visibility of the Jewish community with the closure of synagogues and other community facilities due to the COVID-19 pandemic:

> The increase in the number of more serious incidents is especially concerning in light of the fact that synagogues and other Jewish community facilities were closed for varying periods from March onwards due to the COVID-19 pandemic, and there were thus fewer opportunities for antisemites to abuse, harass and intimidate Jews in the vicinity of those facilities as they have done in the past. In previous years, these kinds of incidents have often occurred during the Jewish Sabbath (Friday evenings and Saturdays) and festivals when many Jews walk to and from synagogue.[57]

The report also stated that throughout 2020 there had been a visible rise in online right-wing extremist discourse that vilified the Jewish community:

> The rise in right-wing extremist discourse was especially visible online, including on non-mainstream sites which allow almost unfettered speech… The "white-replacement" theory, which places the blame on "the Jews" for the supposed demise and destruction of the European races, culture and civilisation, including in Australia, is uncritically accepted within the right-wing extremist milieu. Many subscribers to the theory continue to express support for violence, armed action, revolution, terrorism and race war… Conspiracy theories by right-wing extremists blamed "the Jews" for creating and spreading the Covid-19 virus, generally either as some massive money-making scam and/or as a means to decimate the European races.[58]

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54 Iner, *Islamophobia in Australia - II (2016–2017)*, p. 10.

55 Ibid., p. 11.

56 Executive Council of Australian Jewry, *Report on antisemitism in Australia 2020: 1 October 2019 – 30 September 2020*, Edgecliff, 2020, p. 6.

57 Ibid., p. 7.

58 Ibid.

Dvir Abramovich, Chairman of the Anti Defamation Commission, told the Committee that antisemitism in Victoria is pervasive and is increasing:

> In the background, of course, is antisemitism, the longest hatred. Antisemitism is not history; it is news. Over the last few years we have seen antisemitism rise to levels not seen in this state and in our nation before—in schools, in the workplace, at universities, on the streets, on social media. This is especially true in schools, where Jewish students on a daily basis are being subjected to physical assaults, bigoted stereotypes and insults, exclusion, degrading text messages and social media lynching. God help us if we get to a stage where young people will have to hide their Jewish faith so as not to be singled out and vilified by their classmates. And God help us if what we see in Europe today is a glimpse into our future five or 10 years from now.[59]

In late 2019, two serious antisemitic incidents occurred in Victorian schools. In one incident, a teenage boy was subjected to ongoing and severe verbal harassment and threats, including being forced to kiss the feet of another teenage boy. Maxine Piekarski, the mother of the teenager subjected to the abuse, described at a public hearing the severity of the abuse and how it continued over time:

> There was the threat of affray in the event that my son did not kiss the shoes of a Muslim boy. The affray was instigated by a group of white supremacist children— 13-year-old children. There was nothing the police could do, because the threat could not be proven. The school removed itself from being involved because it did not happen on school grounds. But after that initial incident, which was partly resolved between myself and the Muslim family, understanding that the schools could not get involved, the police could not get involved and parents needed to parent—and we resolved that quite nicely between myself and the other family. But when I approached the mother of the instigator, of the white supremacist boy, and introduced myself, I was told to 'Fuck off, you Jewish dog'...
>
> When the Adam Goodes story broke, my son was then called 'the Jewish ape', 'the Jewish nigger' and 'the Jewish gimp'. In the lead-up to my son's final assault, after six months of bullying with racial and religious torments, I contacted the school several times in the preceding seven days knowing that something was brewing. No-one could do anything at the school or help until something happened, and it did. My son was beaten and called a 'cooked up Jewish cunt'—excuse my language—but apparently it could not be considered a hate crime.[60]

In its submission, VEOHRC stated that it had been told at a religious roundtable that there was a general climate of fear within Jewish communities. This in turn leads to fears regarding the safety of congregation and the need to implement strict security precautions, such as checking the underside of cars for bombs.[61]

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59 Dr Dvir Abramovich, Chairman, Anti-Defamation Commission, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*.

60 Maxine Piekarski, Parent, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 29–30.

61 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 36.

3.2 The impact of hate and vilification

The intention of hate speech or conduct is often to make the perpetrator's message 'part of the permanent visible fabric of society'. That is, to communicate to target groups that they are not welcome or wanted, and to communicate to those that might be sympathetic to the message that they are not alone in holding that view.[62]

Anti-vilification laws are intended to provide a remedy for the individuals directly targeted by vilifying conduct, as well as discourage further harassment and violence that can result from allowing such conduct to circulate publicly.[63] This approach acknowledges that there are, broadly speaking, two forms of harm from vilifying behaviour. Firstly, causal harm encompasses the distinct harms experienced by targets of the conduct, such as public ridicule. Second, consequential harm considers the flow-on effects of the conduct upon the broader community, such as societal marginalisation of the targeted group.[64]

Some effects can be immediate, such as fear or anxiety, whereas others can accumulate over time or manifest in the long term, such as withdrawal from public life. As highlighted by Professor Beth Gaze from the Australian Discrimination Law Experts Group, for the purpose of remedies, many of the related harms are intangible and difficult to compensate when a complaint progresses through mediation or hearing stages.[65]

Critically, the immediate responses to an incident can play a key role in minimising harm experienced by victims. For example, in analysis of incidents of anti-Muslim harassment and abuse, the Islamophobia in Australia report found:

> The victim stories note some positive experiences with police response. Timely and supportive responses from third parties, including police, security, managers or bystanders, were instrumental in alleviating the shock and trauma the victim was going through. In the absence of third-party support, victims expressed disappointment and distress.[66]

The Committee considers that when vilification incidents do occur, active support from bystanders and public authorities is crucial in order to minimise long-term and consequential harms. The importance of building trust between police and marginalised or vulnerable communities, and police provision of victim support, is discussed in more detail in Chapter 8.

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62 Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press, 2012, pp. 2–3.

63 Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia', *Law & Society Review*, vol. 49, no. 3, 2015, p. 638.

64 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 17.

65 Prof. Beth Gaze, Professor, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 21.

66 Iner, *Islamophobia in Australia - II (2016–2017)*, p. 8.

3.2.1 Mental and physical health

Persons targeted by vilifying conduct are likely to experience various mental and physical health impacts that affect their quality of life. These can include psychological distress, depression, anxiety, post-traumatic stress disorder, psychosis and substance abuse disorders, as well as diseases and conditions such as cardiovascular disease, obesity, and poor self-reported health.[67]

The impacts of racism on health were explored in the 2014 Victorian Population Health Survey. This survey undertook random sampling of 34,000 adults via telephone interviews, geographically distributed across the state, to collect information on the broad health and wellbeing of people living in Victoria. Interviews were also conducted in languages other than English. A 2017 report on the results with regard to racism and impacts on health found that:

- Individuals who frequently experience racism are almost five times more likely than those who do not experience racism to have poor mental health.
- Individuals who frequently experience racism are 2.5 times more likely than those who do not experience racism to have poor physical health.[68]

Crucially, the report concluded that racism can play a greater role in poor health than other behavioural factors:

> Social determinants (including racism) make a larger contribution to ill-health than the unhealthy behaviours of individuals (lifestyle risk factors). This suggests that more action is needed to address the social determinants of health.
>
> Racism damages health via multiple pathways, directly and indirectly.
>
> This report suggests that effectively tackling racism would improve the mental and physical health of Victorians. The first step to reducing the harmful impact of racism is to acknowledge that it exists and that it is harmful to health.[69]

Research into the mental health impacts of racial discrimination in Victorian Aboriginal communities found that of the 755 Aboriginal Victorians surveyed, those who experienced the most racism had recorded the most severe psychological distress levels. Two-thirds of participants who experienced 12 or more racist incidents reported high psychological distress scores, indicating that every incident prevented could help to reduce the risk of mental ill health, such as anxiety or depression. Further, 70% of participants in the study reported being worried at least several times per month that family and friends would be victims of racist incidents.[70]

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67 Department of Health and Human Services, *Racism in Victoria and what it means for the health of Victorians*, p. 25.

68 Ibid., p. vi.

69 Ibid.

70 VicHealth, *Mental health impacts of racial discrimination in Victorian Aboriginal communities*, p. 2.

VEOHRC stated in its submission that similar impacts had been reported by various multifaith and multicultural stakeholders, including 'physical harm, mental health impacts and sometimes suicide'.[71] These impacts are likely to be even further exacerbated for newly arrived migrant communities from conflict countries, or other groups that have a history of trauma.[72]

3.2.2 Participation in public life

Vilifying conduct undermines self-worth and heightens vulnerability, isolation and exclusion. This has a silencing effect where individuals feel unwelcome or unable to participate in public life. In addition, it can diminish trust in public institutions and lead to under-reporting of vilification.

Discussion around freedom of speech in the context of anti-discrimination and anti-vilification laws often focuses on the individual or group making the discriminatory remarks. However, the UN Committee on the Elimination of Racial Discrimination has issued guidance on consideration of the broader implications for victims:

> The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the persons and groups entitled to the protection of the [CERD] also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims.[73]

Vilification has the potential to silence the speech of others where, for example, a person engaging in the conduct has the benefit of a position of social or other authority, such as prominent media figures or celebrities. It is often much more difficult for targeted individuals or groups to respond to such behaviour due to that person's platform and audience.[74] Alternatively, it can occur in online environments where hate materials can be disseminated widely with little opportunity for the targeted individual or group to respond. These types of situations can serve to 'undermine, rather than exemplify or enhance, freedom of speech'.[75]

As noted in Chapter 2, freedom of speech and expression is important in ensuring free and open public debate and should be protected for all persons. This includes those affected by hate conduct, whose ability to speak up is diminished as a result.

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71 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 44.

72 Diana Sayed, Chief Executive Officer, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 5.

73 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 35: Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, p. 7.

74 Ishani Maitra and Mary Kate McGowan, 'Introduction and Overview', in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech*, Oxford University Press, 2012, p. 9.

75 Ibid., p. 21.

Over time, communities can become limited in the ways that they participate in, and contribute to, Victorian society. This can normalise prejudicial behaviour and marginalise particular groups, which degrades social cohesion and sets a standard of behaviour that is come to be seen as acceptable. In their article, *Evidencing the harms of hate speech*, Professor Katharine Gelber and Professor Luke McNamara note that these long-term societal impacts further entrench power imbalances with regard to marginalised groups.[76]

The Islamophobia in Australia report stated that some victims of harassment responded by changing their daily routines and removing their headscarves.[77] The Jewish Community Council of Victoria reported that persons who had experienced antisemitic incidents had a fear of expressing their Jewish identity in public, such as through dress or cultural practices.[78] Similarly, VLA and VALS stated in their submission that their clients had reported avoiding places where they had experienced racism and having to leave their jobs due to the mental harm resulting from racist incidents.[79]

Further, Diana Sayed, Chief Executive Officer of AMWCHR, described the impacts of negative political and media focus on minority communities:

> People are often retreating, particularly Muslim women; they have to make calculated risks about what spaces they go into and they often will just retreat from public life altogether because they are just safer in their homes.[80]

Fear can also be used as a protective mechanism where risks of vilification are prevalent. VEOHRC shared the account of a young African community leader who told them that parents in his community would instil fear in their children in order to protect them:

> They remind them "don't bring attention to yourself"; "people who get noticed, get killed".[81]

The impacts of hate conduct and vilification are likely to manifest in different ways for young people, who may be coming to terms with the extent and nature of this conduct alongside other developmental challenges. AMWCHR explained in evidence to the Committee:

> There is another incident in a regional town where young Muslim women in different schools were told that they were not able to get a job in certain places. The managers of those restaurants and fast-food places and retail places were telling them that they just could not risk having someone in a hijab working in a front-facing customer service position. These girls could see that this sort of fear was being filtered through the whole community—so having mums run off the road with cars, having their mums accused of shoplifting when the Muslim women's centre had given them gift cards to use at Coles,

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76 Katharine Gelber and Luke J. McNamara, 'Evidencing the harms of hate speech', *Social Identities*, vol. 22, no. 3, 2016, p. 2.

77 Iner, *Islamophobia in Australia - II (2016–2017)*, p. 9.

78 Jewish Community Council of Victoria, *Submission 26*, received 20 December 2019, p. 2.

79 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, pp. 4–5.

80 Diana Sayed, *Transcript of evidence*, p. 8.

81 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 44.

> and also being threatened to be drowned during swimming lessons at school by their peers. And when they report these incidents teachers just see it as bullying rather than discrimination or racism.
>
> So there is a broader conversation happening within young people around: how much do they internalise versus how much do they see it as a problem within Australian society? I think for a lot of young people there is that internalisation, but for a growing number of young people they are starting to see the links between their identity, the way politicians and public figures speak about their identity and then the way that the community reacts to them.[82]

These experiences can accompany young people into adulthood and inform the ways in which they interact with broader society throughout their lives.[83] Akeer Garang, a Youth Volunteer with the CMY , shared with the Committee at a public hearing how the discrimination she faced at school compelled her to 'distance herself from her difference' and ultimately lose the ability to speak her native language.[84]

Critically, many of the impacts of vilification are long-lasting and cumulative over time. This can result in intergenerational trauma and disassociation from mainstream society. Charmaine Clarke discussed these cumulative effects in relation to the experiences of Aboriginal and Torres Strait Islander people:

> Like many Indigenous Australians, I live in rural Victoria where the history of unresolved race relations still bubbles under the surface. Many long-term residents, including farming families, share our history, a legacy of these racialised practices and attitudes. In my town, curfews for Indigenous people were in place up until the 1940s. Blacks, as we were at times referred to by locals, were to be out of town and out of sight. Many of my elders remember well being chased by police or yelled at by the locals to get back to the mission. There is a palpable wound that festers in these places, and it is the generations who are raised here that inherit its attitudes and scars.[85]

3.2.3 Broader societal harms

As noted above, vilification can act as an indication to others in society that these views are acceptable or commonplace. Unless responded to effectively, there is the potential for this behaviour to gain momentum and enable or encourage others to act similarly.[86]

On 15 March 2019, a terrorist attack orchestrated by an Australian white supremacist killed 51 people, and injured 40 others, during afternoon prayers at Al Noor Mosque and Linwood Islamic Centre in Christchurch, New Zealand. Part of the attack was livestreamed on Facebook and was watched across the world, both during and subsequent to the attack taking place.

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82 M.Y. , *Transcript of evidence*, p. 6.

83 Diana Sayed, *Transcript of evidence*, p. 7.

84 Akeer Garang, Youth Volunteer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 39.

85 Charmaine Clarke, *Transcript of evidence*, p. 22.

86 Gelber and McNamara, 'Evidencing the harms of hate speech', p. 2.

Tell MAMA ('Measuring Anti-Muslim Attacks'), a project run by non-governmental organisation, Faith Matters, is a confidential community-run service in the United Kingdom (UK) that provides an anonymous portal for reporting anti-Muslim harassment or hate incidents. In March 2020, Tell MAMA published a report on the impact of the Christchurch terror attack, which concluded that there had been a significant spike in anti-Muslim incidents in the United Kingdom following the attack. In the week following the events in Christchurch, incidents reported to Tell MAMA increased by 692% (95 incidents from 12 incidents the week prior). The organisation also reported increases in incidents in public areas and those targeting mosques or Islamic institutions.[87] A direct and deliberate link with Christchurch was made in 74 offline incidents, where the perpetrator reportedly made verbal or symbolic references to the terror attack. Some of these include:

> A man shouted "49! Yes! Yes!"—a reference to the rising death toll from New Zealand—at a Muslim woman and her daughter within hours, made headlines nationally...
>
> A mosque received an anonymous phone call from a man who said, "Do you know what has happened in New Zealand?!", followed by "go back to your own country".[88]

In evidence to the Committee, Adel Salman from the ICV , described a similar increase in Islamophobic incidents in Australia:

> The Muslim community has suffered enormously due to Islamophobia over many years, and unfortunately the situation is not becoming any better, even since Christchurch, the very horrible events of Christchurch almost one year ago. Some of us were optimistic and felt that the situation would improve because that would shock us, it would shock us collectively as a society, into realising this is real, anti-Muslim hatred is real and it kills, and it would actually see a dramatic turnaround. We have seen the opposite; we have actually seen a spike.[89]

Diana Sayed, from AMWCHR, similarly reported ongoing hatred towards the Muslim community:

> The atrocity in Christchurch also reignited debates about the extent of right-wing extremism, Islamophobia and race hate as social problems in Australia and the urgent need to re-centre and address these if we are to build strong, socially cohesive communities. Earlier this year we marked the one-year commemoration of the Christchurch massacre, and I am sad to report that we have not made nearly enough progress in alleviating the growing sentiment of hate towards our communities.[90]

The increase in Islamophobic incidents following the Christchurch terror attack show how public vilification can have severe implications for social cohesion. This can be immediate, as described above, or take place over time, where prejudicial attitudes come to be accepted within society. Professor Jeremy Waldron, in his book *The Harm in Hate Speech*, describes the gradual normalisation of hateful conduct:

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87 Faith Matters, *The impact of the Christchurch terror attack: Tell MAMA Interim Report 2019*, Faith Matters, 2020, p. 5.

88 Ibid., p. 50.

89 Adel Salman, *Transcript of evidence*, p. 37.

90 Diana Sayed, *Transcript of evidence*, p. 2.

> it creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good [of inclusiveness].[91]

3.3 Other forms of vilification

As per Term of Reference eight, the Committee explored the possible extension of protections or expansion of protection to classes of people not currently protected under the RRTA. As discussed in Chapter 2, a number of other Australian jurisdictions protect additional attributes from vilification, including sexual orientation, gender, gender identity and expression, sex characteristics and/or intersex status, disability, HIV/ AIDS status and personal association.

Anti-vilification provisions in international jurisdictions also provide protections on a broader range of grounds. In the UK, sexual orientation is protected, in addition to religion, race, colour, nationality (including citizenship) or ethnic or national origins.[92] This range of attributes are similarly protected in Canada, alongside age, sex, gender identity or expression and mental or physical disability.[93] South Africa further extends its provisions to persons on the grounds of pregnancy, marital status, ethnic or social origin, culture, language and birth, as well as on any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner.[94]

This section briefly discusses the experiences of three groups that are commonly targeted by hate that were raised by stakeholders throughout the inquiry process—the LGBTIQ+ community, women and people with disability.

3.3.1 LGBTIQ+ community

Vilifying behaviour towards persons who identify as LGBTIQ+ is pervasive and takes many forms.[95] AHRC reported in 2015 that nearly 75% of LGBTI people in Australia have experienced bullying, harassment or violence on the basis of their sexual orientation or gender identity.[96]

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91 Waldron *The Harm in Hate Speech*, p. 4.

92 See, *Public Order Act 1986* (UK) Part III (Racial Hatred), in particular s 17 (Meaning of "racial hatred"); Part IIIA (Hatred Against Persons on Religious Grounds or Grounds of Sexual Orientation), in particular s 29A (Meaning of "religious hatred") and 29AB (Meaning of "hatred on the grounds of sexual orientation").

93 See, *Criminal Code*, RSC 1985, c C-46, ss 318–319 (definition of 'identifiable group' for offences of 'public incitement of hatred' and 'wilful promotion of hatred').

94 See, *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 1 (Definitions—'Prohibited grounds') and s 10 (Prohibition of hate speech).

95 This report uses the acronym LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer and/or questioning) except where research is quoted that uses a different acronym to denote the persons represented by that research. Other terms used include LGBTI (lesbian, gay, bisexual, trans and intersex).

96 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report*, AHRC, 2015, p. 15.

According to another AHRC report, *Face the Facts: Lesbian, gay, bisexual, trans and intersex people*, of young people that identify as LGBTI, approximately 61% have experienced verbal homophobic abuse and 18% have experienced physical abuse. The large majority of this (80%) occurs at school and has significant impacts on education and long-term wellbeing.[97] In addition, many young people are unsupported by their families, increasing potential societal marginalisation and isolation and making it even more difficult to navigate gender and sexual identities. These and other factors contribute significantly to the vulnerability of LGBTIQ young people, increasing risks of suicide, suicide ideation, homelessness, violence and mental health issues.[98]

HRLC's *End the Hate* report found that people from LGBTI communities are less likely to report violence or seek support due to fears of being 'outed', facing discrimination, exacerbating the conduct or being further victimised, a lack of trust in reporting to police, and belief that complaints will not be taken seriously.[99] These concerns are grounded in historical realities that have been recognised by Victoria Police, who issued a public apology in 2019 for causing 'unnecessary and unacceptable harm' to the LGBTIQ community.[100] In its submission, Thorne Harbour Health cited the use of the homosexual advance ('gay-panic') provocation defence in Victorian murder cases as recently as 1991, demonstrating how vilification has previously been protected under state law.[101]

Public harassment, intimidation and vilification on the basis of sexual orientation heightened in the lead up to the 2017 Australian postal survey on whether the law should be changed to allow same-sex couples to marry. Sam Elkin, Coordinator of the LGBTIQ Legal Service at St Kilda Legal Service, provided examples of the vilifying content that was widely circulated at the time:

> During the 2017 marriage equality postal survey it was widely reported in the media that far-right political groups and unknown groups had erected posters around Melbourne that falsely claimed that homosexuality was a curse of death and that up to 92 per cent of children of gay parents suffered abuse. Other posters featured rainbow nooses next to text that said 'Stop the fags'. There were also pamphlets that claimed that same-sex marriage would result in more protections for transgender women, who would then go on to rape people in public toilets.
>
> ...
>
> During the postal survey Queenslanders were also subjected to this kind of hate speech, where posters and leaflets appeared emblazoned with slogans such as 'Burn the faggots', 'Send poofters to their own island' and 'Hitler had the right idea about

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97 Australian Human Rights Commission, *Face the Facts: Lesbian, gay, bisexual, trans and intersex people*, AHRC, Sydney, 2014, p. 2.

98 Professor Kerry H. Robinson, et al., *Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse* Young and Well Cooperative Research Centre, Melbourne, 2014, pp. 11–2.

99 Human Rights Law Centre, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, HRLC, Melbourne, 2018, p. 15.

100 'Victoria police say sorry to LGBTIQ+ community for causing 'unacceptable harm'', *The Guardian*, 19 August 2019, <https://www.theguardian.com/australia-news/2019/aug/19/victoria-police-say-sorry-to-lgbtiq-community-for-causing-unacceptable-harm> accessed 5 October 2020.

101 Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 5.

> homosexuals—burn them'. My counterparts at the LGBTI Legal Service in Queensland were able to take action against the authors of similar posters and leaflets due to that state having laws to protect LGBTIQ people from this kind of vilification.[102]

Research led by The Australia Institute sought to identify the impacts of the survey and associated public debate on the LGBTIQ community. The study, which surveyed almost 10,000 people, found that these events raised prejudice-related stress with negative impacts on psychological health.[103] In addition, experiences of verbal and physical assault reportedly doubled in the three months following announcement of the postal survey, when compared to the previous six-month period.[104]

The above data also reflects experiences of vilification on the basis of gender identity and expression, such as for persons who are transgender or intersex. However, there is significant research into the particular experiences of persons who have gender identities or expressions that are different from the sex assigned to them at birth. For example, the Trans Pathways report, which investigated the mental health experiences of young trans people, found that nearly 80% had self-harmed and almost half had attempted suicide, as a result of their experiences of discrimination, violence and bullying.[105] Many trans and gender diverse people who have experienced vilification expect it to happen again, and change behaviours to avoid being reminded of the experience (including not reporting the incident).[106]

Sam Elkin from the LGBTIQ Legal Service shared with the Committee a story of a client who had been targeted by hate conduct:

> Veronica is a transgender woman who lived in a private rental property in an inner suburb of Melbourne. Within days of her moving into her new house she started being harassed and bullied by numerous neighbours in the common areas of her apartment complex and on the streets near her home. She was subjected to numerous hateful and humiliating comments about her transgender history and referred to by various transgender, sexist and homophobic slurs as she walked in and out of her home. One of her neighbours made explicit reference to her genitals in very humiliating terms, which made her feel particularly distressed and fearful. Veronica was unable to utilise current Victorian tenancy laws to address this situation as her private landlord did not rent to or otherwise have any effective control over the behaviour of her neighbours, some of whom owned their own homes. She was also unable to utilise current Victorian anti-discrimination laws to address her situation as her relationship with her neighbours

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102 Sam Elkin, Coordinator, LGBTIQ Legal Service, St Kilda Legal Service, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 3.

103 Saan Ecker, et al., 'Impact of the Australian marriage equality postal survey and debate on psychological distress among lesbian, gay, bisexual, transgender, intersex and queer/questioning people and allies', *Australian Journal of Psychology*, vol. 71, no. 3, 2019, p. 294

104 Dr Saan Ecker and Ebony Bennett, *Preliminary results of the Coping with marriage equality debate survey: Investigating the stress impacts associated with the Australian marriage equality debate during the lead up to the postal survey results announcement*, The Australia Institute, 2017, p. 3.

105 P. Strauss, et al., *Trans Pathways: the mental health experiences and care pathways of trans young people: Summary of results*, Telethon Kids Institute, Perth, 2017, p. 33.

106 Human Rights Law Centre, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, p. 15.

did not fall into an area of public life protected by these laws. Veronica did call the police on numerous occasions, and while they did take a statement, they determined that her neighbours' behaviour did not amount to criminal conduct and told her that they would not be able to assist her in obtaining a personal safety intervention order. As a result of this ongoing harassment, Veronica was left with little choice but to break her lease and to move out of her home. She was then faced with a significant financial penalty and was faced with homelessness.[107]

For some groups there is limited awareness of the protections available to combat certain vilifying acts, however, the Committee heard that the LGBTIQ+ community is broadly aware of the lack of protections afforded to them outside the scope of anti-discrimination law.[108] This can lead to anxiety and distress, particularly during circumstances of high media attention for the community, such as in the lead-up to the Australian marriage law postal survey.

Of other Australian jurisdictions, New South Wales (NSW) has criminal offences of inciting violence on grounds of sexual orientation, gender identity or intersex or HIV/AIDS status, as well as civil offences of homosexual, transgender and HIV/AIDS vilification.[109] In Tasmania, incitement offences protect attributes of sexual orientation or lawful sexual activity, gender identity or intersex variations of sex characteristics, and the harm-based test protects these attributes as well as gender.[110] The Australian Capital Territory's (ACT) civil and criminal vilification provisions extend to attributes of gender identity, HIV/AIDS status, sex characteristics and sexuality,[111] while Queensland's civil and criminal protections are limited to attributes of sexuality or gender identity.[112]

3.3.2 Women

Gendered hate speech and vilification remains common in Australia. In a 2018 study in the University of New South Wales Law Journal, D'Souza et al found that gendered hate speech is 'so pervasive and insidious that it is a normalised feature of everyday public discourse' and 'in some circumstances, is even openly defended'.[113] The article contends that this kind of hate speech fuels gender-based violence through the perpetuation of prejudice and hostility towards women.[114]

In their submission to the inquiry, Nicole Shackleton, Dr Laura Griffin and Danielle Walt, all from LaTrobe University, reported that women targeted by gendered hate speech can feel intimidated, scared and threatened, and ultimately silenced.[115] They contend

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107 Sam Elkin, *Transcript of evidence*, p. 3.

108 Ibid., p. 5.

109 *Crimes Act 1900* (NSW) s 93Z;*Anti-Discrimination Act 1977* (NSW) ss 38S,49ZT, ZXB.

110 *Anti-Discrimination Act 1998* (Tas) ss 17(1),9.

111 *Discrimination Act 1991* (ACT); *Criminal Code 2002* (ACT) s 750.

112 *Anti-Discrimination Act 1991* (Qld) ss 124A,.

113 Tanya D'Souza, et al., 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech', *University of New South Wales Law Journal*, vol. 41, no. 3, 2018, pp. 1, 16.

114 Ibid., p. 2.

115 Nicole Shackleton, Dr Laura Griffin and Danielle Walt, La Trobe University, *Submission 19*, received 20 December 2019, p. 8.

that there are certain groups more likely to be targeted, including women who step out of traditional gender roles or who enter traditionally masculine spaces.[116] For example, Jobwatch provided a case study of a client who had been subjected to gendered vilification in their workplace:

> Tracey was employed as an apprentice mechanic. She was highly distressed when she contacted JobWatch, as she had just been dismissed from her job. Tracey worked almost entirely with men. She described her workplace as a "boys club." She had been subjected to verbal abuse over the 12 month period of her employment with her colleagues victimizing her on a daily basis calling her names such as "dumb bitch," "drama queen" and a "fucking slut". Tracey told JobWatch about one particular incident in which the men she worked with spent the day calling her derogatory, sexist names before attempting to set her on fire. Tracey was very afraid and upset. She felt unsafe. She described having stomach ulcers and anxiety as a result of the treatment she had endured.[117]

VEOHRC's submission referred to reports from the Women's Legal Service Victoria of an increase in verbal abuse towards women, including threats of rape. Women who are 'outspoken or active in public debate about women's rights' are most likely to be targeted, with this most commonly occurring online where the reach is amplified via sharing or liking the content.[118] Similarly, Jacinta Masters, Manager of Gender Equity Victoria, reported that gendered hate often targets particular individuals as 'backlash for perceived gains for women's equality'.[119]

The Committee is also aware that online hate towards women has increased in recent years. A 2020 report by Plan International surveyed 14,000 girls and young women from 22 countries, including Australia, about their experiences online. More than half of those surveyed reported having been harassed and abused online, particularly on social media. One in four that were abused reported feeling physically unsafe due to this behaviour, which commonly includes threats of rape and physical violence, sexist language, and sharing of manipulated photos and pornographic content.[120] In Australia, an Amnesty International survey found that three in 10 women had experienced online abuse or harassment, which increased to nearly 50% for women aged 18–24.[121] In evidence to the Committee, Jacinta Masters from Gender Equity Victoria, provided examples of hate speech targeted at Victorian journalists and writers Van Badham, Kate O'Halloran and Giselle Au-Nhien Nguyen:

> you should be gang raped
>
> you should have your throat slit

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116 Ibid., p. 10.

117 JobWatch Inc., *Submission 31*, received 20 December 2019, p. 6.

118 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 40.

119 Jacinta Masters, Manager, Gender Equity Victoria, public hearing, Melbourne, 12 March 2020, *Transcript of evidence*, p. 26.

120 Plan International, *Free to be online?: Girls and young womens' experiences of online harassment*, 2020, p. 7.

121 Amnesty International, 'Australia: Poll reveals alarming impact of online abuse against women', 7 February 2018, <https://www.amnesty.org.au/australia-poll-reveals-alarming-impact-online-abuse-women> accessed 5 October 2020.

> you should be raped by dogs
>
> whatever it is, it doesn't have friends
>
> retrospective abortion would have been incredibly useful here
>
> what a mouth, I'm surprised she hasn't been a victim of DV herself
>
> face the facts you are all sluts
>
> if her husband beat her I'd have to say good on him[122]

The Commission for Children and Young People stated in its submission that the inclusion of gender as a protected attribute is critical in addressing gender equality, which is one of the key drivers of family violence.[123] Further, in her second reading speech to the Racial and Religious Tolerance Amendment Bill 2019 (Vic), Fiona Patten MP emphasised that online hate speech towards women is intrinsically linked to the social attitudes that allow family violence to prosper:

> Victoria understands family violence. We instituted a royal commission and we are implementing all of its 227 recommendations. We accept that 'we must change community attitudes towards women if we are to prevent violence from happening in the first place', to quote the Premier of Victoria.
>
> Yet we have done little to address this type of violence against women where it is most pervasive. Hate speech lives and breeds in social media feeds and the comments sections of news articles; it is shaming, bullying and brutalising via the everyday mediums that we use to communicate and consume media. …
>
> We authorise hate speech if we do not act to prevent it—hate speech that if left unchecked can embed discrimination and prejudice; hate speech that can lead to hate crime, which does not occur in a vacuum. It is the violent manifestation of prejudice in the wider community.[124]

VEOHRC advised in its submission that current protections for women are limited to hate conduct of a sexual nature in particular areas of public life, such as in employment and the provision of goods and services. However, conduct that is not sexual or happens outside of these particular areas is not covered.[125]

Gender or sex are not protected attributes for the purpose of an incitement test under anti-vilification law in any other Australian jurisdiction. However, Tasmania's harm-based test does include gender as a protected attribute for conduct which offends, humiliates, intimidates, insults or ridicules another person.[126]

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122 Jacinta Masters, *Transcript of evidence*, p. 26.

123 Commission for Children and Young People, *Submission 9*, received 9 December 2019, p. 2.

124 Victoria, Legislative Council, 28 August 2019, *Parliamentary debates*, pp. 2725–6.

125 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 39.

126 *Anti-Discrimination Act 1998* (Tas) s 17(1).

Gender identity is a protected attribute for incitement tests in the ACT, NSW, Queensland and Tasmania,[127] although the definition of this term varies. The ACT, NSW and Tasmania all broadly define it as including the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth. In their submission, Nicole Shackleton, Dr Laura Griffin, and Danielle Walt state that this definition:

> may be interpreted to cover [gendered hate speech] targeted at cis women, but it was not explicitly intended to do so (being a modification of the previous terminology of 'trans gendered').[128]

3.3.3 Disability

Persons with disability face ongoing harassment and hate conduct. Disability sector representatives report that this often manifests as verbal abuse, and is common in public settings, such as schools. In addition, it is often normalised as 'part of daily life', particularly where conduct started early in life, such as at school.[129]

In its submission, the Victorian Government referred to a series of national and state reports that demonstrated people with disability are commonly subjected to discriminatory and negative behaviours, including bullying, abuse and harassment.[130] It identified that abuse in disability-specific services and institutions is usually the focus of these reports, although 'abuse is not confined to these environments and is experienced in community and mainstream services'.[131] The Government also advised that overall there is limited research about the vilification of people with disability, but from its stakeholder consultations it found that for people with a disability:

- online vilification is more common than in person vilification
- people with multiple attributes, such as disability and sexual orientation, face a compounding effect in terms of vilification
- different people are more vulnerable to vilification and less likely to self-advocate in response.[132]

In the Australian Institute of Health and Welfare's (AIHW) report *People with a disability in Australia,* it includes a section on justice and safety which focuses on discrimination and violence. The findings reflect the Victorian Government's insights and is informative for this inquiry. For example, one in four people with a disability aged over 15 experienced some form of discrimination and nearly 50% of AHRC complaints relate

127 *Discrimination Act 1991* (ACT) s 67A; *Criminal Code 2002* (ACT) s 750; *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) ss s124A,31A; *Anti-Discrimination Act 1998* (Tas) s 19.

128 Nicole Shackleton, Dr Laura Griffin and Danielle Walt, *Submission 19*, p. 15.

129 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 40–1.

130 Victorian Government, *Submission 13*, p. 14.

131 Ibid.

132 Ibid., pp. 14–5.

to disability discrimination, including discrimination by 'strangers in the street'.[133] The report indicated that disability discrimination affects victims' access and participation in public life.[134]

In its submission, VEOHRC stated there is limited data on the prevalence of vilification and hate conduct directed at people with a disability.[135] However, for people with disability, hate and discrimination often go together.[136] Similar to the Victorian Government, VEOHRC highlighted that people can be the targets of hate based on multiple attributes, reiterating that 'hate speech towards women with disabilities was likely to be intersectional, targeting their gender and their disability'.[137] When considering Victorian anti-discrimination law, VEOHRC reported that the highest number of complaints of discrimination under the EOA related to disability, and that some of these complaints would likely involve vilification. [138]

Felix Walsh, Policy and Law Reform Officer at the Disability Discrimination Legal Service, told the Committee that while there is limited research and data on the prevalence of vilifying conduct towards persons with a disability in Victoria, the experiences of other jurisdictions can help to inform the Victorian response.[139] For example, disability is a protected attribute in vilification law in Tasmania.[140] In the last two reporting periods (2017–18 and 2018–19), complaints to the Tasmanian Equal Opportunity Commission alleged that offensive, insulting, intimidating, humiliating or ridiculing conduct on the basis of disability were higher than complaints on the basis of any other protected attribute.[141] This was similarly the case for complaints of alleged incitement to hatred, serious contempt or severe ridicule. The ACT also includes disability as a protected attribute from vilification.[142] While only one complaint has been made per year over the past two reporting periods, complaints of discrimination on the basis of disability were higher than any other attribute for the same period.[143]

In her second reading speech on the Racial and Religious Tolerance Amendment Bill 2019 (Vic), Fiona Patten MP shared one piece of hate speech sent to disability advocate Carly Findlay in response to an article she had written on disability slurs in the AFL:

> Seriously? We call them retards because you should never have been born. The sad fact is you were, so why should the able bodied tread on eggshells around you? It is us

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133 Australian Institute of Health and Welfare, *People with disability in Australia 2020*, Australian Government, Canberra, 2020, p. 129.

134 Ibid., p. 131.

135 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 40.

136 ibid., p. 41.

137 Ibid.

138 Ibid., p. 42.

139 Felix Walsh, Policy and Law Reform Officer, Disability Discrimination Legal Service, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 21.

140 *Anti-Discrimination Act 1998* (Tas) s 19.

141 The majority of these were made by one complainant; however, even if these complaints are excluded, disability is still the attribute that received the most complaints. Anti-Discrimination Commissioner and Equal Opportunity Tasmania, *Equal Opportunity Tasmania: Annual Report 2018–19*, Equal Opportunity Tasmania, 2019, p. 22.

142 *Discrimination Act 1991* (ACT) s 67A.

143 ACT Human Rights Commission, *Annual Report 2018–19*, Canberra, October 2019, p. 43.

> you should be thanking for the roof over your head the meals that you eat and all the free medical and welfare you get … the day of the rope draws nearer with every (effing) online whinge post you make.[144]

A recent survey of community attitudes in Victoria towards persons with disability reported various negative stereotypes and beliefs. For example, nearly 20% of participants agreed that people with disability should not raise children, and a similar proportion agreed that employers should be allowed to refuse to hire people with disability.[145] Twelve per cent of participants thought that people with disability are a burden on society.[146] As noted in the Victorian Disability Advisory Council's submission, negative community attitudes such as these can lead to derogatory treatment and bullying.[147]

In evidence to the Committee, Felix Walsh from the Disability Discrimination Legal Service shared the story of a woman in the UK who had been subjected to significant harassment and humiliation when her private photographs were edited and posted in a mocking light on various social media platforms. The content was shared with approximately 68,000 people and gathered thousands of comments. In an open letter, the woman who was targeted by this abuse wrote:

> In the past few years, I have lost the ability to walk and endured multiple surgeries … But nothing compares to being looked at and laughed at by thousands of strangers. On top of that, I was subjected to overwhelming levels of hatred found in the comments on your post and I had to read that people think I should just 'wheel myself off a cliff' or that someone should 'take one for the team' and murder me in my sleep. I have spent the last few days battling with really dark thoughts about myself and my life because of what these people have said about me.[148]

Online hate speech towards persons with disability is estimated to be higher than offline conduct.[149] The Commission for Children and Young People explained the particular impact this can have for young people:

> Young people, and those with learning disabilities in particular, may have greater reliance upon social media to feel less isolated or find a much-needed community to connect with, making them more exposed to the risk of online vilification.[150]

A recent UK report into hate crime noted that there may be a variety of perpetrator motivations for targeting persons with disability, such as a belief that the person's disability makes them an easy target, or a general lack of respect for disabled people.[151]

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144 Victoria, Legislative Council, 28 August 2019, *Parliamentary debates*, p. 2727.

145 Bollier AM, et al., *Survey of Community Attitudes toward People with Disability: A report for the Victorian Department of Health and Human Services*, report prepared by Disability & Health Unit, Centre for Health Equity, University of Melbourne, Department of Health and Human Services, Melbourne, 13 August 2018, pp. 21, 5.

146 Ibid., p. 19.

147 Victorian Disability Advisory Council, *Submission 62*, received 1 October 2020, p. 1.

148 Felix Walsh, *Transcript of evidence*, p. 22.

149 Victorian Government, *Submission 13*, p. 14.

150 Commission for Children and Young People, *Submission 9*, p. 2.

151 UK Law Commission, *Hate crime laws: A consultation paper: Consultation Paper 250*, 23 September 2020.

In its submission, the Victorian Government referred to reports from community stakeholders that some persons with disability might be more vulnerable to vilification and less likely to be able to self-advocate in response. For example, people with an intellectual disability, autism or who have high communication needs.[152]

3.3.4 Expanding vilification protections

Many stakeholders to the inquiry supported the extension of anti-vilification provisions to additional attributes. VEOHRC stated this would acknowledge and seek to remedy harms experienced by communities commonly targeted by vilification, provide more effective redress for intersectional forms of hate, send a message about standards of behaviour, and ensure consistency with best practice Australian jurisdictions.[153]

A small number of submissions opposed the extension of protections under the RRTA to additional attributes, predominantly due to the symbolic nature of the Act remaining focused on racial and religious vilification.[154] For example, Adel Salman from the ICV advised the Committee that while the Council supports anti-vilification protections across the board, the RRTA has a particular purpose that needs to be conserved. On the other hand, the Institute of Public Affairs opposed inclusion of further attributes on the basis that any protected attributes are 'inconsistent with formal equality'.[155] However, this was the only evidence received throughout the inquiry that supported this position.

In its submission, the Victorian Government stated that when selecting whether and which additional attributes should be protected, a clear case must be made as to 'why it is in the public interest to afford greater protection to people with these attributes'.[156] The Australian Hate Crime Network recommended that, on the basis of international best practice, two areas of guidance can inform these decisions:

- existing anti-discrimination and human rights standards, which provide an important benchmark for identifying relevant attributes
- research evidence that identifies communities most at risk of vilification.[157]

It advised that on the basis of these factors, the most urgent areas of protection are people with disability, the LGBTIQ community and women. The Victorian Government similarly acknowledged that on the basis of consultations and available evidence, these

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152 Victorian Government, *Submission 13*, p. 15.

153 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 64.

154 See, for example, Islamic Council of Victoria, *Submission 45*; Hindu Council of Australia, *Submission 21*, received 20 December 2019; The International Society for Krishna Consciousness Victoria, *Submission 25*, received 20 December 2019; Australian Christian Lobby, *Submission 35*, received 21 December 2019; Catholic Archdiocese of Melbourne, *Submission 33*, received 20 December 2019.

155 Institute of Public Affairs, *Submission 18*, received 19 December 2019, p. 2.

156 Victorian Government, *Submission 13*, p. 4.

157 Professor Gail Mason, Co-Convenor, Australian Hate Crime Network, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 23.

groups have the most frequent experiences of hate conduct and vilification.[158] Further, it indicated that the disparity between attributes protected under discrimination law and those protected under anti-vilification law can be confusing:

> During consultations, some stakeholders suggested that vilification protections should be expanded to cover all attributes under the EOA, to provide more consistent protections against both discrimination and vilification. Several stakeholders raised that the inconsistencies in how hate conduct and vilification against particular attributes are provided is confusing, unfair and outdated, and indicated their support for extending protections beyond race and religion.[159]

This view was echoed by a number of stakeholders to the inquiry, and some contended that people who are currently protected by the 18 attributes enshrined in Victorian anti-discrimination law should similarly be protected from vilification.[160]

The Law Institute of Victoria (LIV) submitted that the extension of protections to additional attributes would assist the RRTA to achieve its broader purpose of protecting individuals from social, political and economic exclusion.[161]

The Committee considers that on the basis of the evidence received throughout the inquiry, the attributes protected by Victorian anti-vilification laws should be extended to additional groups. In considering particular attributes, the Committee took the approach recommended by the Australian Hate Crime Network above. Namely, that this process should be informed by relevant anti-discrimination and human rights standards, as well as current evidence on the communities most at risk of vilifying behaviour.

The Committee considers that there is compelling evidence to support the extension of anti-vilification laws to people with disability, women and the LGBTIQ+ community. There was broad support from stakeholders for the extension of protected attributes to these groups. Of submissions received, 25 explicitly advocated for the extension of anti-vilification protections to persons on the basis of disability.[162] A total of 30 submissions considered protections should be extended to persons on the basis of

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158 Victorian Government, *Submission 13*, p. 12.

159 Ibid., p. 17.

160 See, for example, Thorne Harbour Health, *Submission 34*, p. 6; Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020, p. 6.

161 Law Institute Victoria, *Submission 46*, received 31 January 2020, p. 16.

162 Australian Centre for Christianity and Culture, *Submission 7*, received 21 November 2019; Commission for Children and Young People, *Submission 9*; Law and Innovation Allens Hub for Technology, *Submission 10*, received 10 December 2019; Telecommunications Industry Ombudsman, *Submission 12*, received 18 December 2019; Centre for Multicultural Youth, *Submission 14*, received 19 December 2019; Mr Alastair Lawrie, *Submission 17*, received 19 December 2019; Liam Bywater, *Submission 20*, received 20 December 2019; Bill Swannie, Senior Lecturer, Victoria University College of Law and Justice, *Submission 22*, received 20 December 2019; Office of the Public Advocate, *Submission 23*, received 20 December 2019; Casey Multi Faith Network, *Submission 24*, received 20 December 2019; Jewish Community Council of Victoria, *Submission 26*; Greater Dandenong City Council, *Submission 29*, received 20 December 2019; Victorian Council of Social Service, *Submission 30*, received 20 December 2020; JobWatch Inc., *Submission 31*; Mr Nicholas Butler, public hearing, Melbourne, 12 March 2020, *Transcript of evidence*; Thorne Harbour Health, *Submission 34*; Springvale Monash Legal Service, *Submission 43*, received 24 January 2020; Australian Discrimination Law Experts Group, *Submission 44*; Law Institute Victoria, *Submission 46*; Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020; Victorian Multicultural Commission, *Submission 48*, received 31 January 2020; Australian Muslim Women's Centre for Human Rights, *Submission 49*; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*; Victorian Disability Advisory Council, *Submission 62*.

their sexual orientation.[163] In addition, eight submissions considered HIV/AIDS status should also be protected.[164] At a public hearing, Jonathan Meddings, Senior Policy Analyst at Thorne Harbour Health, described the often-interrelated nature of vilification on the basis of sexual orientation and HIV/AIDS status:

> In Victoria gay and bisexual men account for the large majority of the HIV-positive population, and their experiences of vilification on the basis of their sexual orientation and HIV or AIDS status can often overlap. Clearly there is a need to expand anti-vilification laws to protect people on the basis of their LGBTI or HIV and AIDS status.[165]

Some stakeholders also advocated for the protection of persons with a personal association with a person who is identified by reference to any of the protected attributes, such as parents or advocates.[166]

Sex and gender attributes

Many stakeholders advocated for the extension of vilification provisions to sex and/or gender attributes, including sex, gender, gender identity, gender expression, sex characteristics and intersex status. However, there was broad debate about the meaning of certain terms, and which ones are most appropriate for inclusion in an anti-vilification legislative framework.

As noted in the Trans Pathways report, terminology used to describe gender is developing to become more inclusive of different gender identities.[167] AHRC stated in a 2011 report that terminology in this area is strongly contested with limited consensus on what is most appropriate, but 'people have a right to identify their own sexual orientation and sex and/or gender'.[168] It further argued that 'terminology can have a

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163 Alexis Green, *Submission 5*, received 15 November 2019; Australian Centre for Christianity and Culture, *Submission 7*; Commission for Children and Young People, *Submission 9*; Allens Hub for Technology, *Submission 10*; Telecommunications Industry Ombudsman, *Submission 12*; Centre for Multicultural Youth, *Submission 14*; Mr Alastair Lawrie, *Submission 17*; Liam Bywater, *Submission 20*; Bill Swannie, *Submission 22*; Casey Multi Faith Network, *Submission 24*; Jewish Community Council of Victoria, *Submission 26*; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, received 20 December 2019; Greater Dandenong City Council, *Submission 29*; Victorian Council of Social Service, *Submission 30*; JobWatch Inc., *Submission 31*; Thorne Harbour Health, *Submission 34*; Uniting Church Australia, *Submission 36*, received 23 December 2019; Liberty Victoria and St Kilda Legal Services's LGBTIQ Legal Service, *Submission 39*, received 17 January 2020; Springvale Monash Legal Service, *Submission 43*; Australian Discrimination Law Experts Group, *Submission 44*; Law Institute Victoria, *Submission 46*; Human Rights Law Centre, et al., *Submission 47*; Victorian Multicultural Commission, *Submission 48*; Australian Muslim Women's Centre for Human Rights, *Submission 49*; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*; Union for Progressive Judaism, *Submission 57*, received 12 March 2020; Victorian Disability Advisory Council, *Submission 62*; Nicole Shackleton, Dr Laura Griffin and Danielle Walt, *Submission 19*; Nicholas Michael Butler, *Submission 32*, received 20 December 2019.

164 Victorian Gay and Lesbian Rights Lobby, *Submission 27*; Greater Dandenong City Council, *Submission 29*; Thorne Harbour Health, *Submission 34*; Law Institute Victoria, *Submission 46*; Human Rights Law Centre, et al., *Submission 47*; Australian Muslim Women's Centre for Human Rights, *Submission 49*; Judaism, *Submission 57*; Liam Bywater, *Submission 20*.

165 Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 8.

166 In a similar form to section 6(q) of the EO Act. See, Human Rights Law Centre, et al., *Submission 47*, p. 10; Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 11; Jewish Community Council of Victoria, *Submission 26*; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*.

167 Strauss, et al., *Trans Pathways: the mental health experiences and care pathways of trans young people*, p. 8.

168 Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination*, AHRC, Sydney, 2011, p. 5.

profound impact on a person's identity, self-worth and inherent dignity',[169] and therefore the terminology used to describe sex and gender-diverse people should be inclusive and acceptable.

Most stakeholders agreed that sex and/or gender should be protected attributes. Of these, there was broad consensus to use a gender-based concept of sex, such as gender, gender identity, gender expression and gender non-conformity.[170] Stakeholders that advocated for a gender-based concept of sex argued that using the term 'gender' or 'gender identity' will protect both women and, broadly speaking, members of the LGBTIQ community, without diminishing the rights and protections of either group.[171]

Dr Holly Lawford Smith challenged this view and the use of the term 'gender' or 'gender identity'. She argued that using a gender-based concept of sex diminishes the protections afforded to women who are vilified based on sex, not gender. At a public hearing, Dr Laura Griffin of La Trobe University indicated that this approach was inappropriate as the simplification of hate against women occurring solely on a biological basis is 'misleading' and 'unhelpful'.[172]

VEOHRC stated that use of gender-based terminology was the most appropriate option and added that the amended law should provide context for the use of 'gender' to protect women through the preamble, purposes or objectives of the legislation or in the second reading speech.[173]

Four organisations advocated for adoption of terminology incorporated in the *Anti-Discrimination Act 1998* (Tas) as amended in 2013, namely, 'gender identity' and 'gender expression'.[174] In their joint submission, Liberty Victoria and the LGBTIQ Legal Service argue that these definitions 'are inclusive of people who are non-binary or gender-non-conforming, and do not utilise outdated binary notions of gender'.[175] They also argued that both terms are required to cover different classes of people: those who identify as a particular gender, and those who express a gender but who may not necessarily identify with a particular gender. For 'gender expression', they gave the example of 'a person who engages in "drag" performances but who does not identify as transgender or non-binary'.[176]

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169 Ibid.

170 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*; Mr Alastair Lawrie, *Submission 17*; Alexis Green, *Submission 5*; Allens Hub for Technology, *Submission 10*; Dr Bruce Baer Arnold and Dr Wendy Bonython, *Submission 41*, received 21 January 2020; Australian Discrimination Law Experts Group, *Submission 44*; Casey Multi Faith Network, *Submission 24*; Centre for Multicultural Youth, *Submission 14*; Mr Craig King, *Submission 1*, received 2 October 2019; Equality Australia, *Submission 53*, received 3 February 2020; Gender Equity Victoria, *Submission 52*, received 31 January 2020; Greater Dandenong City Council, *Submission 29*; Human Rights Law Centre, et al., *Submission 47*; Islamic Council of Victoria, *Submission 45*; JobWatch Inc., *Submission 31*; Nicole Shackleton, Dr Laura Griffin and Danielle Walt, *Submission 19*; Springvale Monash Legal Service, *Submission 43*; Victorian Multicultural Commission, *Submission 48*; Telecommunications Industry Ombudsman, *Submission 12*; Uniting Church Australia, *Submission 36*; Victorian Council of Social Service, *Submission 30*.

171 See, for example, Dr Laura Griffin, Lecturer, La Trobe University, public hearing, Melbourne, 12 March 2020 *Transcript of evidence*, p. 6.

172 Ibid.

173 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 64.

174 Liam Bywater, *Submission 20*; Liberty Victoria and Service, *Submission 39*; Thorne Harbour Health, *Submission 34*; Victorian Gay and Lesbian Rights Lobby, *Submission 27*.

175 Liberty Victoria and Service, *Submission 39*, p. 11.

176 Ibid.

The Committee considers that anti-vilification protections should be as inclusive as possible for women and gender diverse persons in order to provide adequate protection from harm for these groups. As emphasised by a number of stakeholders, including AMWCHR, LIV and VEOHRC, specific terminology and definitions should therefore be finalised in consultation with relevant and affected stakeholders.[177]

In addition, under the EOA, the attributes for which discrimination is expressly prohibited in certain areas of public life that are relevant to this discussion include sex, gender identity, sexual orientation and lawful sexual activity. The definitions for these attributes have not been updated since the Act was introduced in 2010, and some submissions contended that the definitions of certain terms such as gender identity are now outdated.[178] Noting the above discussion, the Committee acknowledges that there may be a need to update the terminology and definitions of the EOA in conjunction with any future changes to anti-vilification provisions.

RECOMMENDATION 1: That the Victorian Government extend anti-vilification provisions (in both civil and criminal laws) to cover the attributes of:

a. race and religion

b. gender and/or sex

c. sexual orientation

d. gender identity and/or gender expression

e. sex characteristics and/or intersex status

f. disability

g. HIV/AIDS status

h. personal association.

The precise terms and definitions of additional protected attributes should be finalised in legislation in consultation with all relevant stakeholder groups.

3.3.5 Complaints on the basis of more than one attribute

Numerous stakeholders emphasised the importance of an intersectional approach that recognises the compounding effects of vilification on the basis of multiple protected attributes, such as race and gender.[179] This type of approach would allow individuals

177 Australian Muslim Women's Centre for Human Rights, *Submission 49*; Law Institute Victoria, *Submission 46*; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*.

178 See, for example, Thorne Harbour Health, *Submission 34*, p. 9; Liberty Victoria and Service, *Submission 39*, p. 11; Law Institute Victoria, *Submission 46*, p. 17.

179 See, for example, Human Rights Law Centre, et al., *Submission 47*, p. 11; Islamic Council of Victoria, *Submission 45*, pp. 11–2.

to make a complaint on the basis of more than one attribute in order to have these compounding effects recognised. The Springvale Community Legal Centre provided an example of how a combination of attributes can increase fear or anxiety:

> 'Zahra' runs an organisation supporting Afghan women with settlement needs in Australia, including English classes, driving programs, mothers programs and support for women experiencing family violence. A partner organisation suggested to Zahra that they apply to Bunnings Warehouse to run a barbeque as a fundraiser for their community projects. This is a common fundraiser for community groups. The suggestion shocked Zahra, who said that she would never expose herself or her workers in that way. 'We would be on display, in a group, all wearing headscarfs. It wouldn't be safe for us; it would be like being a target'.[180]

As acknowledged in the submission, this fear arises on the basis of the group being both Muslim and women, with visibility increased due to the women wearing headscarfs. There is clear basis for this fear—women who are identifiable as Muslim are the most common targets of 'offline' incidents of Islamophobia in Australia.[181]

AMWCHR provided a further example of how discrimination on the basis of particular attributes cannot always be easily distinguished:

> We conducted several different conversations around Islamophobia with young people and in a lot of those conversations young African Muslims were saying that the level of Islamophobia that they faced was difficult to identify because it was mixed with racism due to their skin colour, so due to them being African. And a lot of the young women in particular who wore hijab or who were covered were experiencing difficulties in understanding whether the racism was due to their skin colour or due to their religion. I think that that creates a really massive barrier for young people in reporting incidents of discrimination and racism.[182]

Shashwat Tripathi, a Youth Volunteer for the CMY, described to the Committee the complexity of identity, particularly for those exposed to multiple forms of marginalisation:

> I would like to reiterate the fact that identity is multidimensional and complex, and we do not choose these multidimensional identities. When these intersecting identities interact with each other it can be really hard to navigate the resulting challenges. If the law seeks to protect my race and religion and chooses not to protect my gender or sexual orientation or disability, then I am not protected at all. It is important to understand that people of colour, especially from refugee and migrant backgrounds, who have genders, sexual orientations and disabilities different than the status quo already face exclusion and discrimination within their communities. They are doubly marginalised in this sense. Their position in the social hierarchy is already threatened or challenged. If there is no law that protects me from acts of vilification, and my

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180 Springvale Monash Legal Service, *Submission 43*, pp. 8–9.

181 Iner, *Islamophobia in Australia - II (2016–2017)*, p. 11.

182 M.Y. , *Transcript of evidence*, p. 5.

> community and family already does not support me enough, then where should I go? Where should I seek my protection from?[183]

Chris Christoforou, Executive Officer of the Ethnic Communities' Council of Victoria, explained the importance of being able to identify with multiple attributes:

> broadening the scope of that legislation to include other groups that do experience hatred as a result of sexual orientation or gender or disability is something that the parliamentary Inquiry should consider, because again I think the idea that people fit into nice neat boxes is not always the case. What is important to people in terms of their identity is something that should be covered by legislation so that people can feel safe within our community...[184]

In their group submission, HRLC, GetUp!, Anti Defamation Commission, Victorian Trades Hall Council and the Asylum Seeker Resource Centre, stated that this type of approach should make the complaints process straightforward for persons who identify with multiple protected attributes, but also not undermine the ability for people to bring claims solely on an individual attribute.[185]

The Committee is aware that vilification is complex and often occurs on the basis of multiple perceived or actual characteristics. It considers that it is crucial that complaints mechanisms are able to consider these compounding effects.

RECOMMENDATION 2: That the Victorian Government amend anti-vilification laws to ensure people can make complaints on the basis of more than one attribute.

183 Shashwat Tripathi, Youth Volunteer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 38.

184 Chris Christoforou, Executive Officer, Ethnic Communities' Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 10.

185 Human Rights Law Centre, et al., *Submission 47*, p. 12.

4 Preventing vilification in Victoria

Legislative protections against vilification have been described as an 'incredibly significant instrument of social change'.[1] However, legislation alone cannot change community attitudes or prevent hate speech or vilifying conduct. A more sophisticated and holistic approach is required to reduce the overall incidence of vilification and hate conduct in Victoria. As acknowledged by the Victorian Government in its submission:

> Hate-based and vilification protections should, as a primary objective, seek to prevent vilification and hate conduct from happening in the first place. To achieve this, action must be taken against the drivers of vilification and hate-based conduct, for which there is an emerging evidence base.[2]

Critically, vilification can also be an early warning sign of more serious acts and with potentially more dangerous and far-reaching impacts. The United Nations (UN) Office on Genocide Prevention and the Responsibility to Protect has published guidance on preventing the incitement of violence that could lead to atrocity crimes. This guidance acknowledges that in certain settings, vilification can lead to some of the most grievous forms of violence:

> Incitement to discrimination, hostility and violence is both an early warning indicator and a trigger of atrocity crimes. Most, if not all, have been preceded and accompanied by this phenomenon. In situations when communities are under stress and tensions are growing, incitement contributes to sowing the seeds of suspicion, mistrust and intolerance. Increased hate speech targeting communities or individuals, based on their identity, contributes to enabling or preparing atrocity crimes, and is thus an indicator that those crimes may be committed.[3]

In light of the potential for the escalation of violent activity, however small that risk may be, it is imperative to focus on preventing hate speech and vilifying conduct before it occurs. In particular, understanding the root causes and drivers of hate conduct is critical to building a coordinated and effective response.

Addressing the causes of discrimination and hostility towards minority groups is complex, and efforts to do so in the past have often fallen short. Throughout the inquiry, the Committee heard that key areas of focus for prevention activities include school-based education, community awareness campaigns, and responsible public media reporting. The Committee notes, however, various reviews and reports have made similar recommendations over at least the past several decades. For example,

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1 Maria Dimopoulos, Deputy Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 4.

2 Victorian Government, *Submission 13*, received 19 December 2019, p. 34.

3 United Nations Office on Genocide Prevention and the Responsibility to Protect, *Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes*, United Nations, 2017, p. 6.

the Human Rights and Equal Opportunity Commission's 1991 *Report of the National Inquiry into Racist Violence in Australia* advocated for various strategies to address racism, including school education initiatives on multiculturalism, the establishment of safe and accessible complaints mechanisms for students and community education and awareness-raising; and called for balanced media reporting on race-related issues.[4] Similarly, the Senate Legal and Constitutional Affairs Committee's report into the Racial Hatred Bill 1994 (Cth) supported 'education, public campaigns and fair reporting in the media' in addition to legislative responses to effectively respond to racial hatred.[5] While significant progress has been made over the subsequent decades to combat various forms of entrenched discrimination and prejudice, the Committee is well aware that hate continues to prosper within Victorian communities. It is therefore imperative that preventative strategies are informed by current research and data, remain responsive to international best practice, and are informed by affected communities. Consistent monitoring and evaluation of early intervention and prevention measures are also required from all actors working to combat discriminatory and hostile conduct in order to ensure that these are as effective as they can be.

The Committee considers it essential that the Victorian Government commit to both legislative reform and other complementary prevention-based strategies. Throughout the inquiry, stakeholders told the Committee that preventing hate conduct is 'just as important as changing the law'.[6] In order to do so meaningfully, a whole-of-government commitment is required.

Building on from the previous chapter, this chapter provides an overview of the drivers and root causes of vilification and discusses some of the areas where it is prevalent. It also considers ways to move forward in preventing vilification, and in particular, in combatting prejudice in a systemic way before it manifests as more serious harms. This includes promoting responsible media reporting, school-based education initiatives, and community awareness and education campaigns. The chapter also addresses potential ways to prevent events from taking place where vilification is likely to occur.

4.1 The causes of vilification and where it occurs

4.1.1 What drives vilification?

In his evidence to the Committee, John Batho, the Executive Director of Multicultural Affairs and Social Cohesion, Equality at the Department of Premier and Cabinet (DPC), indicated that there is 'no single cause of hate conduct or vilification', and the various factors that can drive this kind of thought or behaviour may operate at

4 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence in Australia*, Australian Government Publishing Service, Canberra, 1991, pp. 346, 50, 60, 73.

5 Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Racial Hatred Bill 1994*, March 1995, p. 27.

6 Ruth Barson, Joint Executive Director, Human Rights Law Centre, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 30.

individual, societal or systemic levels.[7] Professor Phyllis Gerstenfeld, in her book *Hate Crimes: Causes, Controls, and Controversies*, acknowledged that 'none of us is free of prejudices', although, of course, the extent of each person's biases varies greatly.[8] This section provides an overview of some of the drivers of hate, however, it is not comprehensive and there are many other factors that may influence a person's thinking and conduct.

In its submission, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) highlighted some drivers of hate conduct, including:

- cultural ignorance and assumptions based on stereotypes
- visible markers of a person's identity, such as religious garments (the hijab), Aboriginal flags or the colour of a person's skin
- systemic social issues such as gender inequality, fear and general bigotry
- political commentary and media reporting that drive or reinforce negative stereotypes about marginalised communities.[9]

Vilification incidents primarily occur due to an element of bias or stereotyping. These can be understood as 'preconceived negative opinions, intolerance or hatred' that has been directed towards a particular group on the basis of an actual or perceived characteristic.[10]

As acknowledged in Victoria Legal Aid and Victorian Aboriginal Legal Service's submission, bias and stereotyping can be impacted by systemic or structural factors, which can drive or facilitate prejudice.[11] Professor Barbara Perry, who has researched extensively on hate crime, concludes that culture influences behaviour: '[h]ate crime is … a normal (albeit extreme) expression of the biases that are diffused throughout the culture and history in which it is embedded'.[12] She characterises hate crimes as often a marker of power by majority groups in a given society over minority groups:

> Hate crime … involves acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group.[13]

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7 John Batho, Executive Director, Multicultural Affairs and Social Cohesion, Equality, Department of Premier and Cabinet, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 14.

8 Phyllis B. Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 4th edn, SAGE Publications, 2018, pp. 98–9.

9 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 31.

10 Office for Democratic Institutions and Human Rights, Organization for Security and Co-operation in Europe, *Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region*, OCSE, Poland, 2009, p. 15.

11 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 20.

12 As quoted in Gerstenfeld *Hate Crimes: Causes, Controls, and Controversies*, p. 128.

13 Barbara Perry, *In the Name of Hate: Understanding Hate Crimes*, Taylor & Francis, 2001, p. 184.

Where prejudice continues unchecked, it can escalate and become normalised and ingrained. In its group submission to the inquiry the Human Rights Law Centre (HRLC), Anti Defamation Commission, Asylum Seeker Resource Centre (ASRC), GetUp! and Victorian Trades Hall Council (VTHC) argued that hate conduct occurs 'partly because the broader community ignores or accepts its presence and tolerates an increasingly discriminatory discourse'.[14]

Changing socio-political and economic conditions are another driver for the rise of hateful views or extremist attitudes towards particular groups. The Council of Europe Parliamentary Assembly's Committee on Political Affairs and Democracy published a report in 2011 on responding to the rise in neo-Nazism across Europe. In this report, the Committee noted that extremist neo-Nazist or anti-immigration views can stem from harsh economic policies and perceptions of open or relaxed immigration policies.[15] In the Victorian Government's supplementary submission, 'society inequalities' that lead to 'scapegoating and hatred' was similarly highlighted as a driver of hate conduct.[16] Further, media and political commentary can influence how socio-political and economic conditions are perceived and responded to by broader society. This is discussed in more detail below.

In the current inquiry, the Committee also heard that the rise of social media and online forums where participants can remain anonymous has driven vilification and harassment online. Mark Zirnsak, the Senior Social Justice Advocate of the Synod of Victoria and Tasmania, Uniting Church in Australia, stated at a public hearing that this occurred primarily because individuals felt empowered to participate in conduct online that they would not engage in in person, due to a belief that there would not be the same kind of repercussions.[17]

In its *Strategy and Plan of Action on Hate Speech*, the UN called for coordinated data collection and research, including 'on the root causes, drivers and conditions conducive to hate speech' in order to act effectively to combat it.[18] Stakeholders to the inquiry similarly recommended that further research in this area is required.[19] In particular, the Victorian Government acknowledged that further research is needed around drivers of vilification, for which it stated there is an 'emerging' evidence base:[20]

> Building a stronger evidence base is also critical to preventing and responding to hate conduct and vilification. A better understanding of the experiences of marginalised communities, community attitudes and sentiments and drivers of hate conduct, particularly at a State level, would support a more targeted response.[21]

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14 Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020, p. 22.

15 Committee on Political Affairs and Democracy, *Counteraction to manifestations of neo-Nazism: Doc. 12661, Reference 3816 of 3 October 2011*, Council of Europe Parliamentary Assembly, 2011.

16 Victorian Government, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, supplementary evidence received 24 June 2020, p. 10.

17 Mark Zirnsak, Senior Social Justice Advocate, Synod of Victoria and Tasmania, Uniting Church in Australia, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 29.

18 United Nations, *Strategy and Plan of Action on Hate Speech*, 2019, p. 3.

19 See, for example, Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 20.

20 Victorian Government, *Submission 13*, p. 34.

21 Victorian Government, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, p. 10.

The Victorian Government provided information on work already underway in this area, including collaboration with the Scanlon Foundation to collect Victorian-specific data around community attitudes towards 'racism, social cohesion and immigration'. This will help to inform initiatives under the Anti-Racism Action Plan, which is currently in development, and to improve state-level understandings of racism.[22] The Victorian Government's submission highlighted other initiatives aimed at preventing discrimination and hate-based conduct, such as the State Disability Plan and the LGBTIQ+ Strategy.[23] However, no information was provided regarding the research and evidence base driving these plans, and in particular, any strategies aimed at preventing prejudice.

The Committee acknowledges that more work is required to enhance understanding of the drivers behind vilification in Victoria. While community attitudes provide critical insight, exploration of the key causes, drivers and conditions conducive to hate conduct is also necessary to complement this research, in accordance with the recommendations of the UN's *Strategy and Plan of Action on Hate Speech*. Further, research is also needed to examine the drivers of hate towards other groups, including on the basis of religion, gender, disability or LGBTIQ+ status.

RECOMMENDATION 3: That the Victorian Government fund ongoing research on the drivers behind vilification conduct and prejudice, and effective strategies to prevent this conduct.

4.1.2 Where does vilification happen?

Vilification occurs in many settings, and often in public. The Victorian Government described some of the places where it is prevalent, including 'shopping centres or restaurants, places of recreation, on public transport, educational settings and workplaces, within service settings and online'.[24]

The following section provides examples of different contexts where vilification is commonplace. However, these are not prescriptive and there are many other settings in which this conduct takes place.

Schools

The Victorian Multicultural Commission (VMC) told the Committee that despite a wide variety of school programs focused on cultural diversity and combating racism, there has been a recent increase in incidents of antisemitism and Islamophobia within Victorian schools.[25] In addition to the broad impacts of this conduct discussed in

22 Ibid.

23 Victorian Government, *Submission 13*, p. 35.

24 Ibid., p. 9.

25 Vivienne Nguyen, Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 5.

Chapter 3, acts of intolerance can have particular and lasting impacts for youth and threaten their sense of inclusion and belonging.[26]

The 2017 Speak Out Against Racism project is a significant study into experiences and attitudes to racism and racial bullying, as well as bystander responses to racism and racial discrimination among Australian students in government schools in New South Wales (NSW) and Victoria. The study was led by the Australian National University in conjunction with other universities, in partnership with state education departments and the Australian Human Rights Commission (AHRC), and funded by an Australian Research Council grant. A summary of findings was released in 2019 and reported that:

- about one-third of all students reported experiences of racial discrimination by peers (31%)
- students who were born overseas reported two times more experiences of racial discrimination than students born in Australia
- compared with students from Anglo-Celtic backgrounds, students from all other backgrounds (except European) were twice as likely to experience some form of discrimination at least once
- more than half (60%) of the participants reported seeing other students being racially discriminated against by their peers and nearly half (43%) of students reported seeing incidents of racial discrimination directed towards other students by teachers.[27]

Discrimination and prejudice can often take more covert forms, particularly where negative stereotypes are entrenched or systemic. At a public hearing, M.Y., Young Women's Program Coordinator for the Australian Muslim Women's Centre for Human Rights (AMWCHR), shared the experience of some students that the Centre worked with:

> there is a school in Kensington that we were working with that had several incidents of racism—and very, very subtle racism—towards African Muslim girls. Even though they were quite high achieving, they were told that there was no point in them trying to get into university because their families just would not allow that.
>
> There is no evidence for these sort of claims but for young people, and for teenagers in particular, hearing those things from teachers or hearing those things from school counsellors can be incredibly damaging for a long time.[28]

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26 Centre for Multicultural Youth, *Creating inclusive school communities where racism and discrimination is proactively prevented and effectively addressed – Action Plan*, 2020, p. 1.

27 N Priest, et al., *Summary of findings from the 2017 Speak Out Against Racism (SOAR) student and staff surveys*, Centre for Social Research and Methods, Australian National University,, 2019, p. 2.

28 M.Y. , Young Women's Program Coordinatior, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 6.

The Committee also heard that the effects of discrimination for students at various developmental stages can be wide-ranging and long-lasting. Akeer Garang, a Youth Volunteer with the Centre for Multicultural Youth (CMY), shared her own experiences of racial hatred at school and the ongoing impacts this has had for her:

> I think for young people who are culturally and linguistically diverse vilification in the school grounds is a normative experience. I remember when I was a young person around primary-school age my first experience of vilification was having young people mock me for my lack of English skills. They would play with my hair and ridicule my braids and say that they looked like snakes on my head. They would look at my dark complexion and call it 'poop skin', 'dirty' and 'unwashed'. As a young person my first thought was not to report to teachers or parents or seek out support in that formalised sense, because for me what that would do was draw more attention to my difference and it would further act for kids to ridicule me. Instead what I did—and I think what really highlights the effect of vilification on young people who are of diverse backgrounds—is I actually distanced myself from my difference. I stopped speaking my language at home; I refused to speak it to my parents or to my grandparents. As a result I actually lost the ability to speak my native language fluently.[29]

In addition to the story shared by Maxine Piekarski and discussed in Chapter 3, Monique Meyer shared her experience of another antisemitic incident that occurred to her five-year old son in a Victorian school:

> Our son suffered tremendously as a result of the systematic failure on the part of the school he attended. His story was well covered by national and international media at the time. As a mother, I was devastated by the effects. I felt responsible to some extent because I had trusted the school with his care. Our son is an incredible little boy. He is the kind of child who is friendly to everyone. He loves all sports and is a mad-keen fisherman. He is the child who walks in anywhere and starts a conversation. So when my son told me I should not love him because he is a 'worthless Jewish rodent' you will understand I was without words. I still have no way to describe the feeling, and just saying the words makes my eyes fill with tears. Anyone feeling worthless is horrible, but for your five-year-old child, who you love and care for and adore, feeling those feelings is something that stays with you forever and is something which should never occur. We discovered that a boy in his prep class did not like him and had enlisted his older brother and his friends to target and bully our son. They used awful language, insults and physical intimidation after discovering that he was Jewish and continued to harass him, specifically in the bathrooms and playground, throughout term 1. The bullies focused on the fact that our son's penis was circumcised and would follow him into the bathroom to harass him continually and comment on his genitalia.[30]

29 Akeer Garang, Youth Volunteer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 39.

30 Monique Meyer, Parent, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 21.

The parents that presented to the inquiry, Maxine Piekarski and Monique Meyer, told the Committee that the responses from the relevant schools were severely inadequate in dealing with the individual incidents, as well as the culture that allowed antisemitism in the schools to prosper.[31] The Department of Education and Training (DET) commenced a review of the school responses to the two incidents in late 2019.[32] However, the Committee heard that the report from this review has not been made fully available to parents, other than in a redacted form.[33]

Following reports of serious and prolonged antisemitic bullying at Brighton Secondary College (BSC), DET commissioned an independent inquiry into antisemitism at the school which commenced in July 2020. Upon request, the Committee obtained a copy of the report from the Minister for Education, James Merlino MP. In his correspondence to the Committee, Minister Merlino stated that the 18 recommendations identified in the DET report have been accepted and are being actioned by the Department:

> Key actions will be undertaken at both Brighton Secondary College and state-wide to make system-wide improvements. These recommendations build on the work of 2019 and 2020, which has seen significant commitments to provide better support for students and families who experience antisemitic bullying or any religious or racial vilification. These actions include strengthening Holocaust education in schools and establishing the Report Racism hotline for families and students.[34]

As discussed in Box 1.1, the Committee identified a number of priority recommendations for implementation across Victorian government schools in order to address antisemitism, religious or any other form of attribute-based discrimination. A full list of the recommendations is provided in Appendix C.

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31 Maxine Piekarski, Parent, Public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 15–16.

32 Adam Carey, 'Minister orders review into schools at centre of anti-Semitic bullying', *The Age*, 4 October 2019, <https://www.theage.com.au/national/victoria/minister-orders-review-into-schools-at-centre-of-anti-semitic-bullying-20191004-p52xma.html> accessed 4 December 2020.

33 Meyer, *Transcript of evidence*, p. 17.

34 Hon James Merlino MP, Minister for Education, Department of Education and Training, correspondence, 16 February 2021, p. 1.

BOX 4.1: Priority recommendations from the independent inquiry report into Brighton Secondary College

1. Reporting and record-keeping: enhance these practices at BSC through the creation of an online form to enable students to report antisemitic and other discriminatory behaviour that they are subjected to or have observed. A receipt be issued to the person making the report, whether it is a student or a parent, and that all reports of bullying be entered into the individual chronicle records of both the target and the alleged perpetrator. This recommendation also requires that a quarterly statistical report of incidents be compiled for review by senior leadership and the Wellbeing Department. Further, an annual compilation of the quarterly reports be provided to DET and discussed with the regional Senior Education Improvement leader as part of the annual school review processes.

3. Graffiti management: enhance the management of offensive and inappropriate graffiti through a comprehensive audit of all of BSC's facilities to check for any antisemitic or other discriminatory or inappropriate graffiti; and ongoing monitoring and record keeping of school graffiti by staff and school cleaners, including provision of photos to the designated contact person.

4. Policy change: BSC update its Student Wellbeing Policy to incorporate the new definition of bullying adopted by DET and extend the definition of racial harassment to incorporate religious discrimination and vilification.

8. Teacher education: DET, in consultation with the Jewish Community Council of Victoria, develop a plan for all Victorian teachers and schools to help them develop a better understanding of the specific nature of antisemitism, its common manifestations, impacts and how it can be addressed. Provision of this training material to BSC by DET be a matter of priority.

17. DET and individual schools adopt the International Holocaust Remembrance Alliance's Working Definition of Antisemitism.

Source: Worklogic, *Brighton Secondary College: Independent inquiry*, 29 October 2020.

As referred to above by Minister Merlino, in February 2020, the Victorian Government announced that Holocaust education would become a mandatory component of the Victorian curriculum for year nine and ten students in government schools.[35] The release of new teaching and learning resources to supplement this component was announced on 9 December 2020.[36]

35 Hon James Merlino MP, Minister for Education, *Strengthening Holocaust education in Victorian schools*, media release, 26 February 2020.

36 Hon James Merlino MP, Minister for Education, *Supporting Students To Learn About The Holocaust*, media release, 9 December 2020

The importance of school-based education in swiftly and effectively responding to vilification incidents, as well as combating prejudice and discrimination at early life stages, is discussed further below.

Online vilification

As noted by the Office of the eSafety Commissioner in its submission, internet and digital technologies have evolved significantly since the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) was enacted.[37] The evolution of these technologies has created new challenges in terms of how vilification manifests. In particular, social media and other online forums allow individuals to participate anonymously in vilification, as well as provide a platform through which vilifying materials can be shared extremely quickly to large audiences. This type of conduct is also becoming increasingly common. The Office of the eSafety Commissioner provided some results of their research into online hate speech:

> it is estimated that around 1 in 7 adult Australians aged 18–65 (14%) were the target of online hate speech in the 12 months to August 2019. Staggeringly, this is around 2 million people. People identifying as LGBTQI or Aboriginal or Torres Strait Islander experience online hate speech at double the national average.[38]

In evidence to the Committee, Vivienne Nguyen, Chair of the VMC, stated that they were 'not aware of any specific organisations that do provide, in a structured way and on an ongoing basis, support for people who experience online hate, online vilification and this trolling'.[39]

In addition, a recent study undertaken by researchers from Cardiff University found that there is a direct link between online hate speech and prejudice-motivated crime. This study analysed police crime, census and Twitter data to establish an association between online hate speech on the basis of race and religion and prejudicially-motivated offline crimes in London over an eight-month period. Williams et al concluded that online hate speech is 'part of a wider process of harm that can begin on social media and then migrate to the physical world'.[40]

Online vilification is discussed in detail in Chapter 9.

Private property

Vilification can also take place on private property but have broad implications where members of the community are exposed to it.

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37 Office of the eSafety Commissioner, *Submission 16*, received 19 December 2019, p. 3.

38 Ibid., p. 6.

39 Vivienne Nguyen, *Transcript of evidence*, p. 7.

40 Matthew L Williams, et al., 'Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime ', *The British Journal of Criminology*, vol. 60, no. 1, 2020, p. 114.

One recent high-profile incident occurred in January 2020 where a Nazi flag was flown on a private property in Beulah, in north-west Victoria. Despite significant public protest, as the flag was easily seen by members of the community, the local council, Yarriambiack Shire, told the Committee that neither themselves nor local police were able to compel the residents to take the flag down.[41]

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, provided another example of how this type of conduct can have a public element and should therefore be subject to anti-vilification provisions:

> So if you are putting up on your fence, you know, 'All Jews deserve to die'—excuse that, but that is sometimes the sort of thing that we see—then that is public conduct even though it is happening on your private fence, if you like, and the same is with the wearing or displaying of clothing or signs or other emblems. So making sure that we capture that conduct which is actually not private and has a public element to it.[42]

In NSW, the definition of a 'public act' was recently amended under the *Crimes Act 1900* (NSW) to include conduct observable by the public, such as the wearing or display of clothing, signs, flags, emblems and insignia.[43] This issue is addressed further in Chapter 7, in addition to options to prohibit the display of Nazi symbols.

4.2 Media and political commentary

Media and political commentary play an important role in shaping attitudes towards minority and other groups that are subject to widespread discrimination and vilification.

The 2019 UN*Strategy and Plan of Action on Hate Speech* noted that around the world, public discourse is 'being weaponized for political gain with incendiary rhetoric that stigmatizes and dehumanizes minorities, migrants, refugees, women and any so-called "other"'.[44] In extreme circumstances, as noted by the UN Office on Genocide Prevention and the Responsibility to Protect, media messaging that promotes hostility and hatred, and in particular, the incitement of violence against certain communities, can be a trigger for some of the most grievous forms of violence such as war crimes and other crimes against humanity.[45]

The Committee heard firsthand accounts of the direct impacts that negative and stereotypical media commentary can have on communities that are commonly targeted by discrimination and vilification. In its group submission, HRLC, Get Up!, ASRC, Anti

41 Jessie Holmes, Chief Executive Officer, Yarriambiack Shire Council, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 15–16.

42 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 29.

43 *Crimes Act 1900* (NSW) s 93Z(5).

44 United Nations, *Strategy and Plan of Action on Hate Speech*, p. 1.

45 United Nations Office on Genocide Prevention and the Responsibility to Protect, *Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes*, p. 5.

Defamation Commission and VTHC, shared a story of a report to the Asian Australian Alliance reporting tool regarding an incident of racial vilification:

> The old lady shouted that Channel Nine's 60 minutes and Australian news informed her that Chinese people are "fucking filthy animals who eat bats". She spat at me and told me that "the Chinese government and Chinese people are taking over Australia because the news reporters told her so."[46]

Continued negative commentary can have broad-ranging impacts. One example of this is the significant media reporting and political commentary on perceived issues of Sudanese gangs in Melbourne that has taken place in recent years.[47] Research published by the Australian & New Zealand Journal of Criminology highlighted that 'a small number of young Sudanese Australians are at-risk for violence and other criminal activities, resulting in their over-representation in the criminal justice system'.[48] However, media commentary largely failed to address many of the complex related factors, including significant resettlement challenges such as a lack of employment and education opportunities, acculturative stressors and discrimination; and histories of trauma and family separation.[49] Akeer Garang from theCMY, described how sensationalised reporting on the issue had impacted her family:

> As a South Sudanese young person I would also be remiss not to highlight the fact that for young people living currently the media is a big source of vilification; indeed we are subjected to racist stereotypes persistently in the media. My little brother, who is 16 years old, he is tall, dark, baby faced. He has the distinct characteristics of a South Sudanese youth, and that makes him an archetypal member of an African gang. He once told me that he would refuse to go into Coles past 9 o'clock because he did not want to be followed and watched. That sort of experience for a young person who was born in Australia, who has an Australian accent, who embodies Australian values—I thought that for him the experiences of vilification would not exist because he had integrated, as they say you need to assimilate or integrate in order to not experience vilification, but that was not the case.[50]

Similarly, a study undertaken by researchers from the University of Melbourne, Monash University and CMY examined how racialised narratives about Apex and 'African gangs' have impacted the lives of young South Sudanese Australians in Victoria since the 2016 Moomba 'riot'.[51] The report stated that the key findings 'collectively speak to racism

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46 Human Rights Law Centre, et al., *Stopping hate in its tracks (Part II): Supplementary joint submission to the Victorian government's anti-vilification protections inquiry in response to the rise in racially motivated incidents during the COVID-19 pandemic*, supplementary evidence received 12 June 2020, p. 5.

47 See, for example, Tim Blair, 'Groups thrive in Sudan Andrews' gangless paradise', *The Daily Telegraph*, 17 January 2018, <http://www.dailytelegraph.com.au/blogs/tim-blair/news-story/aa540e78648b097f362ec60834db3ff1> accessed 12 November 2020; James Dowling and Mark Buttler, 'Heavily armed police swoop on Apex suspects in Dandenong arrest', *Herald Sun*, 14 March 2016, <http://www.heraldsun.com.au/news/news-story/b317f3d002c1f27aa9233699a1c16866> accessed 12 November 2020.

48 Stephane M Shepherd, Danielle Newton and Karen Farquharson, 'Pathways to offending for young Sudanese Australians', *Australian & New Zealand Journal of Criminology*, vol. 51, no. 4, 2017, p. 495.

49 Ibid.

50 Akeer Garang, *Transcript of evidence*, p. 39.

51 K. Benier, et al., *'Don't drag me into this': Growing up South Sudanese in Victoria after the 2016 Moomba 'riot'*, Centre for Multicultural Youth, Melbourne, 2018, p. 11. The Moomba 'riot' refers to incidents that occurred at the 2016 Moomba Festival where multiple public brawls and assaults took place.

as the overarching problem identified by [study participants] as a defining feature of their lives since the 2016 Moomba 'riot'.'[52] It acknowledged that while this racism existed prior to the 2016 incident, the findings suggest that 'the portrayal of this event by the local media made things significantly worse for our participants', including by reinvigorating and normalising racialised myths about South Sudanese Australians.[53] The report further stated that these experiences negatively impact sense of belonging, mental health and emotional wellbeing, and perceived abilities to pursue educational and employment opportunities.

Akeer Garang described how this kind of reporting could end up further marginalising communities:

> we want to have honest conversations around our young people and the reasons, if they are offending, what the social and structural things are that are happening to lead to that offending. We want that to be happening in the media, but if that is being undermined by just very basic racist and stereotypical undertones and fear and fear mongering, then we are not talking about what is really happening, and we end up actually creating conditions where young people do not have education, cannot get jobs, are vilified in schools so then they self-fulfil this idea of what they are supposed to be.[54]

All Together Now's 2019 report into racialised reporting by mainstream Australian media examined 281 media pieces—from the top six online newspapers with the highest cross-platform readership (both print and online) and the most-watched current affairs shows—between April 2018 and April 2019.[55] It found:

- 57% of the articles studied were negative when discussing race
- Muslim women were most often targeted by negatively racialised social commentary, followed by Aboriginal and Torres Strait Islander peoples and African Australians
- the 'tone and content' of comments sections of online articles suggested that negatively racialising articles 'solidify the views of readers who already agree with such views'.[56]

The report also found that, when discussing race, 70% of pieces used covert techniques such as dog-whistling, irony and de-contextualisation. It stated that media industry codes of conduct concentrate on overt forms of racism, meaning that regulators are unable to prosecute agencies that perpetrate more subtle forms of covert racism, 'leaving targeted Australians without an "independent" avenue for complaint'.[57]

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52 Ibid., p. 14.

53 Ibid.

54 Akeer Garang, *Transcript of evidence*, p. 42.

55 The newspapers are: The Age; The Australian; The Courier Mail; The Daily Telegraph; Herald Sun; and The Sydney Morning Herald. The television shows are: 60 Minutes (Nine Network); The 7.30 report (ABC); A Current Affair (Nine Network); The Project (Network 10); Sunday Night (The Seven Network); and Today Tonight (The Seven Network).

56 All Together Now, *Social commentary and racism in 2019*, Haymarket, 2019, p. 3.

57 Ibid.

In March 2020, in response to increasing extremism and use of hate speech, the Media, Entertainment & Arts Alliance (MEAA) issued new guidelines on reporting hate speech and extremism.[58] These guidelines specify that a person's race, religion or ethnicity should only be included where relevant; emotive or pejorative terms should not be used to describe groups of people; outdated and offensive terms should be avoided; proportionality and balance should be exercised when reporting on race issues; and racist hate speech should not be broadcast.[59] The guidelines also note that extremists seek to use the media as a platform, and warn against providing 'false balance' by quoting racist or extremist organisations in order to achieve 'balanced' reporting, thereby giving those organisations platforms for their messaging.[60]

The MEAA Code of Ethics and accompanying Guidelines apply only to members of the MEAA, and audiences can make complaints regarding contraventions of these guidelines by members. Other regulatory frameworks apply to other media platforms, which include the Australian Press Council Statement of General Principles (for newspapers) and Commercial Television Industry Code of Practice (for television). In a 2012 review of Australian media and media regulation, the Hon Raymond Finkelstein QC concluded that these disparate mechanisms were 'not sufficient to achieve the degree of accountability desirable in a democracy' and recommended major reform. Specific recommendations included establishment of a body to set journalistic standards for all forms of news media and handle complaints from the public regarding breaches.[61] Similar recommendations were made more recently in the Australian Competition and Consumer Commission's (ACCC) final report for its digital platforms inquiry.[62] To date, these regulatory changes have not been adopted.

In evidence to the Committee, Akeer Garang from the CMY advocated for a consistent national framework to combat racialised reporting:

> what we have found is that some of the barriers that come up in these discussions are the ideas around freedom of speech and freedom of the media and how there is not any clear guidance around racialised media reporting and what that looks like that is consistent in different codes of conduct within the media; there does not seem to really be a consistent framework for how the media should report on crimes that involve diverse young people or diverse people in the community.
>
> I think I am definitely one for encouraging the idea that the media should report on what is happening and what the community interest is—definitely. But the media also needs to be aware that tone, dog-whistle politics and some of the emphases that are used when reporting on young people of these backgrounds do vilify, do create fear and do create a sense that we are to be feared and threatening.[63]

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58 These accompany, and should be read alongside, the MEAA Journalist Code of Ethics. Clause 2 of this Code specifies that unnecessary emphasis should not be placed on personal characteristics including race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief or physical or intellectual disability.

59 Entertainment & Arts Alliance Media, *Guidelines on Reporting Hate Speech and Extremism*, MEAA, Redfern, 2020, p. 2.

60 Ibid.

61 Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation: Report to the Minister for Broadband, Communications and the Digital Economy*, Commonwealth of Australia, Canberra, 2012, p. 8.

62 Australian Competition and Consumer Commission, *Digital platforms inquiry - final report*, Canberra, June 2019, p. 203.

63 Akeer Garang, *Transcript of evidence*, p. 41.

In addition to commentary on race, religion and ethnicity, the Committee also heard evidence that disproportionately negative media commentary has serious consequences for various other groups, such as the LGBTIQ community. For example, in its submission, Aleph Melbourne stated:

> Since 2001 there have been numerous hateful and vilifying attacks on LGBTIQ+ people in print and social media, originating in or closely connected to Melbourne's Jewish community. Had such attacks been anti-Semitic in nature it is likely there would have been justified outrage from the Jewish community and attempts made to seek legal remedy under anti-vilification legislation. At present there is no equivalent protection available for attacks on LGBTIQ+ people.[64]

The Australian Discrimination Law Experts Group advocated for the introduction of a positive duty on online platforms, that would require them to 'take all reasonable steps to ensure that communications on their platforms comply with anti-vilification laws as well as anti-discrimination laws'.[65] The submission noted that this duty could entail, for example, that online platforms publish policies on how they are addressing and eliminating discrimination and vilification in online communications and how they will provide a right of reply to affected persons.[66] Online vilification is discussed in detail in Chapter 9, and a positive duty is discussed further in Chapter 6.

Similarly, political dialogue has a significant impact on how citizens perceive and respond to commonly targeted groups. In its submission, AMWCHR provided examples of this kind of rhetoric by members of the Australian Parliament:

> A Federal Senator referenced "the final solution" when calling for "a plebiscite to allow the Australian people to decide whether they want wholesale non-English speaking immigrants from the third world, and particularly whether they want any Muslims". Another Senator wore a burqa into parliament as a stunt, and warned that Australia is in danger of being "swamped by Muslims". The Minister for Home Affairs described the children of the Biloela Tamil family facing deportation as "anchor babies".[67]

The submission also described how these kinds of statements by politicians can impact on the everyday lives of those targeted by them:

> Muslim women are particularly vulnerable … as the current political climate only further enables discrimination against them. The political rhetoric has unsurprisingly filtered down from the very top echelons of our government and has created an increasingly hostile environment for Muslim women in all aspects of their lives.[68]

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64 Aleph Melbourne, *Submission 58*, received 30 March 2020, p. 1.

65 Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020, p. 9.

66 Ibid., pp. 9–10.

67 Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020, p. 6.

68 Ibid., p. 5.

Peter Wertheim, the co-Chief Executive Officer of the Executive Council of Australian Jewry (ECAJ), told the Committee at a public hearing that: '[p]olitical leaders have an educative role to play too. They need to send consistent messages affirming the equality of all Australians and repudiating racism.'[69]

Recognising the profound impact that such commentary can have, the Australian Parliamentary Joint Committee on Human Rights, in its 2017 *Inquiry into freedom of speech in Australia*, recommended that 'leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public'.[70] More recently, the UN advocated for 'influential figures in society' to 'speak out against COVID-19-related hate speech, misinformation, disinformation and conspiracy theories, express solidarity with those targeted by such expressions, and amplify messages that serve to reduce discrimination and stigma'.[71]

The Committee supports the recommendation of the Parliamentary Joint Committee on Human Rights and is strongly of the view that community leaders and politicians have a responsibility to speak out against hateful and discriminatory speech.

The Committee also supports the recommendations of the 2012 *Report of the Independent Inquiry into the Media and Media Regulation*, and ACCCC's 2019 *Digital Platforms Inquiry Final Report*, regarding the need for a national regulatory framework for all forms of media and recommends that the Victorian Government advocate to the Commonwealth Government to implement these recommendations.

RECOMMENDATION 4: That the Victorian Government advocate to the Commonwealth Government to implement the Australian Competition and Consumer Commission's recommendation six of its *Digital Platforms Inquiry Final Report* to establish a national regulatory framework for all forms of media.

4.3 Combating the risks of vilification

In order to effectively combat hate conduct and vilification, it is necessary to target the underlying prejudices that drive individuals to engage in this conduct. This requires targeting all forms of prejudice—including less serious forms—in order to ensure that prejudice does not become societally accepted or entrenched and does not evolve into more serious forms of harm.

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69 Peter Wertheim, co-Chief Executive Officer, Executive Council of Australian Jewry, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*.

70 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Parliament of Australia, February 2017, p. 49.

71 United Nations, *Guidance Note on Addressing and Countering COVID-19 related Hate Speech*, 2020, p. 7.

In a review of the international research on best practice methods of combating prejudice and discrimination, Maureen McBride, from the Scottish Centre for Crime and Justice Research, reported that theories of prejudice reduction can be broadly divided into two areas:

- Intergroup contact—where associating with different groups reduces negative attitudes and promotes inclusivity (such as inter-cultural events).
- Exposure to information—where a focus on exposure to information about other groups can challenge the way people think about them (such as education programs and media campaigns).[72]

Based on her review of the research, McBride concluded that while the evidence on 'what works' is limited, a number of key lessons regarding effective prejudice prevention can be determined:

- A broad prejudice-reduction framework should be developed to avoid 'prioritising' certain prejudices over others, which is flexible enough to allow for focus where needed on specific forms and particular local context.
- As prejudices towards different groups have different developmental trajectories, it is useful to treat these as distinct problems in designing anti-prejudice initiatives, with an individualised focus on causes, solutions and interventions.
- 'One-off' activities have limited impact, and longer-term activities usually produce better results.
- Interventions should be based on evidence, have a clear strategy, and recognise monitoring and evaluation as being central to success.
- Positive approaches are likely to be more effective than those that focus on correcting 'bad' or 'wrong' views, which may have a 'backlash' effect. These types of approaches include positive intergroup contact, or courses focusing on principles of considering different perspectives or inducing empathy.[73]

The following sections discuss particular areas of focus for reducing risks of vilification, including school education and community engagement, education and awareness-raising. The Committee acknowledges that these tools are not new. Numerous reports, studies and inquiries have recommended myriad versions of each of these consistently and over many decades. However, stakeholders told the Committee that in order to be effective, these tools need to be based on current research, data and evidence, and in consultation with affected communities.[74] It is therefore crucial to remain responsive to emerging best practice models in order for preventative strategies to remain relevant, useful and responsive to evolving forms of harm.

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72 Maureen McBride, *What works to reduce prejudice and discrimination? A review of the evidence*, report for Scottish Government, Scottish Centre for Crime and Justice Research, Edinburgh, 2015, pp. 3–4.

73 Ibid., pp. 4–6.

74 See, for example, VMC, *Submission 48*, p. 2.

4.3.1 School education

It is critical to proactively target prejudice in early schooling years to ensure that it does not become further entrenched and systemic, and to allow children to feel safe, learn and develop at school. The findings from the 2017 Speak Out Against Racism student and staff surveys indicated that childhood and adolescence are 'formative periods for future attitudes and behaviour', and so reducing discriminatory views and attitudes at this time through school-based interventions can have lasting impacts.[75]

McBride offers a number of key lessons from her review of the literature on constructing educational initiatives aimed at combating prejudice and discrimination, in addition to the general lessons identified above. According to McBride, long-term education initiatives and cross-cultural opportunities should be prioritised; and curriculums should include empathy-induction, cooperative learning and positive messaging around intergroup contact. In addition, peer engagement in informing and shaping future lessons can play an important role.[76]

Similar sentiments were echoed by Henry Erlich in his submission to the inquiry, who advocated for age, gender and group-specific education that focuses on empathy in sharing stories of different target groups. He described this as 'an appeal to the emotional, rather than logical side of the brain' that 'allows the students to empathise with people who are different to themselves, and assumes that it is then harder to vilify such a group'.[77]

In her evidence to the Committee, Monique Meyer stated that school-based education initiatives need to take place from a young age, in response to the measures implemented following the antisemitic incidents discussed earlier in this chapter:

> I have a question as to how effective those programs will be given none of them actually target children at the younger end of the spectrum. Now I understand it is a particularly complex thing to do and I understand that children who are so small are particularly vulnerable, but it is imperative that we educate children clearly at this young age that it is okay for everyone to have a different religion, to be different, to have a different belief system, and that there is some sort of effective education model.[78]

Peter Wertheim from ECAJ agreed that education initiatives should begin at a young age, around 'difference, anti-prejudice training, critical thinking'.[79] Similarly, Akeer Garang from the CMY stated that school-based programs should be conscious of student demographics and diversity:

> When I was in primary school I went to a school that was predominately all white, and I was actually one of the only black kids in that school. I think in terms of having

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75 N Priest, et al., *Findings from the 2017 Speak Out Against Racism (SOAR) student and staff surveys: CSRM Working Paper No. 3/2019*, ANU Centre for Social Research & Methods, 2019, p. 8.

76 McBride, *What works to reduce prejudice and discrimination? A review of the evidence*, pp. 4–5.

77 Henry Erlich, *Submission 60*, received 17 July 2020, p. 1.

78 Meyer, *Transcript of evidence*, p. 17.

79 Peter Wertheim, *Transcript of evidence*, p. 19.

> education around inclusivity and diversity and racism as part of the curriculum would be an approach that at times in that setting could cause me to kind of stick out as different...[80]

The following sections outline a number of issues relating to schools raised by stakeholders throughout the inquiry, including school responses to vilification, general anti-bullying programs, the Safe Schools program, Aboriginal and Torres Strait Islander and anti-racism initiatives, the Respectful Relationships program and religious curriculum. The Committee notes, however, that most of these programs target secondary school students. Based on the evidence received, the Committee is aware that similar types of education initiatives should be established for students in their early years of schooling. This was discussed by numerous inquiry stakeholders in the context of promoting positive messaging around diversity and social cohesion to influence children in a safe environment and to reduce the development of prejudicial attitudes.[81]

RECOMMENDATION 5: That the Victorian Government implement programs within primary schools to strengthen respect, diversity and cohesion among all students.

Responding to vilification incidents in schools

DET's website states that the duty of care held by principals and teachers requires that suitable and safe premises are provided and strategies are implemented to prevent bullying. This duty is non-delegable and therefore cannot be assigned to another party.[82] In addition, the *Education and Training Reform Regulations 2017* (Vic) provide that government school principals must develop a Student Engagement Policy including in relation to student behaviour, and in consultation with the school community.[83] Bullying initiatives should be addressed either in a school's Student Engagement Policy or in a standalone policy.

According to DET, an effective anti-bullying policy outlines 'the steps the schools will take when staff become aware of bullying behaviour, the strategies that may be utilised to address the behaviour, and the support the school will provide to all students involved'.[84] The bullying policy must also be clearly communicated within the school community and reviewed every two to three years.[85]

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80 Akeer Garang, *Transcript of evidence*, p. 40.

81 Meyer, *Transcript of evidence*, p. 77; ibid.; Peter Wertheim, *Transcript of evidence*, p. 19; Adel Salman, Vice President, Islamic Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 42; Professor Suzanne Rutland, Member, Australian Delegation to the International Holocaust Rememberance Alliance, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 34; Henry Erlich, *Submission 60*, p. 1.

82 Victorian Government Department of Education and Training, *Legal duty of care*, 2018, <https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/prinduty.aspx> accessed 16 November 2020.

83 *Education and Training Reform Regulations 2017* (Vic) s 23.

84 Victorian Government Department of Education and Training, *School operations: Bullying Prevention and Response*, 2020, <https://www2.education.vic.gov.au/pal/bullying-prevention-response/policy> accessed 16 November 2020.

85 Ibid.

When an incident occurs, DET advises that students and families should first report it to the school for action and support. Where unsatisfied with the response, complaints can then be made to the closest regional DET office who will work through the matter with the school and other parties involved. If still unsatisfied, complaints can then be made to DET's central office, who will either work to resolve the issue or refer eligible complaints to the Independent Office for School Dispute Resolution.[86] This Office provides a complaint and dispute management process that is independent of schools and DET and is the 'final step' in resolving issues.[87]

In evidence to the Committee, Brigid Monagle, Deputy Secretary of Fairer Victoria, Department of Premier and Cabinet (DPC), described how the Victorian Government had recently worked with community bodies to develop resources to assist schools to appropriately respond to vilification incidents:

> And I think also you would be aware too that there was an issue with two incidents of specific antisemitic bullying in schools last year as well, and the Department worked very closely with the Jewish Community Council of Victoria and a range of other Jewish organisations to implement actions and reforms to ensure schools respond appropriately. The Department established a Report Racism phone line, and in February 2020 the government also committed to all government secondary school students in years 9 and 10 being taught about the Holocaust as well.[88]

The recently-established Report Racism hotline allows students or families to report incidents of racial or religious discrimination and abuse to DET where they feel uncomfortable reporting the incident to the school, or where they are unhappy with the school's response.[89] DET's website does not provide further information on how these reported incidents are dealt with or responded to. However, if successful, the Committee considers that similar mechanisms should be established for other groups who commonly face serious harassment and bullying at school, such as LGBTIQ+ youth.

DET also provides access to independent counselling and support for parents through Parentline, a confidential and anonymous phone service.[90]

The Committee believes it is critical that all schools are able to quickly and meaningfully respond to allegations of vilification by students. However, the Committee heard of multiple incidents linked to schools where affected students and their families felt they were not taken seriously or were unhappy with the response provided. M.Y from AMWCHR provided one example of this:

> We have had a school actually where a group of 20 young people wanted to report different incidents of discrimination, and the school basically put them through so many

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86 Victorian Government Department of Education and Training, *Feedback about schools*, 2020, <https://www.education.vic.gov.au/parents/going-to-school/Pages/school-complaints.aspx> accessed 6 December 2020.

87 Department of Education and Training, *School operations: Bullying Prevention and Response*.

88 Brigid Monagle, Deputy Secretary, Fairer Victoria, Department of Premier and Cabinet, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 17.

89 Victorian Government Department of Education and Training, *Reporting religious or racial discrimination and abuse in schools*, 2020, <https://www.education.vic.gov.au/parents/going-to-school/Pages/discrimination-schools.aspx> accessed 16 November 2020.

90 Ibid.

> administrative barriers that the students pulled out and said, 'We're almost in year 12; we just want to leave. We just want to get through our schooling and leave, and we don't actually care that much'. And that is something that I think is becoming more and more of an issue, that young people are recognising it and wanting to report it but then the reporting mechanisms are not there to support them.[91]

The Committee also received evidence that broader societal and structural influences impact the ways that schools respond to particular incidents or types of discrimination. Diana Sayed, Chief Executive Officer of AMWCHR, described how these factors influence relationships with students:

> I just wanted to add that schools are not necessarily a safe space from what happens in Australian society; you do not all of a sudden go into a school environment and you are safe. This is about a broader education strategy for teachers, principals, social workers in schools, guidance counsellors—people who inherently carry these unconscious biases because of what is happening in larger society and the context. They are not immune to the media. They are not immune to other prejudices that play out from the political leadership or lack thereof. These are the sorts of enabling environments that filter down through parents, that filter down through teachers, and inherently the children and our future generations are internalising these beliefs, and it feeds into their lack of self-worth and confidence.[92]

Monique Meyer told the Committee that there was 'systemic failure' on the part of the school in response to her son's experience:

> Once we found out, we did all the right things. We notified the school immediately, we had numerous roundtable meetings, we took him to doctors and we insisted on a safety plan prior to his return to school— something the school never suggested and then proceeded to breach within 24 hours of implementation, with the principal indicating the teacher had been overwhelmed...
>
> I was shocked and appalled by the handling of the matter. We had made it quite clear as part of the safety plan that if anything occurred we were to be contacted immediately. We had identified a medical practitioner with whom our son has a relationship as the only person to interview him, given the significant stress and anxiety he was suffering from. This was again ignored. We requested an incident report. This was provided a month later and crucial factual elements were missing. In the interests of brevity, the department were very slow to respond. It was really only through the repeated canvassing of the matter and the Cheltenham incident and the efforts of organisations like the Anti-Defamation Commission and associated media coverage that this matter was ever reviewed.
>
> In our situation the school concerned failed him. They did little or nothing to combat directly the racism and religious vilification he experienced at the time in any meaningful way. In fact when we requested some kind of action be taken—an education initiative or just a general announcement at assembly effectively condemning racism and religious

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91 M.Y. , *Transcript of evidence*, pp. 6–7.

92 Diana Sayed, Chief Executive Officer, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 7.

> vilification of this kind—the school refused. We were simply pointed to the bullying programs and policies in place which provided little or no reference to antisemitism and specifically to religious vilification and of course provided the context in which this all took place.[93]

Discussing the need for further professional development for teachers, Maxine Piekarski provided examples of situations where teachers had sought to dismiss incidents or avoid dealing with issues of prejudicial behaviour:

> my experience with educators and leaders on this issue and professional development: one of the teachers who actually witnessed an antisemitic during a class that my son was in was a Jewish teacher who just happened to teach at that school. When she heard what was said, she quickly ushered my son down to the front of her classroom and said, 'Darl, just sit here up the front with me and just ignore it and let's just move forward'. So it was swept under the carpet very quickly. Then when my son was beaten up we had a psychologist come in from the education department who ended up being Jewish. She recommended that my son start speaking Hebrew and swearing at the children in Hebrew so that no-one knows that he is actually swearing because, you know, that might help.[94]

Dr Dvir Abramovich, Chairman of the Anti Defamation Commission, used the example of the recent incidents at Cheltenham Secondary College to illustrate how there needed to be greater accountability where schools fail to provide an adequate response to allegations of vilification and other serious forms of bullying:

> Okay, so at Cheltenham Secondary College a 12-year-old Jewish boy was lured into a park by some classmates. I think most people would have seen this. He was given a choice—he was surrounded by eight or nine boys and was told, 'You have a choice: you are going to get beaten badly or you are going to kiss the feet of a Muslim boy' who was standing to the corner. That is exactly what he did. As he was kissing the feet the pictures were taken and they were then circulated on Instagram.
>
> You have touched on an important point—what did the principal do? Nothing. He said it happened during the holidays; it happened outside school grounds. I have said it in a series of opinion pieces. I have said it publicly: often what we get is principals, educators and coordinators averting their gaze when this happens because (a) they do not have the tools to deal with it, (b) they do not want to bring the school into the public realm or (c) they simply do not treat this as serious enough—'Kids will be kids' and it is just a form of bullying. But there is a racial element and there is a religious element. So that is one problem.
>
> I think we need to make sure that the education department is sending a very clear and unequivocal message to principals: 'If you are going to drop the ball on this, we will come after you. We will make sure that this doesn't happen again'. I think there needs to be a sense of accountability. There are a lot of good principals, there are a lot of good teachers, but we have seen too many cases whereby the parents have complained about

93 Meyer, *Transcript of evidence*, pp. 15–6.

94 Maxine Piekarski, *Transcript of evidence*, p. 34.

> cases and the principals simply shrug their shoulders and say, 'Look, it's going to happen at a school'.[95]

Dr Abramovich also stated that parents often hit a 'wall of bureaucracy' when reporting incidents to schools, and that responses to serious bullying incidents should be expedited in order to protect and support the students involved.[96]

The Committee recognises that the above examples are based on particular context and circumstances and may not reflect practice at all, or even many, government schools. However, it considers that DET can play a greater role in ensuring adequate staff development and professional training in responding to serious incidents such as these, including in linking schools to the various resources available for particular scenarios such as antisemitic bullying.

As advocated by Professor Suzanne Rutland, member of the Australian delegation to the International Holocaust Remembrance Alliance (IHRA), curriculum alone cannot create an open and responsive school environment—this must be complimented by broader staff training and development:

> If there is not professional development, then what is done at the curriculum level can fail… I have interviewed my students who are out there teaching in schools. They say the problem is there is so much pressure on teachers to deal with the basic curriculum, they do not have time to follow up on these issues, on bullying, on religious bullying. So we need both curriculum changes and we need professional development at all levels and to realise that this is so important because otherwise it is going to undermine our society.[97]

Monique Meyer discussed the breadth of measures required to both prevent and respond to vilification incidents, including a whole-of-government commitment:

> The law is of course critically important, but it cannot do its job unless it is backed by a whole-of-government commitment. In my view if programs like Safe Schools are provided in schools, they must be rigorously implemented if they are to be successful and they need to be offered to all students. Likewise, if an individual safety plan is drawn up, it has to be followed, and all staff are responsible for ensuring that the specific, absolute guidelines are implemented. There has to be a consistent approach. Junior staff need to be counselled and educated accordingly. Senior staff have an obligation to demonstrate true leadership by both their words and their actions. There has to be a concerted effort to eradicate discrimination of any kind, and there needs to be accountability for this external to the department itself. If cultural diversity and inclusion are to be genuinely acknowledged, all departmental policies and programs must require that there is strict adherence to these principles and an unwavering implementation of the objectives. It cannot be a case of paying lip-service. It has to be seen to be done and be done effectively.[98]

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95 Dr Dvir Abramovich, Chairman, Anti-Defamation Commission, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 50.

96 Ibid.

97 Professor Suzanne Rutland, *Transcript of evidence*.

98 Meyer, *Transcript of evidence*, p. 16.

The Committee heard that while there are numerous ways that schools can respond to vilification incidents, restorative processes are predominantly the most valued by those targeted and their families. Peter Wertheim from ECAJ told the Committee that 'the apology means far more to the victim than any financial compensation'.[99] Some stakeholders considered an independent complaints system outside of individual school settings was required to provide assurance to students, families and commonly targeted communities.[100]

Peter Wertheim also raised the potential for introduction of a redress scheme with a restorative process for institutional contexts, to complement formal dispute-settling mechanisms. He stated that this could operate in a similar manner to the national redress scheme for survivors of child sexual abuse:

> It would provide a just, speedy and inexpensive mechanism for victims of racial or other abuse in an institutional context. The institution, not the government, would pay any compensation awarded and also an administration fee to cover the costs of operating the scheme. There would be a low evidentiary threshold to establish eligibility for compensation and the amounts awarded would be modest and capped. It would offer victims counselling and a restorative process that would carry no financial cost or legal liability, but it would make it possible for victims to receive an acknowledgement of the wrong done to them by the institution and an apology.[101]

The Committee considers it crucial that all students feel safe and supported at school, and that there are various mechanisms in place to ensure vilification and other bullying incidents are taken seriously, with support provided to those affected. The Victorian Government has a core role in ensuring that schools have access to, and prioritise, staff development and professional training on appropriate responses to these types of incidents.

RECOMMENDATION 6: That the Victorian Government promote clearer understanding among educators and school leadership on preventing and responding to hate conduct within schools, including through professional development, policies and strategies. Topics to cover may include:

- the role of school-based interventions, at both primary and secondary levels, to reduce discriminatory views and attitudes and prevent systemic prejudice
- the impact of broader societal and structural influences on schools' responses to alleged incidents of vilification or harassment
- appropriate responses of teachers, principals and school bodies to incidents of alleged vilification and harassment between students
- possible expansion of the Report Racism hotline to include other groups who experience serious harassment at school, such as LGBTIQ+ youth.

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99 Peter Wertheim, *Transcript of evidence*, p. 14.

100 See, for example, M.Y. , *Transcript of evidence*, p. 7.

101 Peter Wertheim, *Transcript of evidence*, p. 14.

General anti-bullying programs

DET operates three state-wide anti-bullying programs, including:

- Bully Stoppers—focuses on bullying prevention and response, with support for teachers, principals, parents and students. Bully Stoppers has components related to racist bullying and homophobic and transphobic bullying, as well as both overt and covert bullying.
- eSmart Schools—focuses on cybersafety and cyberbullying, including training sessions and online training, and some one-on-one support.[102]

The Victorian Government told the Committee that additional funding was allocated in this area in 2018 as part of the Victorian Anti-Bullying and Mental Health Initiative, and specifically towards the provision of mental health services in government schools and further rollout of the eSmart Schools program.[103]

The third anti-bullying program is Safe Schools, which was established by the Victorian Government in 2010 to promote safe learning environments for all students to be free from discrimination, and in particular, for students who identify as LGBTIQ+. In light of the significantly higher levels of discrimination, abuse and mental health issues experienced by LGBTIQ+ youth, as discussed in Chapter 3, Safe Schools recognises that a 'safe and inclusive environment is key to tackling bullying and harassment, and preventing suicide and self-harm'.[104] The Commonwealth Government ceased funding for the program in 2017 in response to sustained criticism from a number of media and political commentators. The Victorian Government committed to continue its rollout.[105]

Safe Schools now features in most public secondary schools, with schools determining the level of engagement and means of implementation in their teaching and communities. According to DET, the information and resources available to schools are evidence-based and age-appropriate, and aim to prevent and respond to bullying or discrimination based on sexual orientation, gender identity or intersex status.[106]

Springvale Monash Legal Service stated in its submission that the 'controversy surrounding this program and its eventual defunding in 2016 displays the vulnerability of education programs to moral panic and movements in the political landscape'.[107]

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102 Victorian Government, *Submission 13*, p. 32.

103 Ibid.

104 Victorian Government Department of Education and Training, *Department program: Safe Schools*, 2020, <https://www.education.vic.gov.au/about/programs/Pages/safeschools.aspx> accessed 16 November 2020.

105 David Rhodes, Senior Lecturer, School of Education, Edith Cowan University, 'Why education about gender and sexuality does belong in the classroom', *The Conversation*, 12 September 2018, <https://theconversation.com/why-education-about-gender-and-sexuality-does-belong-in-the-classroom-102902> accessed 16 November 2020.

106 Department of Education and Training, *Department program: Safe Schools*.

107 Springvale Monash Legal Service, *Submission 43*, received 24 January 2020, p. 6.

Aboriginal and Torres Strait Islander histories and culture

Aboriginal and Torres Strait Islander histories and culture are embedded in the Victorian Curriculum F-10 as one of three cross-curriculum priorities that are required to be incorporated into all subject areas.[108] The Victorian Government advised the Committee that schools decide how best to implement the Victorian Curriculum, based on local context and school needs. However, schools are advised to engage with their local Aboriginal community as well as their Local Aboriginal Education Consultative Group. Further, the Victorian Aboriginal Education Association Incorporated (VAEAI) partners with DET to provide advice to schools on best practice engagement with Aboriginal and Torres Strait Islander communities and useful resources to support teaching.[109]

The Victorian Curriculum and Assessment Authority states in its summary of the Aboriginal and Torres Strait Islander histories and cultures curriculum:

> Aboriginal and Torres Strait Islander cultures are the oldest, continuous cultures in the world, having existed in Australia for at least 50,000 years. The uniqueness of these cultures and the wisdom and knowledge embedded in them are things to be highly valued by all Victorians.
>
> The Victorian Curriculum includes the knowledge and skills students are expected to develop about Aboriginal and Torres Strait Islanders histories and cultures, given their particular and enduring importance.[110]

The VAEAI has produced *Protocols for Koorie Education in Victorian Primary and Secondary schools* to advise schools on creating a welcoming environment for Aboriginal community members and building respectful relationships with Aboriginal communities.[111] Teachers must also follow the Koorie Cross-Curricular Protocols, which aim to protect the integrity of Aboriginal and Torres Strait Islander cultural expressions in a way thatall Australians can engage respectfully and feel connected to this identity.[112]

The *Marrung Educational Plan 2016–2026* (Marrung) is Victoria's Aboriginal education plan that seeks to promote and celebrate the culture, knowledge and experiences of Koorie people; ensure that universal service systems are inclusive, responsive and respectful of Koorie people throughout their learning and development; and ensure Koorie peoples can achieve their potential and feel strong in their cultural identity.[113]

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108 Department of Premier and Cabinet, Inquiry into anti-vilification protections hearing, response to questions on notice received 2 October 2020, p. 1.

109 Ibid.

110 Victorian Curriculum And Assessment Authority, *Learning about Aboriginal and Torres Strait Islander histories and cultures* 2020.

111 Ibid., p. 1.

112 Victorian Government Department of Education and Training, *Teaching Aboriginal and Torres Strait Islander culture*, 2020, <https://www.education.vic.gov.au/school/teachers/teachingresources/multicultural/Pages/koorieculture.aspx> accessed 16 November 2020.

113 Victorian Government Department of Education and Training, *Marrung Aboriginal Education Plan 2016–2026*, Melbourne, July 2016, p. 6.

Marrung states that a 'positive climate' is needed to achieve good learning and development outcomes, and this includes creating an environment for Koorie students where they can feel 'proud and strong in their cultural identity'.[114] One important means for creating a positive climate is teaching all students about the history and culture of Australia's First Peoples, which has been incorporated into the new Victorian Curriculum discussed above.[115] In addition, the Victorian Government committed to improving the cultural inclusivity of service providers by supporting education providers to recognise and engage with First Nations peoples as Traditional Owners, and requiring cultural inclusion strategies to be embedded in school planning processes.[116]

DPC also advised the Committee that training in cultural competence is ongoing for staff, although it is unclear when this training commenced and when it is broadly expected to be completed:

> All government school staff are also undertaking Cultural Understanding and Safety Training to increase their understanding and knowledge of Aboriginal history, cultures, and experiences so that they are better equipped to teach Aboriginal histories and perspectives throughout the curriculum. Supporting the delivery of the training is DET's Koorie Education Workforce, which includes approximately 110 Koorie Engagement Support Officers.[117]

In evidence to the Committee, Marsha Uppill, Co-founder and Director of Arranyinha, described the importance of First Nations education in not only combating discrimination and vilification towards communities, but also in moving forward to achieve fundamental structural change:

> For me, and hopefully it came out in some of what I was saying, the importance is with education. It is important to change the foundation on which this country has been built, because unfortunately the systems that fail me also give a voice to those who are unconsciously biased because the system has allowed them that; they are regurgitating the education that they receive throughout their schooling or throughout their environment and that allows them to dehumanise Aboriginal and Torres Strait Islander people. But there is nothing in the system that stops them from doing that.
>
> We know what the constitution of Australia says, and we know what happened in 1967 with the referendum. And we know that even with treaty and the Uluru statement and things like that, every time the Aboriginal and Torres Strait Islander community stands up to educate and to speak about who we are and what we want to see happen, they are not unreasonable requests. They are actually requests, really, where if you are benefiting us, you are benefiting everybody. If you are doing it right with the First Nations people of this continent, you are benefiting everybody, not just those that already live here but those that we welcome across the seas to come and experience the richness of this continent from a number of different angles.

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114 Ibid., p. 16.

115 Ibid., pp. 16–17.

116 Ibid., p. 17.

117 Department of Premier and Cabinet, response to questions on notice, p. 1.

> Education systems really need to be changed, and I think one of the things that I have been really challenged with of late is that people created these systems. People created the constitution. It was not some spiritual being that put this constitution or this system in place; people created it. So you know what? As people, we can change it. It can be changed. And it can be changed respectfully and with a level of authority that ensures that humanity benefits.[118]

Anti-racism

In the 2017 Speak Out Against Racism project's summary of findings, it was recommended that the reduction of experiences of racial discrimination and racism among Australian primary and secondary school students 'should be a major priority', particularly in relation to students who identify as Aboriginal and/or Torres Strait Islander, or who were born overseas or come from stigmatised ethnic backgrounds.[119] The summary further advocated for evidence-based and rigorously tested whole-of-school approaches to address racism be made a 'critical priority' for Australian education.[120]

As noted above, the Victorian Government has introduced a Report Racism hotline that allows religious or racial discrimination and abuse in schools to be reported to DET.[121] The Bully Stoppers program also has a component related to racist bullying, including resources for students, parents and teachers.[122]

The Committee also notes that CMY, in collaboration with DET, has developed comprehensive online resources for schools to implement effective programs aimed at addressing racism and strengthening inclusion, called 'Schools Standing Up To Racism'. Acknowledging the challenging nature of addressing racism and discrimination in a school setting, as well as the unique context of each school, the initiative's resources aim to support schools to 'build the intercultural awareness and understanding required to overcome the barriers to proactively talking about, and addressing, racism and discrimination'.[123]

As noted earlier in this chapter, the Victorian Government announced in February 2020 that Holocaust education would become mandatory for years nine and ten students in Victorian government schools, and that DET would ensure schools 'address broader issues of racism and prejudice'.[124]

The Committee is also aware of Click Against Hate, a free educational anti-racism program created by the Anti-Defamation Commission for students in primary and

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118 Marsha Uppill, Co-founder and Director, Arranyinha, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 13.

119 N Priest, et al., *Summary of findings from the 2017 Speak Out Against Racism (SOAR) student and staff surveys*, p. 6.

120 Ibid.

121 Department of Education and Training, *Reporting religious or racial discrimination and abuse in schools*.

122 Victorian Government Department of Education and Training, *Racist bullying*, 2020, <https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/racistbullying.aspx> accessed 16 November 2020.

123 Centre for Multicultural Youth, *Schools Standing Up To Racism*, 2019, <https://www.cmy.net.au/schools-standing-up-to-racism> accessed 16 November 2020.

124 Hon James Merlino MP, *Strengthening Holocaust education in Victorian schools*, media release.

secondary school, and which focuses on online hate. At a public hearing, Dr Abramovich from the Anti Defamation Commission, described the aims of the initiative:

> This is what I would call a legacy project; this is going to go on hopefully far beyond my time. It is about planting seeds. It is about teaching young people at the age of grade 6, starting from grade 6, about the dangers of racism, of Islamophobia, of sexism, of racism against Indigenous Australians—it is about all forms of bigotry and hatred. It is about equipping and giving them the tools to deal with it when they see it online but also when they see it happening in the schoolyard. It is about inoculating them, if I can use that term, against racism.[125]

Click Against Hate is delivered in over 100 primary and secondary schools across Victoria.[126]

Carmel Guerra, Director and Chief Executive Officer of CMY, acknowledged that while there were projects underway that aimed to address issues around racism, these were 'very uncoordinated and … not linked to a whole-of-government approach'.[127]

Shashwat Tripathi, Youth Volunteer for CMY, described to the Committee the need for comprehensive racial literacy curriculums, including systemic issues around how different groups are able to participate and contribute in society:

> I think it is super, super, super important for us to acknowledge that there is no racial literacy curriculum in the Australian educational sector at all. We have general discussions about multiculturalism, which is (a) a good step to start, but I think it is definitely not enough. Racial literacy is a broad concept. It is a systematic, structural way of teaching the community about how different races should interact—not 'should' interact, rather 'how' they should interact and how it is important to be sensitive, to be aware that there are different multicultural spaces and how to accommodate that. We need to train and equip teachers with this sensitive knowledge. We need to train and build this sense of understanding that children come from different backgrounds, and backgrounds are a significant complement in identity formulation. A lot of people do not understand this fact that where they come from really influences their productivity and how they perform in schools and how they perform at universities.[128]

Peter Wertheim from ECAJ stated in his evidence that in order to combat particular types of prejudice, such as antisemitism, initiatives also need to go beyond generic anti-racism education:

> It seems that generic education against racism will not address this problem because many younger people fail to see antisemitism as a form of racism. They see Jews as part of a privileged white elite who are immune from racism, a misperception which provides a disturbing insight into the appalling ignorance of history of many younger people.

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125 Dr Dvir Abramovich, *Transcript of evidence*, p. 47.

126 Anti-Defamation Commission, *Click Against Hate*, <https://www.clickagainsthate.org.au> accessed 4 December 2020.

127 Carmel Guerra, Director and Chief Executive Officer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 41.

128 Shashwat Tripathi, Youth Volunteer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 41.

What is needed is a school curriculum not only for history but across the disciplines which inculcates critical thinking and educates against prejudice generally and against antisemitism in particular. This should include but go well beyond education about the Holocaust. There is a need to address the religious, racial and political sources of anti-Jewish hatred directly.[129]

The Committee is aware that the Victorian Government is working with Jewish community organisations to develop teaching and learning resources for Holocaust education.**130** More broadly, Peter Wertheim's recommendation echoes McBride's findings discussed earlier in the chapter that a general prejudice-reduction framework should be complemented by an individualised focus on particular and distinct issues where needed.[131]

Respectful Relationships

Respectful Relationships became a core component of the Victorian Curriculum in 2016, as recommended by the Victorian Royal Commission into Family Violence. In recognition of the critical role that schools can play in preventing family violence, the program aims to promote and model respect, positive attitudes and behaviours.[132] Topics taught within Respectful Relationships include:

- emotional literacy—the ability to understand, express and manage emotions, build empathy, and to respond appropriately to the emotions of others
- personal strengths—to be able to recognise and understand strengths and positive qualities in oneself and others
- positive coping—to identify and discuss different types of coping strategies
- problem solving—to develop critical and creative thinking skills, and to apply them to scenarios exploring personal, social and ethical dilemmas
- stress management—to teach positive approaches to stress management
- help-seeking—to highlight the importance of seeking help and providing peer support when dealing with problems that are too big to solve alone
- gender and identity—to challenge stereotypes and critique the influence of gender stereotypes on attitudes and behaviour, promote respect for diversity and difference, and learn about key issues relating to human rights
- positive gender relations—to build an understanding of the effects of family violence and focus on the standards associated with respectful relationships.[133]

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129 Peter Wertheim, *Transcript of evidence*, p. 14.

130 Hon James Merlino MP, *Strengthening Holocaust education in Victorian schools*, media release.

131 McBride, *What works to reduce prejudice and discrimination? A review of the evidence*, pp. 4–6.

132 Victorian Government Department of Education and Training, *Department program: Respectful Relationships*, 2020, <https://www.education.vic.gov.au/about/programs/Pages/respectfulrelationships.aspx> accessed 17 November 2020.

133 Victorian Government Department of Education and Training, *Respectful relationships: A resource kit for Victorian schools*, Melbourne, 2017, p. 3.

The Committee considers that Respectful Relationships is an important tool for promoting respect and positive behaviours to students from a young age.

Religious curriculum

Religious education in schools falls into two categories:

- General religious education—focuses on world faiths and is delivered without promoting a particular religion. General religious education is part of the Victorian Curriculum.
- Special religious instruction—instruction provided by churches and other religious groups and based on distinctive religious tenets and beliefs. Special religious instruction may only be offered in government schools as an opt-in extra-curricular activity outside of class time for a maximum of 30 minutes per week, and parental consent is required.

DET provides guidance on the delivery of general religious education:

> A secular education still includes education about world faiths. Learning about religions is part of the Victorian Curriculum. It provides information to students about world faiths and secular belief structures, which enables them to understand the world around them, display tolerance and respect towards people from all cultures and build strong and respectful relationships.
>
> All education providers must ensure that their programs and teachings are delivered in a manner that supports and promotes the principles and practice of democracy, including a commitment to freedom of religion, speech and association. Government school teachers must not provide teaching in religion other than general religious education.[134]

General religious education is contained in curriculum areas of civics and citizenship and intercultural capability. For example, civics and citizenship course content for levels three and four covers different 'cultural, religious and/or social groups to which they and others in the community may belong and explain how belonging can shape personal identity' and 'listing and comparing the different purposes, beliefs, traditions and symbols used by groups'. For levels seven and eight, the content covers 'how groups express their identities, including religious and cultural identity'.[135] For intercultural capability curriculum, content for levels seven and eight also includes a focus on reflection on cultural practices and beliefs and their contribution to identity, including religious beliefs and traditional celebrations. Levels nine and ten focus on 'complex discussions about interrelationships within and between cultures', including religious beliefs.[136]

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134 Victorian Government Department of Education and Training, *School operations: Special Religious Instruction*, 2020, <https://www2.education.vic.gov.au/pal/special-religious-instruction/policy> accessed 17 November 2020.

135 Victorian Curriculum and Assessment Authority, *Curriculum: Civics and Citizenship*, <https://victoriancurriculum.vcaa.vic.edu.au/the-humanities/civics-and-citizenship/curriculum/f-10> accessed 17 November 2020.

136 Victorian Curriculum And Assessment Authority, *Curriculum: Intercultural Capability*, <https://victoriancurriculum.vcaa.vic.edu.au/intercultural-capability/curriculum/f-10> accessed 4 December 2020.

In evidence to the Committee, Brigid Monagle from Fairer Victoria described how schools have flexibility in implementing this course content:

> my understanding is that religious education is part of the Victorian curriculum, but given in the Victorian curriculum schools adapt for the nature of their own cohorts and their own schools, I could not necessarily say every school is teaching comparative religion and all the details of that. But schools do adapt it for their own purposes.[137]

The Committee received evidence from a number of stakeholders around the need for further broad-based education on world religions in order to combat increasing religious vilification in schools, and for this to begin from a young age. Adel Salman, Vice President of the Islamic Council of Victoria, stated that general religious education should include a focus on the role of religion in shaping identity:

> we need to start early. Religious education in the sense of awareness of other faiths and the importance of faith for people—for me personally, my faith is a core part of who I am. It defines me in some ways, and many people will feel similar. But at the moment the level of religious literacy, if you like, is very low, very low. And that is because it is not seen as an important thing to teach our children…
>
> at the very least there should be a curriculum in there around religious education, so teaching about all faiths and the importance of faith, not just about the faith but the importance. Why is it important that we all become aware of people's faiths? It is because in some ways it shapes who they are, it shapes their views, and to the degree that people have that literacy around, 'You're a Christian', 'You're a Jew', 'You're a Buddhist', 'You're a Hindu', 'You're a Muslim', we have all our people of faith. We can do that at the senior level. At the senior level, in terms of interfaith, we all get together, we talk about, 'We are all people of faith', and we can communicate and share and we understand each other, but that is not translated. Certainly our children, they are not given an opportunity at all.[138]

Professor Rutland from IHRA similarly advocated for general religious education to be provided from primary school onwards:

> I think the curriculum is one thing and I think in my presentation, based on my and Zehavit's work, very much the state of the art, is to argue for what is called 'cooperative education', which is on the one hand [special religious instruction] that provides kids with a safe place to learn about their own identity and their own spirituality. But we are also strong advocates of General Religious Education. Some people call it 'world religions'. The most important place where this needs to be taught, it is probably done in some form in primary school. High school is so crucial for both things. From our study it is becoming clearer: both areas. Kids need at a highschool level—a 13-year-old boy, year 7—to learn about other religions, learn to visit a church, visit a mosque, visit a synagogue. So that is at the curriculum level. But the curriculum level is not enough.[139]

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137 Brigid Monagle, *Transcript of evidence*.

138 Adel Salman, *Transcript of evidence*, p. 42.

139 Professor Suzanne Rutland, *Transcript of evidence*, p. 34.

4.3.2 Community engagement, education and awareness-raising

The following section outlines some of the areas raised throughout the inquiry that stakeholders considered were important in terms of community education and awareness-raising. This includes engagement and empowerment, community education initiatives, legal education and assistance, targeted initiatives, and strengthening Victoria's human rights culture.

Engagement and empowerment

The Committee understands that the effectiveness of community-based education, awareness-raising and other initiatives will largely be determined by the relationships between communities and public authorities or other responsible organisations. In particular, prevention activities must be informed by affected communities, and, where possible, led by them. In her evidence to the Committee, Diana Sayed from AMWCHR emphasised the importance of these perspectives:

> Anti-racism, anti-hate, anti-Islamophobia and human rights initiatives, policies and programs must put at their centre and be informed by the experiences and perspectives of communities who are often targeted by or on the receiving end of human rights breaches.[140]

Assistant Commissioner Luke Cornelius from Victoria Police described at a public hearing the importance of ensuring that meaningful engagement is undertaken:

> Look, the most critical piece for us … is to work with community, and particularly to work with communities around their capability and to build their capability so that the response can be community led. Because unless we have a community-based capability and a community-led approach in relation to addressing the underlying drivers of the behaviours that we are seeing, we are always going to be playing catch-up and we are always going to be the catcher in the rye. From a policing perspective we are most effective when we are in the prevention space, and we are in the most effective space when we are able to engage with community to identify early the risks of harm and through community to get on top of those.[141]

The Committee considers that any initiatives aimed at communities, such as education and awareness-raising, must proactively engage and empower those communities in their development and implementation.

Community education initiatives

The Committee believes that anti-vilification education initiatives have two core purposes: to enshrine general expectations of behaviour within the community with the aim of preventing vilification from occurring; and to improve awareness of existing laws and protections.

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140 Diana Sayed, *Transcript of evidence*, p. 2.

141 Luke Cornelius, Assistant Commissioner, Victoria Police, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 7.

Targeting prejudice

McBride states in her literature review that caution should be exercised around how media campaigns and awareness-raising activities are carried out where one of the core purposes is prejudice reduction. She states there is limited evidence regarding the success or otherwise of awareness-raising campaigns in changing prejudicial views or attitudes.[142] Further, dramatic interpretations of issues, such as 'hard hitting' media clips that are aimed at provoking anger or guilt, may risk alienating sections of the audience who do not necessarily recognise overt violence as being related to their own internal prejudices.[143] Instead, McBride suggests that designing media campaigns so as to induce empathy and compassion is likely to be the most effective.[144]

One positive example of the potential for community projects aimed at combating prejudice to deliver broad positive outcomes was reported in a study by researchers from the University of Melbourne and Deakin University. Examining the mental health benefits of participation in a Victorian anti-racism intervention, the study reported multiple benefits for participants:

> The results suggest that the projects met the criteria for promoting positive intergroup contact. There was also evidence that participants' involvement in these projects had positive effects on their autonomy, with particular improvements among people with ethnicities other than 'Australian'. The findings suggest that anti-racism interventions can have positive mental health effects for participants. These benefits redress some of the individual-level effects of racism experiences by supporting young people to develop confidence and self-esteem.[145]

In its submission, the Victorian Government confirmed its belief in the benefits of awareness-raising around prejudice, including the experiences of people affected by it:

> Awareness raising and the dissemination of information can be critical in creating an enabling environment for promoting dialogue, self-reflection and behaviour change.
>
> Promoting the positive stories of Victorians from diverse backgrounds, about their contributions and achievements to broader society as well as the challenges they experience, helps build understanding and empathy across groups.[146]

The submission noted some of the Government's broader policies and initiatives aimed at preventing and addressing discrimination, including the State Disability Plan; actioning self-determination for Aboriginal and Torres Strait Islander people as set out in the Victorian Aboriginal Affairs Framework 2018–2023, new gender equality

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142 McBride, *What works to reduce prejudice and discrimination? A review of the evidence*, p. 30.

143 Ibid., p. 7.

144 Ibid., pp. 31–2.

145 Margaret Kelaher, et al., 'Exploring the mental health benefits of participation in an Australian anti-racism intervention', *Health Promotion International*, vol. 33, no. 1, 2018, p. 107.

146 Victorian Government, *Submission 13*, p. 35.

legislation, development of an Anti-Racism Action Plan and LGBTIQ+ Strategy, and economic inclusion initiatives.[147]

The Victorian Government's Community Resilience Grants Program—which provided funding to organisations to either support communities to build resilience to hate and violent extremist narratives or support communities at risk of violent extremism—was discontinued in 2016.[148]

The Committee heard from numerous stakeholders that improved education campaigns and other programs were needed to target prejudice in Victorian communities. Citing the example of the national *Stop it at the Start* campaign targeting violence against women, Springvale Monash Legal Service stated that the 'power of public education programs to effect positive change is immense and should complement and be informed by the objectives of the [RRTA]'.[149]

Maria Dimopoulos, Deputy Chair of the VMC, similarly stated that community education programs should include a focus on the profound impact that vilification can have on the capacity of individuals to participate in and contribute to society.[150]

Chris Christoforou, Executive Officer of the Ethnic Communities' Council of Victoria, told the Committee about the anti-racism work it is conducting with communities:

> We are currently funded by the State Government to run an anti-racism community engagement campaign, and really our focus is on systemic racism. So going back to a lot of the questions that the Committee here has asked around why people are experiencing entrenched unemployment in some communities, it is addressing the systemic factors of why people are under-reporting their experiences of vilification or why they are not accessing our health services, for example. I think they are the sorts of things that we are working with at a strategic level with a number of organisations that are looking at taking measures to address the experiences of different groups within our community.[151]

The VMC informed the Committee that during consultations in the wake of the Coronavirus Pandemic with community leaders and representatives, including representatives of Victoria's Chinese and Asian communities, there was advocacy for an 'immediate, comprehensive and long-term implementation of an anti-vilification/racism campaign'. It was reported that a campaign should:

- be developed in partnership with affected communities
- encourage positive messaging and promote goodwill news stories

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147 Ibid., p. 3.

148 Victorian Multicultural Commission, *Victorian Government Community Resilience Grants - deadline extended*, 2016, <https://www.multicultural.vic.gov.au/news-articles/516-victorian-government-community-resilience-grants-deadline-extended> accessed 18 November 2020.

149 Springvale Monash Legal Service, *Submission 43*, p. 6.

150 Maria Dimopoulos, *Transcript of evidence*, p. 3.

151 Chris Christoforou, Executive Officer, Ethnic Communities' Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 14.

- comprise supportive mainstream and social media campaigns that share stories and create awareness of the effects of hate conduct and vilification
- support VEOHRC and similar agencies to fight systemic racial vilification.[152]

In her review of the literature, McBride recommended that prejudice interventions should take place within a broader context of commitment to diversity in terms of institutional and cultural change.[153] This was similarly emphasised by HRLC, Get Up!, ASRC, Anti Defamation Commission and VTHC in their group submission, in arguing that Victoria's human rights culture should be further strengthened:

> Part of preventing hateful conduct includes building a more enduring Victorian human rights culture. The most recent review of the Charter in 2015 said this could be done by strengthening the Charter's scope and operation, and including stronger remedies and more rights. The Victorian Government should action these recommendations. Strengthening the scope and operation of the Charter could go a long way towards creating a culture in Victoria where people better understand and respect each other's human rights.[154]

Similarly, the Law Institute of Victoria recommended widespread community education on 'values of equal opportunity and diversity'.[155] The Committee considers that strengthening Victoria's human rights culture is a critical aspect of preventing future discrimination and vilification.

Awareness of protections

The Committee heard there is a broad lack of awareness of the anti-vilification protections available under the RRTA. Of those who are aware of the laws, many are unclear on how to report an incident, and there is broad confusion around terminology such as incitement. In addition, there is confusion with regard to overlapping discrimination and vilification laws at both state and federal levels. Diana David, Chief Executive Officer of Reconciliation Victoria, told the Committee that during engagement activities, the organisation had heard criticisms around how the Government promoted anti-vilification protections to communities:

> There was a view that there had been very little education and work and very little money spent around promoting the Act. Road safety and family violence campaigns were pointed to as two exemplar cases of the state government providing sustained effort and focus to solve a societal problem. It was questioned why similar focus had not been given to stopping vilification.[156]

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152 Victorian Multicultural Commission, *Victorian Multicultural Commission: Supplementary submission to the inquiry into anti-vilification protections*, supplementary evidence received 15 June 2020, p. 2.

153 McBride, *What works to reduce prejudice and discrimination? A review of the evidence*, p. 5.

154 Human Rights Law Centre, et al., *Submission 47*, p. 22.

155 Law institute Victoria, *Supplementary submission to the inquiry into anti-vilification protections*, supplementary evidence received 17 June 2020, p. 13.

156 Diana David, Chief Executive Officer, Reconciliation Victoria, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 26.

The Victorian Government described in its submission the work that VEOHRC undertakes in targeting prejudice:

> VEOHRC provides tailored education and engagement programs across communities, workplaces and other settings. These education activities inform and build understanding of how Victoria's anti-discrimination and human rights legislation works, help achieve compliance with legislation, embed best practice and support culture change, and promote the benefits of diversity and inclusivity.[157]

The Committee is also aware that VEOHRC runs various targeted information sessions around discrimination and vilification, including some in collaboration with other organisations. For example, throughout September 2020, VEOHRC and the VMC ran online Zoom information sessions targeted to different communities, including sessions for Asian communities, African communities, South Sudanese women, Muslim communities, Māori and Pasifika communities, and youth.[158] Further, VMC is also working with VEOHRC to translate information materials aimed at improving public reporting of vilification incidents, and which will be disseminated through both organisations' networks.[159]

In its submission, VEOHRC told the Committee that it has been working to increase awareness of protections through its Reducing Racism project and Community Reporting Tool. However, it also acknowledged that more needs to be done to ensure the law is visible and accessible in the Victorian community.[160] The ways in which limited awareness of relevant protections negatively impacts communities is also discussed in Chapter 8, regarding under-reporting of vilification incidents.

With appropriate resourcing, VEOHRC is well-placed to expand its education initiatives to encourage improved understanding of how anti-vilification provisions work alongside anti-discrimination and human rights laws. This will be particularly important in relation to any future amendment of the RRTA, such as the extension of the provisions to additional protected attributes.

The Committee believes that awareness of the anti-vilification framework is important not only to improve the accessibility of the law, but also in its use as an educational or symbolic tool. Professor Katharine Gelber, Head of School of Political Science and International Studies in the Faculty of Humanities and Social Sciences at the University of Queensland, explained in her evidence to the Committee the numerous ways in which the protections can support communities:

> there is evidence that affected communities do not know that vilification laws exist, then there is evidence that when they do find out they are like, 'Well, this is terrific', and then there is evidence that actually very few of them would ever bother lodging

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157 Victorian Government, *Submission 13*, p. 34.

158 Victorian Multicultural Commission, *Racism information sessions: Understanding your rights and taking action*, 2020, <https://www.multiculturalcommission.vic.gov.au/racism-information-sessions-understanding-your-rights-and-taking-action> accessed 11 November 2020.

159 Victorian Multicultural Commission, *Victorian Multicultural Commission*, p. 2.

160 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 83.

> a complaint. But what they might do is go to the person vilifying them or within their community and have a conversation, and sometimes that is really explicit. People in the Jewish [community] in particular have been very effective at doing this—taking judgements that say Holocaust denial is an unacceptable form of racial vilification and going to somebody and saying, 'Look, do you know that if you say that, it is actually unlawful conduct?'. People explicitly and implicitly use the existence of the legislation in educative ways.[161]

Well-designed education initiatives also have the potential to dispel myths around anti-vilification laws and many of the common misconceptions that arise, such as regarding intended limits or impacts on free speech and fair public debate. Professor Gelber highlighted the importance of distinguishing that anti-vilification laws do not seek to limit speech as such, but rather, to minimise community harm:

> when you conduct yourself in public you have a responsibility to conduct yourself in public in ways that do not harm other people.
>
> So you can hold any views you like; we are not going to do anything about that. You can say what you like in a private conversation. But in public, because we are a society and because as a community we want to maximise people's ability to participate, we want to maximise people's ability to engage, all that vilification laws ask you to do … is to comport yourself or conduct yourself in public debate in a way that does not harm others.[162]

The Committee believes that future community education initiatives require a significant focus on increasing public knowledge of anti-vilification laws, including around what constitutes vilification; what protections are available; who to report vilification to and seek support from; and where to get further information regarding the law.

There was broad consensus in the inquiry evidence received regarding the importance of education and its complementary role to the suite of reforms to the legislative framework. The Committee considers that best-practice education initiatives will be crucial to the success of any legislative reform stemming from this inquiry.

RECOMMENDATION 7: That the Victorian Government work with relevant organisations (such as the Victorian Equal Opportunity and Human Rights Commission and the Victorian Multicultural Commission) to develop community education campaigns on vilification and hate conduct. Such education should be both broad to the public and also tailored to specific groups that are protected under amended anti-vilification laws. Topics addressed should include creating awareness about vilification laws, hate conduct, responding to incidents, online vilification and strengthening social cohesion.

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161 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 21.

162 Ibid., p. 20.

4.4 Preventing harmful events

One distinct area of the inquiry relates to the inability of public authorities to prevent events from taking place where there is a clear and significant risk of vilification occurring. This debate has arisen in response to the Hammered Music Festival in late 2019, organised by the groups Blood & Honour Australia and the Southern Cross Hammerskins. The event was planned at a secret location. The festival, which aims to spread white supremacy messaging through music, including denigration of minority groups, sparked a widespread community campaign to cancel the event and a petition presented to the Victorian Government signed by 28,000 people. Similar events have been held annually in Victoria for a number of years to commemorate the death of Blood & Honour's founder in 1993.

While the music festival was reportedly cancelled by its organisers, the Victorian Government made a public announcement that it was otherwise unable to prevent the event from taking place.[163]

4.4.1 Victorian law

The Victorian Government stated that it 'did not have an effective basis' to stop the event as anti-vilification laws only allow for complaints to be made regarding events that have already occurred and does not provide for pre-emptive action.[164] The submission stated that Victoria Police has powers to manage events that are underway, but is otherwise limited to informally pressuring venues and organisers not to proceed with an upcoming event.[165]

In evidence to the Committee, Assistant Commissioner Cornelius explained that the primary mechanism police use to prevent events occurring in the near future are breach of the peace provisions:

> Well, certainly in other jurisdictions protests and events may be the subject of a permit arrangement. We do not have those arrangements here. Instead we rely first and foremost on provisions available to us potentially under the Control of Weapons Act, under the Summary Offences Act, in relation to breaches of the peace or possible breaches of the peace and then more generally the common law as it relates to a breach of the peace. We do find that under the breach of peace provisions we do have a fair degree of room to move in relation to opportunities for pre-emption. I guess the difficulty that we face in that space at times is that we do have to wait for the behaviour to become pretty proximate to an actual breach of the peace before we can take action, and we are required to give warnings. Now, we have got to a point, in terms of our

163 'White supremacist concert in Melbourne cannot be stopped, Premier says', *ABC News*, 8 October 2019, <https://www.abc.net.au/news/2019-10-08/white-supremacist-neo-nazi-concert-in-melbourne-to-go-ahead/11582120> accessed 6 December 2020.

164 Victorian Government, *Submission 13*, p. 30.

165 Ibid.

> tactics, where we will get proximate, we will give a rapid warning and there will be a rapid and effective policing response to take that potential harm out of the equation.[166]

Breach of the peace provisions can be used pre-emptively where a person is 'likely to breach the peace', however, they apply only to events or other circumstances that take place on public land and only where the persons are already gathered in the public place.[167]

The Victorian Government stated in its submission that any potential pre-emptive actions or powers would need to be undertaken with consideration of due process, and action can only take place where there is clear evidence of the organisation of a relevant event.[168] However, it did not provide any potential solutions to responding to events where vilification is likely to occur.

Some stakeholders recommended introducing a positive duty for vilification similar to that which exists in relation to discrimination, sexual harassment and victimisation under the EOA. The current duty requires 'duty holders' (including employers and providers of goods or services) to take 'reasonable and proportionate measures' to prevent discrimination, sexual harassment and victimisation before it occurs. The VEOHRC stated in its submission that extending this to vilification would require organisations to 'proactively prevent cultures of vilification' and 'counter passive bystandership'.[169]

While this recommendation does not directly relate to events organised by hate groups, a positive duty in relation to vilification could be framed in such a way so as to ensure employers and service providers have a duty not to engage in or promote vilification in the course of their business activities. For example, where a business is providing a service at an event where there is clear evidence that vilifying conduct will be taking place, such as the Hammered Music Festival. A positive duty could provide additional mechanisms for preventing hate in the community, in conjunction with any strengthened powers for VEOHRC to undertake investigations and public inquiries and seek enforceable undertakings and issue compliance notices in response to these processes.

The potential for introduction of a positive duty relating to vilification is discussed further in Chapter 6.

At a public hearing, Ruth Barson, Joint Executive Director of HRLC, stated that amendments to civil and criminal provisions under the RRTA could provide additional powers to prevent events like the Hammered Music Festival from taking place:

> Obviously the specific circumstances of every situation would need to be taken into account but, for example, our proposed changes to the criminal vilification test would be

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166 Luke Cornelius, *Transcript of evidence*, pp. 6–7.

167 See, *Summary Offences Act 1966* (Vic) s 6(1).

168 Victorian Government, *Submission 13*, p. 30.

169 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 82.

that the fault element is amended to cover circumstances where there is intentionally or recklessly a significant risk that a person's conduct is likely to incite hatred. Then for the civil test, if you go to our submission, we say there should be a reformed provision that provides that a person must not engage in conduct that expresses or is reasonably likely to express hatred in all of the circumstances.[170]

However, the Committee considers that it is unclear how amendment of the civil and criminal tests would provide police with powers to pre-empt and prevent any vilification activity before it occurs.

4.4.2 Commonwealth law

The Committee also explored the process of 'listing' a group as a public means of associating them with terrorist activity, which has been used in other international jurisdictions in relation to groups that have clearly engaged in serious hate conduct and vilification. For example, Blood & Honour was added to Canada's Listed Terrorist Entities in accordance with the *Anti-Terrorism Act* in June 2019, due to their history of violent actions in various countries across North America and Europe. The consequences of this listing include that the group's property can be subject to seizure, restraint or forfeiture and individuals who participate in the group's activities may be committing an offence where seen as contributing towards terrorist activity.[171] However, membership of the group is otherwise permissible.

The Commonwealth Government has primary responsibility for responding to terrorism in Australia, as a result of the 2002 Leaders' Summit where all states and territories agreed to refer powers regarding terrorism offences to the Commonwealth.[172] Victoria's passage of the *Terrorism (Commonwealth Powers) Act 2003* (Vic) formally referred these powers in accordance with section 51(xxxvii) of the Australian Constitution.[173]

The *Criminal Code Act 1995* (Cth) (Criminal Code) establishes a number of terrorism-related offences, including in relation to terrorist organisations.[174] Under the Code, the Minister for Home Affairs can 'list' an organisation as a 'terrorist organisation' in regulations. Once listed, a number of offences exist in relation to that organisation, including for being a member; directing activities or recruiting; training; dealing with organisation funds and providing support or being associated with the group.[175]

There are currently no listed terrorist organisations that support ideologies that primarily seek to vilify particular communities, such as white supremacy groups. Of the

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170 Ruth Barson, *Transcript of evidence*.

171 Public Safety Canada, *Currently listed entities*, <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#59> accessed 1 February 2021.

172 Council of Australian Governments, *Intergovernmental Agreement on Counter-Terrorism Laws*, <https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-counter-terrorism-laws> accessed 29 October 2020.

173 *Terrorism (Commonwealth Powers) Act 2003* (Vic) s 1.

174 *Criminal Code Act 1995* (Cth), Schedule 1, Part 5.3 (Terrorism).

175 Department of Home Affairs, *Terrorist organisations*, <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Documents/terrorist-organisations.pdf> accessed 1 February 2021.

27 organisations listed at the time of publication of this report, 26 are linked to Islamic terrorism.[176]

The offences established in relation to terrorist organisations in Australia are more significant than those established in Canada—for example, regarding general membership of a listed group. The Victorian Government stated in its submission that the Commonwealth Government may be the most appropriate avenue for responding to 'hostile organisations' where they meet certain thresholds, although no further specific detail about what exactly those appropriate avenues are was provided.[177] While in theory listing certain groups that have a history of violent activity could constitute one means of preventing planned activities or events from taking place, it is unlikely that groups that engage in serious vilifying conduct would generally meet the threshold for being listed in accordance with the Criminal Code.

4.4.3 Responses of other jurisdictions

Other jurisdictions have taken different approaches to responding to extremist groups or organisations that promote racial, religious and other forms of vilification. For example, Blood & Honour was banned in Germany in 2000 after an increase in violent attacks, and its violent affiliate, Combat 18, was banned in January 2020.[178] The announcement regarding Combat 18 was accompanied by police raids across the country to confiscate documents, paraphernalia and other items from leading members of the group.[179]

Similar measures have been adopted in a number of European countries, and the European Parliament passed a resolution in October 2018 calling on member states to ban 'neo-fascist and neo-Nazi groups and any other foundation or association that exalts and glorifies Nazism and fascism' in the wake of a number of violent attacks by right-wing extremists.[180]

In other Australian jurisdictions, permit arrangements are in place for demonstrations, rallies or protests that take place in public spaces. For example, in Queensland, notice must be given to police of an intention to hold a public assembly (including protests and rallies) under the *Peaceful Assembly Act 1992* (Qld). Police or the relevant local authority are able to apply to a Magistrates Court for an order refusing to authorise the event to proceed where there are reasonable concerns regarding public safety,

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176 Department of Home Affairs, *Listed terrorist organisations*, 2020, <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx> accessed 6 December 2020.

177 Victorian Government, *Submission 13*, p. 30.

178 'Germany bans neo-Nazi group Combat 18 Deutschland', *The Guardian*, 23 January 2020, <https://www.theguardian.com/world/2020/jan/23/germany-bans-neo-nazi-group-combat-18-deutschland> accessed 29 October 2020; 'Germany bans neo-Nazi group', *BBC News*, 14 September 2000, <http://news.bbc.co.uk/2/hi/europe/925009.stm> accessed 29 October 2020.

179 'Germany bans Combat 18 as police raid neo-Nazi group', *BBC News*, 23 January 2020, <https://www.bbc.com/news/world-europe-51219274> accessed 29 October 2020.

180 European Parliament, 'Rise of neo-fascist violence in Europe', *European Parliament resolution of 25 October 2018 on the rise of neo-fascist violence in Europe* (2018/2869(RSP)) 7.

risk of serious public disorder, or 'excessive' interference with rights and freedoms.[181] An event may also be permitted to proceed, but with specified conditions.[182] This type of power provides police greater control over events where there is significant concerns around public safety and the potential for harm. However, in circumstances such as the Hammered Music Festival, which are reportedly held at secret locations on private properties, such arrangements would not apply.

In New South Wales, the definition of a 'public act' under the *Crimes Act 1900* (NSW) for the purposes of offences relating to incitement of violence includes acts that occur on private land where the conduct is observable by the public.[183] This would apply where, for example, a private property hosts an event where incitement occurs and that event is observable to members of the public. However, this provision applies to conduct that has taken place and cannot be used to pre-empt or prevent incitement events.

The Committee notes that on 9 December 2020, the Minister for Home Affairs, referred to the Australian Parliamentary Joint Committee on Intelligence and Security an inquiry into extremist movements and radicalism in Australia.[184] The inquiry's terms of reference include to examine the nature and extent of, and threat posed by, extremist movements and persons holding extremist views in Australia, with a particular focus on the motivations, objectives and capacity for violence of extremist groups. In addition, the terms of reference specify inquiry into 'changes that could be made to the Commonwealth's terrorist organisation listing laws to ensure they are fit for purpose, address current and emerging terrorist threats, reflect international best practice, and provide a barrier to those who may seek to promote an extremist ideology in Australia', and 'the role and influence of radical and extremist groups, which currently fall short of the legislative threshold for proscription, in fostering disharmony in Australia and as a conduit to persons on a pathway to extremism'.[185] The reporting date for the inquiry is April 2021.

This Committee welcomes the Parliamentary Joint Committee on Intelligence and Security's inquiry and considers that this is a timely opportunity to ensure that 'listing' processes are responsive to the changing nature of extremism in Australia. The Committee acknowledges the short reporting timeframe, however, encourages the Victorian Government to make a submission to the Inquiry regarding the nature of vilification and extremist threats to community cohesion in Victoria, as well as the need to ensure the threshold for listing a terrorist organisation is reflective of these threats.

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181 *Peaceful Assembly Act 1992* (Qld), s 12.

182 Ibid., s 11.

183 *Crimes Act 1900* (NSW) ss 93Z(5), Division 8.

184 Parliament of Australia, *Intelligence Committee to inquire into extremist movements and radicalism in Australia*, media release, 9 December 2020.

185 Parliamentary Joint Committee on Intelligence and Security, *Terms of Reference: Inquiry into extremist movements and radicalism in Australia*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ExtremistMovements/Terms_of_Reference> accessed 1 February 2021.

5 Civil anti-vilification protections

The *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) is the cornerstone of Victoria's anti-vilification framework. Its enactment brought Victoria in line with the Commonwealth Government and other jurisdictions, such as New South Wales (NSW), where vilification laws already existed.

The RRTA is an incitement-based regime that prohibits conduct that incites hatred of another person or group because of their race and/or religion. In the most serious circumstances, vilification is criminalised and attracts a fine or imprisonment or both. Under the Act, the onus is on individuals and groups to enforce the law by either making a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), an application to the Victorian Civil and Administrative Tribunal (VCAT), or report an offence to Victoria Police.

This chapter explores Victoria's current civil anti-vilification laws and reforms discussed throughout the inquiry that are aimed at addressing existing concerns. In their evidence to the Committee, both the Victorian Government and VEOHRC emphasised that civil protections are the key feature of the RRTA.[1] However, there was broad consensus among stakeholders that nearly twenty years after the RRTA's enactment, Victorians still experience widespread racial and religious vilification. Further, many Victorians experience vilification based on other attributes not currently protected under the Act. With the Committee recommending the expansion of protected attributes in Chapter 3, there is the need to make significant reforms to the civil provisions to ensure victims of vilification can be provided with meaningful redress.

5.1 Overview

The RRTA contains civil provisions that prohibit racial and religious vilification. For vilification on the ground of race, section 7 of the Act states:

> (1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
>
> (2) For the purposes of subsection (1), conduct—
>
> (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
>
> (b) may occur in or outside Victoria.[2]

1 Victorian Government, *Submission 13*, received 19 December 2019; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020.

2 *Racial and Religious Tolerance Act 2001* (Vic) s 7.

Section 8 of the RRTA stipulates the same terms but applies to the ground of 'religious belief or activity'.[3] The provisions make clear that 'engage in conduct' includes the use of the internet or email to publish or transmit statements or other material.[4] Further, section 9 states that the motive of a person's vilifying conduct is irrelevant, as is whether the race or religious belief or activity of the person or group was the only or dominant ground for the conduct.[5] It is also irrelevant whether an accused person made an incorrect assumption about the race or religious beliefs or activities of another person or class of persons at the time of the offence.[6]

The RRTA contains complementary provisions that prohibit victimisation of a person in relation to disputes, complaints or proceedings taking place under the Act,[7] and authorising or assisting vilification or victimisation.[8] In addition, an employer or principal is vicariously liable for the conduct of an employee or agent who breaches the RRTA, unless they can prove that they took 'reasonable precautions' to prevent the breach.[9]

5.1.1 Public conduct and private conduct exceptions

In order to protect freedom of expression, sections 11 and 12 of the RRTA contain public conduct and private conduct exceptions if a person can establish that their conduct was engaged in reasonably and in good faith in the course of any of the following:

- performing, exhibiting or distributing an artistic work
- a statement, publication, discussion or debate for genuine academic, artistic, religious, scientific purposes, or any purpose that is in the public interest
- making or publishing a fair and accurate report of any event or matter of public interest
- conduct that was meant to be private that is seen and heard only by them.[10]

The RRTA also provides that an exception for a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.[11]

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3 Ibid., s 8.

4 Ibid., ss 7, 8.

5 Ibid., ss 9(1) and (2).

6 Ibid., s 10.

7 Ibid., ss 13, 14.

8 Ibid., s 16.

9 Ibid., s 18.

10 Ibid., s 11–12.

11 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law: Racial and religious vilification*, 28 June 2019, <http://austlii.community/foswiki/VicDiscrimLRes/RacialandreligiousvilificationS> accessed 2 September 2020.

5.1.2 Complaints and disputes

In Victoria, conciliation is the preferred approach to resolve alleged breaches of the RRTA. VEOHRC is responsible for the operation of the civil complaints system and the dispute resolution process. It also has responsibility for the *Equal Opportunity Act 2010* (Vic) (EOA), and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter).

Under the RRTA, a person can make a complaint to VEOHRC for resolution through conciliation. It also allows a representative body, with sufficient interest in the case, to bring a complaint on behalf of a named person or persons. Complaints can be made against individuals of any age, corporations and unincorporated associations.[12]

While VEOHRC manages the dispute resolution process, it does not have powers to make orders or award compensation. Rather, it aims to resolve complaints through a range of outcomes, such as an apology, financial compensation or a donation to charity.[13] In its submission, VEOHRC stated that in the last six years, 64% of conciliations under the RRTA have been resolved.[14] Some examples of these conciliations include:

> The complainant alleged racial and religious vilification by a newspaper that allegedly published statements that were highly offensive to the Jewish community and were disparaging towards Jewish business or community figures. The matter was resolved, without admission of liability, with an apology.
>
> The complainant alleged he was racially vilified at work when co-workers referred to him as a 'gook', 'slopehead' and 'rice eater'. He complained to management that he did not like being spoken to in this way and was laughed at and the vilification continued. The matter was resolved, without admission of liability, for compensation.
>
> The complainant alleged his neighbour racially vilified him for being of Middle Eastern descent by verbally abusing his family on a daily basis. The complainant feared for his family's safety. The matter was resolved through an undertaking by the respondent to cease the behaviour.
>
> The complainant, a man of Indian descent, was involved in a minor car accident. He alleged when he asked for the other driver's details, the driver refused and threatened to kill him and crack his head open. The matter was resolved, without admission of liability, with a written apology and compensation.[15]

12 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 25.

13 Ibid.

14 Ibid.

15 Ibid., p. 25–6.

Applications to VCAT

A complaint does not need to be lodged with VEOHRC, as a person can make a direct application to VCAT. VCAT can also receive complaints that were originally made to VEOHRC but which were not resolved through dispute resolution.[16] Section 23C of the RRTA outlines that VCAT can make one or more of the following orders if it determines that a person has contravened the Act:

- that the person refrain from committing any further breaches of the RRTA
- that the person pay compensation to the complainant within a specified period of time
- that the person does anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the breach.[17]

According to VEOHRC, VCAT resolved six matters by compulsory conference—a process similar to mediation with the assistance of a VCAT member—and seven matters by mediation between 2012–2014 and 2018–2019. VCAT also finalised 25 matters, including nine that were withdrawn, 11 that were struck out and five that were dismissed.[18] As detailed in Box 5.1, there have only been two successful cases of vilification before VCAT. There have been none since 2007.[19]

BOX 5.1: Vilification cases at VCAT

In its submission, VEOHRC detailed the two successful cases of vilification before VCAT:

In *Khalil v Sturgess* [2005] VCAT 2446, VCAT found the complainants had been racially vilified by repeated racial abuse from their neighbours. VCAT ordered the respondents to publish a formal apology in the Herald Sun and pay compensation totalling $7,000. In doing so, VCAT took into account 'the very serious and persistent nature of the respondents' abuse, the need not to trivialise what happened, the objectives of the Act … and the great disruption and humiliation caused to the complainants'.

In Ordo Templi Orientis v Legg [2007] VCAT 1484, VCAT found a website produced and maintained by the respondents vilified the complainants by claiming the Ordo Templi Orientis was a protected paedophile group and linking the group to alleged satanic and/or ritual sexual abuse of children. VCAT ordered the respondents to remove offensive material from their website and to refrain from making, publishing or distributing similar statements in Victoria. The respondents were later sentenced to nine months' imprisonment for failing to do so.

Source: Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p.26.

16 *Racial and Religious Tolerance Act 2001* (Vic)., Division 2, Section 23.

17 Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law*.

18 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 26.

19 Ibid.

5.2 Utilisation of the *Racial and Religious Tolerance Act 2001* (Vic)

One of the key objectives of the RRTA is to 'promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy'.[20] Yet, the Committee heard and which is discussed in Chapters 3 and 4, that Aboriginal and Torres Strait Islander, multicultural and multifaith communities continue to experience vilification in Victoria. Many stakeholders indicated that it is continuing to rise.[21]

Overall, there was broad consensus among inquiry stakeholders that the RRTA is under-utilised and does not effectively deliver on its purposes of promoting racial and religious tolerance and providing redress to victims of vilification. This is reflected in the low number of enquiries, complaints and prosecutions. In its submission, VEOHRC stated that 'despite the fact that the RRTA has been in operation for almost two decades, there is limited use of the Act in practice'.[22]

Tables 5.1 and 5.2 detail the numbers of enquiries and complaints received by VEOHRC on a yearly basis since 2014–2015.

Table 5.1 Complaints under the RRTA by attribute

Attribute	2014–15	2015–16	2016–17	2017–18	2018–19
Racial vilification	45	9	3	4	4
Religious vilification	37	4	5	14	5

Source: Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2016/17*, Victorian Government, Carlton, 2017; Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2017–18*, Victorian Government, Carlton, 2018

Table 5.2 Issues raised from enquiries

Issue	2014–15	2015–16	2016–17	2017–18	2018–19
Racial vilification	129	66	54	50	47
Religious vilification	93	28	27	27	24

Source: Victorian Equal Opportunity and Human Rights Commission, Annual Report 2016/17, Victorian Government, Carlton, 2017; Victorian Equal Opportunity and Human Rights Commission, Annual Report 2017–18, Victorian Government, Carlton, 2018.

VEOHRC also provided a snapshot of vilification complaints under the RRTA, including where incidents occurred and against whom. This is detailed in Box 5.2.

20 *Racial and Religious Tolerance Act 2001* (Vic) s 4(1)(a).

21 See Chapter 3, s3.1: Experiences of racial and religious vilification.

22 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 25.

BOX 5.2: Snapshot of VEOHRC's complaint and enquiry data

Since the commencement of the RRTA in 2002, there have been a total of:

- 335 complaints of racial vilification (averaging 18.6 complaints per year)
- 283 complaints of religious vilification (averaging 15.8 complaints per year).

Complaints to VEORHC allege that vilification occurs in a range of places. For example, between July 2013 and June 2019:

- 17 complaints were made against media outlets (newspaper, radio and TV)
- 10 complaints were against individuals in public places
- 5 complaints were in employment
- 4 complaints were in retail and clubs.

In the same period, the majority of complaints were made by Muslim people (16 complaints), Christian people (10 complaints), Jewish people (8 complaints) and Aboriginal people (8 complaints).

In the six years between July 2013 and June 2019, VEOHRC received 615 enquiries from people seeking information about the RRTA.

Source: Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p 25.

In its submission, Thorne Harbour Health emphasised the small number of complaints and enquiries in 2018–19 as a percentage of all complaints and enquiries received by VEOHRC:

> Data from the Victorian Equal Opportunity and Human Rights Commission shows that in 2018/19 there were 9,868 issues raised through enquiries, including 47 for racial vilification and 24 for religious vilification (0.7% of total enquiries), and of that 1877 complaints were made, of which 4 related to racial vilification and 5 related to religious vilification (0.5% of total complaints).[23]

A key concern of some stakeholders is the discrepancy between the number of complaints and widespread hateful conduct in the community, bringing into question the effectiveness of the Act. VEOHRC explained in its submission:

> Given the evidence of the ongoing prevalence of hate based conduct in the community and its impact, it is clear that the RRTA is not meeting its intended purpose to provide an adequate means of redress for people who experience racial or religious vilification.[24]

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23 Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 7.

24 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 46.

Similarly, in their group submission the Human Rights Law Centre (HRLC), GetUp!, Victorian Trades Hall Council (VTHC), Asylum Seeker Resource Centre (ASRC) and the Anti Defamation Commission stated:

> There have been few complaints of racial vilification, only two successful cases of vilification before VCAT and only one prosecution of serious religious vilification. There have been no criminal prosecutions of racial vilification under the RRTA. This is in circumstances where hateful conduct is rife.[25]

The under-utilisation of the Act was identified as a key justification for reform of Victoria's anti-vilification laws.[26] The evidence presented to the Committee indicates that this under-utilisation stems from both the operational and legal ineffectiveness of the Act. Operational effectiveness relates to the accessibility of the law in terms of the community's awareness and understanding, in addition to their ability to use the Act to enforce their rights.[27] VEOHRC's current powers and duties to address vilification also impact the operational effectiveness of the RRTA. These issues are addressed in Chapters 6 and 8. Legal effectiveness relates to the complexity of the law and the difficulty in satisfying the high legal threshold for vilification. Reform of the civil provisions is addressed in the following sections and the criminal provisions are addressed in Chapter 7.

5.3 Reform of offence provisions

Inquiry stakeholders raised a number of barriers to the effective utilisation of the RRTA's civil provisions, with the difficulty in substantiating a complaint of vilification identified as the key issue. In its submission, VEOHRC outlined how the legal threshold is too high and overly complex:

1. The test focuses exclusively on the effect of a conduct on a third party.
2. The test requires identification of a potentially hypothetical audience.
3. The test requires incitement of 'extreme responses'.
4. It is difficult to prove that conduct is capable of inciting strong emotions.
5. The incitement test does not consider the harm caused by the conduct.[28]

This complexity is demonstrated in Figure 5.1, which outlines some of the steps that must be satisfied to substantiate a claim of unlawful vilification. Figure 5.1 also details alternative legislative frameworks that could provide other redress options to a complaint of vilification.

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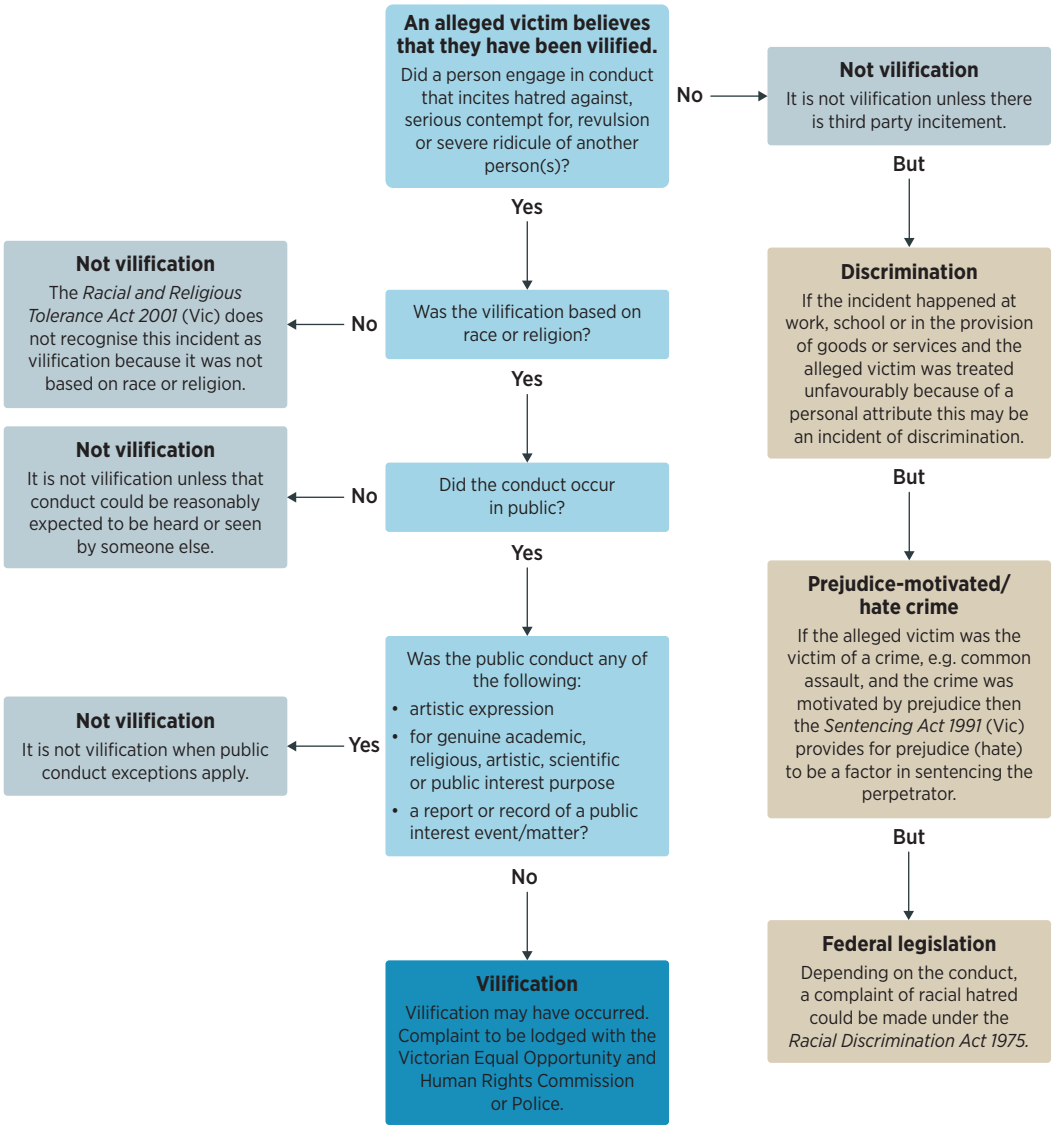
25 Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020, p. 8.

26 Ethnic Communities' Council of Victoria, *Submission 15*, received 19 December 2019; Uniting Church Australia, *Submission 36*, received 23 December 2019; Liberty Victoria and St Kilda Legal Services's LGBTIQ Legal Service, *Submission 39*, received 17 January 2020.

27 Jacinta Lewin, Chair, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 39.

28 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 50.

Figure 5.1 The steps to substantiate a claim of unlawful vilification under the RRTA



Source: Adapted from the *Racial and Religious Tolerance Act 2001 (Vic)*, *Equal Opportunity Act 2010* (Vic), *Sentencing Act 1991* (Vic) and *Racial Discrimination Act 1975* (Cth), Victorian Legislative Assembly, Legal and Social Issues Committee, 2020.

5.3.1 High threshold for incitement test

Stakeholders were frank in their criticism of the high threshold for vilification under the RRTA. In their joint submission, Liberty Victoria and the LGBTIQ Legal Service stated that the incitement test for vilification is inappropriate because it sets the bar too high and is too difficult to prove.[29] In its submission, Thorne Harbour Health addressed the issue of balancing freedom of expression and freedom from vilification, stating that while the RRTA supports a 'high bar in the context of limiting public speech and expression... we believe the incitement test for meeting this bar is currently too high

29 Liberty Victoria and Service, *Submission 39*, p. 12.

and difficult to prove'.[30] The Victorian Gay and Lesbian Rights Lobby (VGLRL) similarly stated that the test 'involves a level of proof almost impossible to satisfy'.[31]

The high threshold for vilification was raised as a contributing factor to the low numbers of complaints and convictions.[32] As explained by HRLC in its group submission with other organisations:

> In the 17 years the RRTA has been in effect, few complaints of vilification have been made pursuant to these sections. This is because of a myriad of factors, which are compounded by a legal test that sets the bar too high by requiring a person to prove that a third party has been incited to hatred.[33]

In contrast, the Committee heard from other stakeholders who were more broadly opposed to the RRTA, including the civil provisions, on the basis that the Act adversely impacts on freedom of expression.[34] For these stakeholders, particularly the Institute of Public Affairs , there was a general concern regarding the subjectivity in determining what constitutes unlawful vilification:

> While the Victorian RRT Act does provide a definition for what vilification means, the definition fails to provide meaningful specificity as to what it means in practice. A restriction on conduct which is likely to incite hatred or severe ridicule for instance fails to establish an objective standard for unlawful speech.[35]

For most other stakeholders, however, they expressed greater concern regarding the legal effectiveness of the RRTA. In particular, many acknowledged the difficulty for complainants to prove the effect of the vilifying conduct on an 'often-unidentifiable' audience, and that the conduct was capable of inciting hatred among a third party.[36] Bill Swannie, Lecturer at the Victoria University School of Law and Member of the Law Institute of Victoria's (LIV) Human Rights Committee, stated in his individual submission that 'incitement is a complex requirement for a complainant to prove' and that 'it is a term borrowed from the criminal law and requires a very high, or quasicriminal, standard of conduct'.[37] When he appeared at the public hearing on behalf of LIV, he restated LIV's position from its submission:

> Our submission argues that it is a very difficult test to satisfy, whether it is online material or whether it is material published in another format. We argue that the incitement test on which the current legislation is based has two main problems. Practically it is very difficult for people to enforce that and to prove the incitement

30 Thorne Harbour Health, *Submission 34*, p. 12.

31 Victorian Gay and Lesbian Rights Lobby, *Submission 27*, received 20 December 2019, p. 15.

32 Greater Dandenong City Council, *Submission 29*, received 20 December 2019, p. 5.

33 Human Rights Law Centre, et al., *Submission 47*, p. 13.

34 Institute of Public Affairs, *Submission 18*, received 19 December 2019; Australian Jewish Association, *Submission 55*, received 12 February 2020; Australian Christian Lobby, *Submission 35*, received 21 December 2019.

35 Institute of Public Affairs, *Submission 18*, p. 4.

36 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 5.

37 Bill Swannie, Senior Lecturer, Victoria University College of Law and Justice, *Submission 22*, received 20 December 2019, p. 3.

> requirement, because it does require proving the response which is experienced by a third party—so not the target of the vilification but a third party to the speech.[38]

Victoria Legal Aid (VLA) and the Victorian Aboriginal Legal Service (VALS) similarly stated in their joint submission that the existing high threshold often discourages their clients from making a vilification complaint:

> Whether the conduct happens on the street or in a newspaper it is very difficult to prove that racial or religious comments incite others to hatred. In the absence of evidence that people were incited in practice it is close to impossible to adduce evidence that people would have been incited by the conduct.[39]

In a public hearing, Professor Beth Gaze from the Australian Discrimination Law Experts Group (ADLEG) explained the difficulty in substantiating a claim:

> One of the things that we did raise in the submission was the actual formula that is used to define the prohibited conduct. So the Victorian Bill, like a lot of the other state and territory bills, uses the formulation of incitement to serious harassment and so on. That is actually looking to the audience; to prove it you have to actually prove that somehow the audience for the speech is being affected in that way, and this is quite a difficult thing to prove. What evidence would one bring forward to prove that? So it is perhaps one of the reasons why there has been so little enforcement of this, because even if someone is concerned and they go off to a legal service or a lawyer to get advice, the answer will be, 'Well, how would you prove that standard anyway?.'[40]

In its submission, VEOHRC referred to the Victorian Court of Appeal's determination of the civil test for vilification in *Catch the Fire Ministries Inc vs Islamic Council of Victoria Inc* [2006] (Catch the Fire). The test considers 'whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case'.[41] The Victorian Court of Appeal also determined that this includes 'the characteristics of the audience to which the words or conduct are directed and the historical and social context in which the words are spoken, or the conduct occurs'.[42] This requirement to identify the relevant audience, a hypothetical third party, is also highly problematic, particularly if the complainant does not personally know the audience. VEOHRC indicated this places a significant burden on the complainant to demonstrate that the respondent's conduct was 'capable' of inciting an ordinary member of that audience.[43]

As noted by Gemma Cafarella, the Chair of the Government Regulation and Equality Committee at Liberty Victoria, the definition of vilification is somewhat divorced from the reality of public understanding of the term, making it difficult for people to satisfy the legal threshold:

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38 Bill Swannie, Member, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 40.

39 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 8.

40 Professor Beth Gaze, Professor, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 16–17.

41 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 51.

42 Ibid.

43 Ibid.

> At the moment the definition of vilification is somewhat divorced from what we think most people think of when they hear the word 'vilification' and also from the pretty straightforward dictionary meaning of vilification …it really focuses on some quite hypothetical third party. Is the act or words, or whatever it is, something that actually kind of incited something in others?[44]

The cases detailed in Box 5.3, drawn from VEOHRC's submission, reflect the significant difficulty for complainants to substantiate a claim of vilification under the RRTA.

BOX 5.3: Vilification cases

Sisalem v The Herald & Weekly Times Ltd

In *Sisalem v The Herald & Weekly Times Ltd* [2006] VCAT 1197, shortly after terrorist attacks in Paris, the Herald Sun published a front-page article titled 'Islam must change', quoting politicians' views on the link between Islam and terrorism. The applicant argued the article claimed his religion was 'involved in serious crimes without any proof' and as a result, people had been encouraged to 'hate' him and 'discriminate and act violently against [him] because of [his] religion'. The applicant also claimed that as a result he had 'suffered humiliation, embarrassment, fear, isolation, loss of self-esteem, stress, anxiety and depression'. VCAT noted that:

> I have no doubt that Mr Sisalem regards the comments made by the politicians quoted in the article as inaccurate, unfair, unbalanced and deeply offensive. I also have no doubt that many other members of our community (Muslim and non-Muslim alike) share his views. I also accept that Mr Sisalem was considerably distressed by the publication of the article and that, as a Muslim, he holds genuine concerns for his personal safety.

However, VCAT found that this was not enough to establish a breach of section 8 of the RRTA because, following the reasoning in Catch the Fire, the applicant had not provided sufficient evidence to show that the 'natural and ordinary effect of the publication of the article to an ordinary reader of the Herald Sun was to incite hatred against, serious contempt for, revulsion or severe ridicule of Muslims'.

Bennett v Dingle

In *Bennett v Dingle* [2013] VCAT 1945, the respondent told the complainant that he was a 'big fat Jewish slob' and that 'Hitler was right about you bastards' while they were walking their dogs at a local park. VCAT assumed the relevant audience was 'the ordinary member of the class of persons being non-Jewish members of the public present in the park when the words were uttered'. VCAT concluded even on a generous interpretation of who the audience was (that is, anyone in the park), it was doubtful that 'the ordinary non-Jewish person would perceive the words as going beyond venting' (particularly when the words were directed at the complainant).

Source: Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, pp. 51–52.

44 Gemma Cafarella, Chair, Goverment Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 2.

These cases reflect some of the limitations of the Act as perceived by stakeholders, particularly in the context of proving incitement. As reflected in this section, the threshold of vilification was discussed at length during the inquiry, and there was less commentary on the specific legal elements that define vilification: 'hatred against, serious contempt for, or revulsion or severe ridicule'. The case of *Khalil v Sturgess* provides a useful example of the seriousness of the conduct required for it to be deemed unlawful vilification, as explained in the VCAT ruling:

Their comments by their nature incite serious contempt, severe ridicule and hatred against the Khalils. I am satisfied that the comments were made because of the Khalils' colour and Arabic origin. This applies not only to those comments which were expressly racial in nature, but also to the obscenities, sexual references and other abuse which the respondents directed to the Khalils.[45]

In contrast, the Committee notes that in the case of *Bennet v Dingle*, the respondent's conduct was identified in the VCAT ruling as 'venting'.

The Committee is of the view that while there is overwhelming evidence to support readjusting the high threshold of the incitement test, the elements used to describe vilification are appropriate and should remain robust to uphold the legitimacy of the legislative framework.

Lowering the threshold

To address the issues raised above, inquiry stakeholders proposed reforms to lower the high legal threshold for the civil provisions.[46] The two key proposals were to amend the current test of 'must not engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons' to incorporate either:

- conduct that 'expresses or is reasonably likely in the circumstances to incite'[47] or
- conduct that 'is likely to incite'.[48]

The first option was originally proposed in the 2015 ACT Law Reform Advisory Council's *Inquiry into the Discrimination Act 1991*:

> prohibit not incitement, but expression, on the basis that conduct that expresses hatred etc is likely to incite those feelings. This would require a complainant to prove only that the conduct occurred, and was the approach taken in the original draft of the NSW legislation. Because there will be occasions when the conduct does not directly express hatred etc but is, in the circumstances, likely to incite it, both approaches could operate concurrently.[49]

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45 *Khalil v Sturgess* [2005] VCAT 2446, paras 28–50.

46 *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 8.

47 See, for example, Human Rights Law Centre, et al., *Submission 47*, p. 13.

48 See, for example, Victorian Gay and Lesbian Rights Lobby, *Submission 27*, p. 3.

49 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 66.

There was broad support for this approach by several stakeholders.[50] In its joint submission, VLA and VALS stated that the test should be amended in this way to remove the barrier for complainants to prove that vilification has occurred.[51] Similarly, VEOHRC explained in its submission that this approach would ensure that the law captures conduct that expresses 'strong negative emotions' based on a protected attribute that is capable of incitement, without needing to prove a third party was actually incited. It also stated that in this test the respondent's conduct is the focus rather than that of a third party or audience.[52] While the Committee believes this option has merit, it questions whether it could be confused as a harm-based test with users to interpret the term 'expresses' as meaning direct conduct between two people. A complementary harm-based provision is discussed in section 5.3.2.

The Committee understands that the second option to amend the word 'incites' to 'is likely to incite' will reflect existing judicial interpretation of sections 7 and 8, which has established that a third party does not have to be incited for conduct to be deemed unlawful vilification. Rather, the conduct only needs to be 'capable' of inciting others. As stated in the VCAT ruling of *Australian Macedonian Advisory Council Inc v LIVV Pty Limited* (2011), the 'conduct does not have to "succeed" in provoking a particular response for a breach to occur'.[53]

The Committee also notes that incorporating the wording 'is likely to incite' will ensure that the standard of proof for civil vilification does not exceed the standard of proof for serious vilification. Sections 24 and 25 currently state that a person must not intentionally engage in conduct that the offender knows is 'likely to incite'.[54] In its submission, Thorne Harbour Health indicated its support for this amendment, noting that this was originally proposed in the Racial and Religious Tolerance Amendment Bill 2019 (Vic):

> While we support a high bar in the context of limiting public speech and expression (i.e. serious contempt, revulsion or serious ridicule), we believe the incitement test for meeting this bar is currently too high and difficult to prove. We note that the private member's bill introduced by Fiona Patten MLC seeks to alter the incitement test by amending section 7(1) of the Act to change "incites" to "is likely to incite".
>
> While we support a high bar in the context of limiting public speech and expression (i.e. serious contempt, revulsion or serious ridicule), we believe the incitement test for meeting this bar is currently too high and difficult to prove. We note that the private member's bill introduced by Fiona Patten MLC seeks to alter the incitement test by amending section 7(1) of the Act to change "incites" to "is likely to incite".[55]

The Committee acknowledges the concerns raised by stakeholders regarding the particular difficulty in proving incitement of a hypothetical third party. However, it

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50 Ibid., p. 9; Human Rights Law Centre, et al., *Submission 47*, p. 13; Law Institute Victoria, *Submission 46*, received 31 January 2020, p. 2; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 9.

51 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 9.

52 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 66.

53 *Australian Macedonian Advisory Council Inc v LIVV Pty Limited* (2011) 1647 VCAT, 65.

54 *Racial and Religious Tolerance Act 2001* (Vic) ss 24, 5.

55 Thorne Harbour Health, *Submission 34*, p. 12–13.

believes that incorporating the wording 'is likely to incite' will reduce this burden while also clarifying the standard of proof to reflect current judicial interpretation. It is also essential that the focus on the third party remain the priority in an amended incitement test, and that a complementary test employ a broader focus as discussed below.

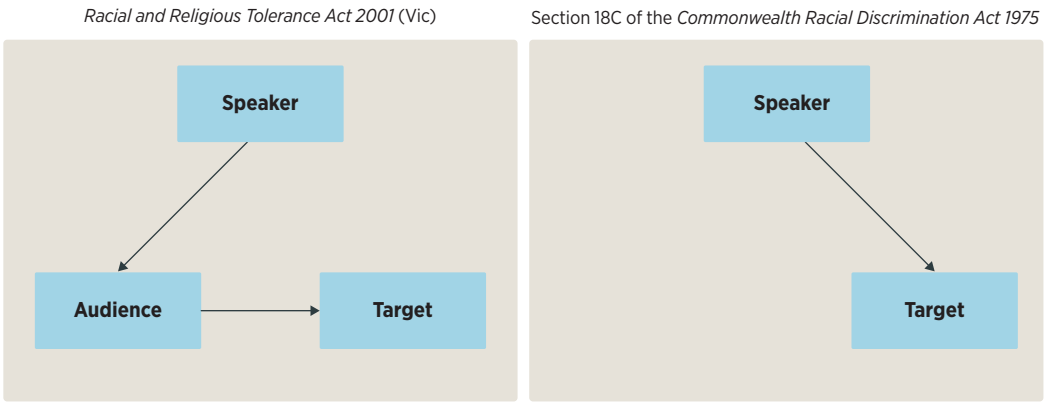
RECOMMENDATION 8: That the Victorian Government lower the civil incitement test from 'conduct that incites' to 'conduct that is likely to incite'.

5.3.2 Considering the harms of vilifying conduct

A related criticism regarding the RRTA is that it does not place any emphasis on the harms experienced by victims of vilification. The Committee understands that this undermines the RRTA's ability to deliver on its purposes of promoting social cohesion and providing redress to victims who suffer from the harmful impacts of vilification. Numerous stakeholders recommended that a harm-based provision be introduced to the RRTA to complement the incitement-based provision.[56] Such models already exist in the Commonwealth *Racial Discrimination Act 1975* (RDA) and Tasmania's *Anti-Discrimination Act 1998* (ADA).

Bill Swannie from Victoria University provided a diagram in his submission comparing the RRTA's incitement-based regime with the harm-based regime of the RDA.[57]

Figure 5.2 Comparing operation of RRTA with RDA's section 18C



Source: Adapted from Bill Swannie, Lecturer of Law, Victoria University, *Submission 22*, received 20 December 2019, p 8.

56 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*; Bill Swannie, *Submission 22*; Liam Bywater, *Submission 20*, received 20 December 2019; Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020; Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020; Casey Multi Faith Network, *Submission 24*, received 20 December 2019; Greater Dandenong City Council, *Submission 29*; Human Rights Law Centre, et al., *Submission 47*; Islamic Council of Victoria, *Submission 45*, received 31 January 2020; Jewish Community Council of Victoria, *Submission 26*, received 20 December 2019; Law Institute Victoria, *Submission 46*; Liberty Victoria and Service, *Submission 39*; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*; Victorian Gay and Lesbian Rights Lobby, *Submission 27*.

57 Bill Swannie, *Submission 22*, p 8.

According to Bill Swannie, the diagram demonstrates that harm-based anti-vilification laws are 'explicitly victim-focused',[58] whereas the primary focus of incitement-based laws is to address the behaviour of an incited third party. He argued that on this basis, the 'incitement requirement in the RRTA is not consistent with the stated purpose of protecting human dignity'.[59] VEOHRC stated in its submission that by only capturing incitement, the RRTA fails to consider 'the harm caused to individuals, target communities and broader society'.[60]

Professor Katharine Gelber, Head of School of the School of Political Science and International Studies, Faculty of Humanities and Social Sciences at the University of Queensland, explained to the Committee that while Victoria's anti-vilification laws aim to prohibit vilifying conduct and provide redress to victims, in her opinion—and in the opinion of other experts globally—the primary purpose of such laws is more broadly to ameliorate, prevent and remedy the various and substantive harms caused by vilification.[61] These harms are discussed in detail in Chapter 3.

The Committee also heard that people understand vilification to mean expressions of hatred or abuse, rather than third-party incitement.[62] This is also how most people experience vilification. Several stakeholders advised that a harm-based provision would better reflect this understanding and experience in the legislation and provide formal avenues for redress, potentially protecting more Victorians from the harms of vilification.[63] This is because, as explained by VEOHRC in its submission, a harm-based test is easier to satisfy than an incitement test:

> Under a harm-based test, the evidentiary burden on the complainant is not as onerous. The complainant is not required to identify an audience or prove that an ordinary member of that audience was incited to strong negative emotions as a result of the respondent's conduct. Instead, the complainant's evidentiary burden focuses on the respondent's conduct and whether it was reasonably likely to cause harm.[64]

Chapters 3 and 4 detailed numerous examples from the inquiry evidence of people experiencing vilification that would not be regarded as such under the RRTA's current incitement regime but would under a harm-based provision.[65] In consultations with VEOHRC about this inquiry, Dr Michael Akindeju from the Ballarat African Association stated:

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58 Ibid., p. 3.

59 Ibid.

60 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 5.

61 Professor Katharine Gelber, *Transcript of evidence*, p. 16.

62 Ethnic Communities' Council of Victoria, *Submission 15*, p. 3; Gemma Cafarella, *Transcript of evidence*, p. 2; Jamie Gardiner, Member, Government Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 4; Greater Dandenong City Council, *Submission 29*, p. 5; Professor Beth Gaze, *Transcript of evidence*, p. 17–18.; Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 8.

63 Human Rights Law Centre, et al., *Submission 47*, p. 14; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 9; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, p. 8; Law Institute Victoria, *Submission 46*, p. 2; Islamic Council of Victoria, *Submission 45*, p. 5. Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 67.

64 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 67.

65 Both people with protected and unprotected attributes under the RRTA.

> [As the victim/applicant] I can't tell what the other [third person] might think, feel or react to the vilification they might have heard. But I can tell what the impacts on myself are which sometimes might include isolation, damage to reputation, damage to community standing, loss of employment or relationships, or even suicidal thoughts. I am the one to seek recourse, and therefore only appropriate to base my arguments on my experience instead of the impact vilification conduct does to another person.[66]

The Committee's view is that incorporating a harm-based test would enhance the legal effectiveness of the RRTA, by ensuring all forms of vilification are prohibited. It would also enhance the operational effectiveness of the RRTA by facilitating more enquiries and complaints and thereby increase the utilisation and awareness of the Act. Most importantly, the harm-based provision would shift the focus to the victim and the harms they experience as a result of the vilifying conduct.

RECOMMENDATION 9: That the Victorian Government introduce a new civil harm-based provision to assess harm from the perspective of the target group.

Formulating a harm-based test

In terms of formulating the harm-based test, the Committee considered the following two proposals:

1. Make unlawful an act that 'is reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate another person or group of people', similar to the harm-based provisions contained in the RDA and ADA.
2. Make unlawful conduct that 'a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons'.

Both options aim to achieve the same outcome and comprise a reasonableness test to objectively assess the conduct from the perspective of a reasonable member of the target group. For example, if a person was vilified for their disability, the conduct would be judged against a 'reasonable' person with that same disability.

The difference between options one and two is the terms used to describe vilification, that is, the elements of vilification. Option one is primarily based on section 18C of the RDA, which has been operational since 1995 and tested in Australian courts. It has been subject to significant debate in recent years as to whether it adequately balances freedom of speech and freedom from vilification, as the terms 'offend and insult' are sometimes perceived to set a low threshold for vilification that unreasonably limit freedom of speech. For example, VEOHRC acknowledged in its submission that 'in

66 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 67.

recent years, the terms "offend" and "insult" have been criticised for setting the bar too low'.[67] However, it advised that the test has not been interpreted this way in practice, and encouraged the Committee to recommend that the Victorian harm-based test should provide the same level of protection as existing harm-based laws, which use the elements of offend, insult, humiliate or intimidate.[68]

The Committee acknowledges that judicial interpretation of section 18C, specifically regarding the terms offend and insult, has been robust. In particular, such interpretation has clearly indicated that the threshold only captures conduct with 'profound and serious effects, not to be likened to mere slights'.[69] Therefore, frivolous claims are not upheld. Further, 'offend' is to be read consistently with the words 'insult', 'humiliate' and 'intimidate'.[70] Stakeholders told the Committee that it is important to consider how this provision has been judicially interpreted when considering the proposal for inclusion of a harm-based test. According to Professor Gelber from the University of Queensland, section 18C is narrowly drafted, has been narrowly interpreted by the courts and the several high-profile cases relating to section 18C do not reflect how complaints under the provision are typically settled.[71]

In its *Inquiry into freedom of speech in Australia* (*Federal Inquiry*)—which considered the operation of section 18C of the RDA, among other matters—the Parliamentary Joint Committee on Human Rights examined the provision's threshold and exceptions, noting that it 'received substantial evidence that there was confusion about the meaning and scope of section 18C'.[72] It also remarked that from a 'rule of law perspective there is a persuasive argument that the meaning of the law should be sufficiently apparent from the words of the legislation'.[73]

The Committee acknowledges that while the elements 'offend and insult' have been interpreted narrowly by courts, the everyday meaning of these terms does not convey the serious conduct they prohibit, thereby reducing their clarity and accessibility. The Federal Inquiry's final report stated that the lack of clarity on the face of the legislation has 'significant implications for understanding what conduct is prohibited … and what is protected, particularly as the words 'offend' and 'insult' in section 18C are not applied as generally understood in common usage'.[74] The Federal Inquiry's final report concluded that there is a 'significant and substantial case' to address the confusion created by the two elements.[75]

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67 Ibid., p. 68.

68 Ibid., p. 69.

69 Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 1007 FCA 16.

70 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 68.

71 Professor Katharine Gelber, *Transcript of evidence*, p. 17.

72 Parliamentary Joint Committee on Human Rights, *Inquiry into Freedom of speech in Australia: Final Report*, Parliament of Australia, 2017, p. 17.

73 Ibid., p. 48.

74 Ibid.

75 Ibid.

As stated earlier, the Committee believes that strengthening Victoria's civil anti-vilification provisions requires prohibiting a continuum of conduct, including 'conduct that causes significant harm to individuals alongside conduct that incites others'.[76] It is also of the view that Victoria has the opportunity to take an innovative approach in its drafting of a harm-based provision that is clear and accessible on its face to those who seek its protections. The Committee believes that the divergence between the common meaning of the elements of section 18C and how the provision has been interpreted makes it challenging to educate the community about the law.

In its joint submission, Liberty Victoria and the LGBTQI Legal Service proposed that the definition of vilification focus on the risk of harm to the affected person, such as:

> conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or a class of persons.[77]

This option was also supported by the VGLRL on the basis that it would retain a high bar for restricting freedom of speech.[78] The VGLRL also endorsed prohibiting conduct that is 'reasonably likely to harm', drawing from *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria,* stating that this:

> would involve an objective test determining if the harm done by the conduct was reasonably foreseeable by the respondent. This approach avoids casting the net too widely, unfairly catching those who could not [reasonably] have anticipated that their conduct might cause harm.[79]

In its submission, ADLEG indicated its support for a harm-based provision similar to that in section 18C, however, proposed amending the words used to describe the harm to be more specific. For example, in drawing on the specific terms used in sections 7 and 8 of the RRTA, ADLEG proposed that:

> these or similar terms could be drawn on in drafting an updated provision based on the structure of s 18C of the RDA, which could include: 'to threaten, intimidate, humiliate, seriously insult, ridicule or denigrate, or express serious contempt for the targeted groups or individuals.'[80]

To that end, the Committee supports the formulation of option two for inclusion of a harm-based test, which comprises elements that more clearly describe prohibited and permissible conduct than those in section 18C of the RDA. Option two aims to avoid the perceived shortcomings of section 18C by minimising the gap between the legislation as drafted and its judicial interpretation. It would also establish a high threshold that safeguards the legitimacy and effectiveness of Victoria's anti-vilification laws, by fairly balancing the right to freedom of expression with the right to freedom from vilification.

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76 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 50.

77 Liberty Victoria and Service, *Submission 39*, p. 12.

78 Victorian Gay and Lesbian Rights Lobby, *Submission 27*, p. 9.

79 Ibid., p. 8.

80 Australian Discrimination Law Experts Group, *Submission 44*, p. 7.

The Committee acknowledges that the new formulation in this option would not benefit from the existing body of relevant interpretive jurisprudence. However, this can be overcome, including through strategic litigation as recommended in Chapter 8, that would contribute to setting new precedents.

RECOMMENDATION 10: That the Victorian Government formulate the harm-based provision to make unlawful conduct that 'a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons'.

Harmonising the harm-based provision and section 18C

In recommending that a harm-based provision be incorporated into Victoria's anti-vilification legislative framework, the Committee is aware that in the context of racial vilification, conduct could potentially breach both the Victorian provision and the RDA's section 18C. In these circumstances, the complainant will need to choose which jurisdiction to pursue a complaint in, as provided under section 6A of the RDA.[81] It is important to note that a new harm-based provision would not preclude Victorians from pursuing a complaint under Commonwealth law. Rather, Victorians will have recourse for justice for harm-based racial vilification in both jurisdictions and recourse for justice in Victoria for other protected attributes if the Victorian Government implements recommendation 1.

5.4 Clarifying public conduct exceptions

5.4.1 Religious purposes

The RRTA contains public conduct exceptions to protect Victorians' right to freedom of expression, which is balanced against Victorians' right to live free from vilification. Public conduct exceptions also importantly demonstrate that anti-vilification laws are not arbitrary state laws intended to stifle public debate.

In its submission, the Victorian Government addressed the exceptions to unlawful vilification, stating that they are necessary to allow people to express themselves, and that prohibiting vilification without unjustifiably limiting peoples' rights is a balancing act:

> The definition of 'hate conduct' must preserve the freedom of Victorians to express themselves, while at the same time making sure that this expression is not at the expense of the rights of individuals to participate freely in their society and community without fear of hateful violence or abuse. Living in an open, democratic society requires the recognition that we all have rights and responsibilities to one another.[82]

81 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 24.

82 Victorian Government, *Submission 13*, p. 18.

Under section 11 of the RRTA, public exceptions apply to 'statements, publications, discussions or debates for genuine academic, religious, artistic, scientific purpose or any purpose in the public interest'.[83]

A number of stakeholders raised concern with the meaning of religious purpose and the extent that people can rely on it to avoid liability under the RRTA.[84] Religious purpose is defined in section 11(2) of the Act as including, 'but is not limited to, conveying or teaching a religion or proselytising'.[85]

The Committee is aware that this definition is different to that in the Charter, which is drawn from the International Covenant on Civil and Political Rights (ICCPR).[86] Under the Charter, everyone has the right to freedom of religion, including:

> the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.[87]

The issue of how people lawfully manifest their religious beliefs in light of others' human rights has been addressed in case law and provoked an amendment to the RRTA. In 2006, section 11(2) was inserted into the RRTA after the decision of *Fletcher v Salvation Army* which confirmed that proselytising is a genuine religious activity as long as it does not incite hatred in others.[88] Further, in Catch the Fire, Supreme Court Justice Neave argued that tolerating proselytising aligns with the RRTA's aim to balance freedom of expression and freedom from vilification:

> It would be inconsistent with this aim to interpret the legislation so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.[89]

Despite these rulings, VEOHRC indicated in its submission that the religious purpose exception in the RRTA is too broad and would not necessarily protect groups from vilifying conduct.[90] In consultations with stakeholders, VEOHRC heard that:

> the 'religious purpose' exception arguably covers any public expression of a religious belief with the potential to significantly harm some groups of people in Victoria, including LGBTIQ people and women (if the law is extended to protect these groups).[91]

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83 *Racial and Religious Tolerance Act 2001* (Vic) s 11.

84 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 9; Law Institute Victoria, *Submission 46*, p. 3; Human Rights Law Centre, et al., *Submission 47*, p. 16; Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 16.

85 *Racial and Religious Tolerance Act 2001* (Vic) s 11(2).

86 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art. 18.

87 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14(1)(b).

88 *Fletcher v Salvation Army* (2005) 1523 VCAT, 7.

89 Justice Neave, COA, *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) VSCA 284, para 173.

90 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 73.

91 Ibid., p. 54.

VEOHRC concluded that in these circumstances, the public exception does not:

> strike an appropriate balance between protecting the right to freedom of expression and protecting the rights of people who disproportionately experience hate conduct.[92]

Similarly, Professor Gelber from the University of Queensland raised in her evidence, that there are challenges to the operationalisation of vilification laws and religion because it is very difficult in practice to differentiate proselytising, speaking about one's faith and speaking in a way that vilifies individual adherents of that faith.[93]

VEOHRC proposed harmonising the meaning of religious purposes under the RRTA with the meaning in the Charter—worship, observance, practice and teaching—to ensure the religious purpose exception reflects the limited ability for a person to manifest a religious belief under human rights law.[94]

HRLC in its group submission with other organisations, VLA/VALS and the Australian Muslim Women's Centre for Human Rights similarly supported narrowing the definition of religious purpose to align with the ICCPR.[95] LIV also supported this wording, with the inclusion of 'genuine': 'any genuine manifested religion or belief in worship, observance, practice and teaching'.[96]

In contrast, Sean Mulcahy, a Committee Member of VGLRL advised the Committee of VGLRL'S support for the existing public conduct exceptions. In reference to the RRTA Bill 2019 that proposed their removal, Sean Mulcahy argued that this is unnecessary:

> In particular, the Racial and Religious Tolerance Amendment Bill suggested removing the provision on proselytising, but we believe that if the term 'proselytising' is given its ordinary meaning and if it is done in good faith, no form of proselytising should include the vilification of LGBTI people.[97]

Based on the evidence received, the Committee believes there is merit in reviewing whether the religious purpose definition under section 11(2) is still fit for purpose. This will be particularly necessary if the Victorian Government expands the protected attributes covered by anti-vilification laws, which may create new challenges to balancing different rights. For example, VEOHRC advised that any reform process should consider the concerns of LGBTIQ+ communities regarding the impact of the religious exceptions.[98]

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92 Ibid.

93 Professor Katharine Gelber, *Transcript of evidence*, p. 18.

94 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 54.

95 *International Covenant on Civil and Political Rights*, art. 18.

96 Law Institute Victoria, *Submission 46*, p. 3; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 11, Recommendation 4.

97 Sean Mulcahy, Committee Member, Victorian Gay and Lesbian Rights Lobby, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 27.

98 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 73.

The Committee is also aware of the benefit in harmonising the meaning of religious purpose in anti-vilification laws with the Charter, including to clarify what genuine religious purpose can be engaged in reasonably and in good faith. It is also important that the Victorian Government consider how this will impact the existing characterisation of religious activities, such as proselytising, which is deemed a genuine religious purpose.

RECOMMENDATION 11: That the Victorian Government explore, in consultation with LGBTIQ+ and religious organisations, narrowing the religious purpose exception in section 11(2) to align with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Committee was also advised by inquiry stakeholders of the need to insert the word 'genuine' into the public interest exception in section 11(1)(b)(ii): any *genuine* purpose that is in the public interest.[99] The Committee agrees that this is a straightforward amendment that would align the public interest exception with the artistic, scientific, academic and religious exceptions in section 11(1)(b)(i).

RECOMMENDATION 12: That the Victorian Government amend the public interest exception in section 11(1)(b)(ii) to include the word 'genuine': any *genuine* purpose that is in the public interest.

5.4.2 Defining public conduct

Throughout the inquiry, stakeholders discussed the meaning of 'public' and 'private' conduct, mainly in relation to the display of a Nazi flag on a private property in Beulah that was visible to members of the public. The RRTA does not currently define the meaning of a public act, rather, it includes a private conduct exception that allows people to avoid liability if they engaged in conduct in which it was reasonable that they were heard or seen only by themselves.[100] In particular, section 12 states:

> (1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.
>
> (2) Subsection (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.[101]

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99 *Racial and Religious Tolerance Act 2001* (Vic) s 11; Human Rights Law Centre, et al., *Submission 47*; Australian Muslim Women's Centre for Human Rights, *Submission 49*.

100 *Racial and Religious Tolerance Act 2001* (Vic) s 12.

101 Ibid., s 12.

Some Australians jurisdictions define what constitutes a public act, for example, Queensland defines it as including:

> any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.[102]

Further, in NSW, section 93Z(5) of the *Crimes Act 1900* (NSW) defines 'public act' for both civil and criminal provisions:

> ***public act*** includes—
>
> (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and
>
> (b) any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public, and
>
> (c) the distribution or dissemination of any matter to the public.
>
> For the avoidance of doubt, an act may be a public act even if it occurs on private land.[103]

In a public hearing, Bill Swannie of Victoria University and LIV advised that it is important that the legislation 'distinguish between private conduct on the one hand and public conduct on the other'.[104] He explained that there are advantages and disadvantages to using either a detailed or simple definition, although ultimately, it is important to provide a clear distinction between the two realms, especially to maintain free speech principles.[105]

In a public hearing, Jennifer Huppert, the President of the Jewish Community Council of Victoria, explained the fundamental importance of distinguishing between public and private conduct:

> There has obviously got to be a difference between public and private acts, and it is difficult because we have to balance freedoms. If behaviour is private, I think that many people would find that inimical to—against our expression of freedoms, to limit private behaviours.[106]

Numerous stakeholders advocated to amend the RRTA to include a definition of a public act, and specifically, the NSW definition.[107] Monique Hurley, Senior Lawyer at HRLC supported broadening the definition to one similar to NSW's so as to 'clarify that

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102 *Anti-Discrimination Act 1991* (Qld) s 4A(1)(b).

103 *Crimes Act 1900* (NSW) s 93Z(5).

104 Bill Swannie, *Transcript of evidence*, p. 39.

105 Ibid.

106 Jennifer Huppert, President, Jewish Community Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 19.

107 Human Rights Law Centre, et al., *Submission 47*, p. 16; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 10; Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 16; Law Institute Victoria, *Submission 46*, p. 10; Bill Swannie, *Transcript of evidence*, p. 39.

prohibited conduct includes any form of communication, conduct or distribution or dissemination of material to the public'.[108] She further argued that it was significant because it would:

> clarify that conduct can constitute public conduct even if it occurs on private land. And so a provision like that would go some way potentially to banning displays of symbols like the Nazi swastika...[109]

The Committee supports this proposal and believes that it will further clarify the private conduct exception by explicitly stating that public conduct can occur on private land.

In his evidence to the Committee, Nicholas Butler highlighted that there are some circumstances where people involuntarily view vilifying material displayed on private land, such as in the case of the display of the Nazi swastika flag in Beulah.[110] The Committee's view is that this type of conduct is not genuinely private.

The Committee also believes that adopting the NSW definition will update the application of Victoria's anti-vilification laws to capture the dissemination of physical materials, and online communication and information. The RRTA currently covers some electronic transmission of material, however, the NSW definition includes a specific reference to social media, which, in the years following the enactment of the RRTA, has grown exponentially as the primary medium of online communication for billions of people.

RECOMMENDATION 13: That the Victorian Government adopt the definition of 'public act' in s93Z(5) of the *Crimes Act 1900* (NSW), and ensure it apply to civil and criminal incitement-based and harm-based provisions in Victoria's anti-vilification laws.

108 Monique Hurley, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 33.

109 Ibid., p. 33–4.

110 Nicholas Butler, public hearing, Melbourne, 12 March 2020, *Transcript of evidence*, p. 42.

6 Improving accessibility and enforcement

As discussed in Chapter 5, the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) has been underutilised since it was enacted. Inquiry stakeholders told the Committee that it has failed to deliver on its purpose of promoting racial and religious tolerance due to limited legal effectiveness, and issues regarding accessibility and enforcement have hampered its ability to provide redress to victims. The Committee also understands that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has fewer powers in regulating vilification matters compared to discrimination, resulting in a greater burden on individuals to enforce the law.

This chapter explores how to improve accessibility to Victoria's anti-vilification laws in order to facilitate more complaints and resolution of disputes, in addition to shifting the burden of enforcement from individuals to VEOHRC. In particular, this Chapter discusses:

- incorporating the RRTA into the *Equal Opportunity Act 2010* (Vic) (EOA) and
- enhancing VEOHRC's regulatory and enforcement powers.

6.1 Improving accessibility to Victoria's anti-vilification laws

The Victorian Government enacted the state's first EOA in 1977, which addressed discrimination based on sex and marital status. The Act also created the Equal Opportunity Board and the Office of the Equal Opportunity Commissioner. When the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) was passed, the Commission's name was changed to the Equal Opportunity and Human Rights Commission.[1] The current EOA largely deals with discrimination and sexual harassment matters. VEOHRC's legislative basis is also found in the EOA, which outlines its establishment, structure and Board.

When the RRTA was developed, it was enacted as a standalone act rather than as a separate part to the EOA. This was to reflect its broader symbolic value in promoting a harmonious, multicultural society. As part of this inquiry, there has been strong community support for the laws to offer protections to other groups, in addition to race and religion. Consequently, many stakeholders questioned how the anti-vilification provisions could evolve into a more inclusive legislative framework. Many advocated to

1 Victorian Equal Opportunity and Human Rights Commission, *Our history*, <https://www.humanrights.vic.gov.au/about-us/our-history> accessed 8 December 2020.

streamline these protections by incorporating the civil provisions into the EOA and the criminal offences into the *Crimes Act 1958* (Vic) on the basis that it would:

- improve public accessibility of anti-vilification laws, as the EOA is more familiar to the general public
- streamline and provide a single equality legal framework, so that an incident can be considered in the context of all unlawful behaviour including vilification, discrimination or sexual harassment
- potentially streamline differences in VEOHRC's powers with regard to discrimination, sexual harassment and vilification
- ensure consistency with other jurisdictions who have incorporated vilification protections into anti-discrimination laws, including the Commonwealth, New South Wales (NSW), Queensland, Tasmania and the Australian Capital Territory (ACT).

The Committee understands that community awareness, knowledge and use of the EOA is far greater than awareness of the RRTA. This is reflected in the underutilisation of the RRTA, including the low number of enquiries, complaints and prosecutions, as discussed in Chapter 5. Various stakeholders told the Committee that moving the civil provisions to the EOA would increase public awareness of the laws among individuals, advocates and legal representatives, therefore strengthening access to and enforcement of the law. VEOHRC also advocated to incorporate the anti-vilification provisions into the EOA in order to establish a holistic suite of laws to promote equality in Victoria.[2] Maria Dimopoulas, the Deputy Chair of the Victorian Multicultural Commission, stated:

> By consolidating or streamlining the legislation people seem to have a much-heightened awareness of the *Equal Opportunity Act* as an instrument of social change and as an aspect or a tool to deal with discrimination; there seems to be greater awareness of that as a piece of law.[3]

Jacinta Lewin, the Chair of the Human Rights Committee at the Law Institute of Victoria (LIV), similarly commented that as a result of increased awareness, people will be better-placed to enforce their rights:

> One measure of these laws being accessible is a legal framework that the community is aware of, understands and is able to use to enforce their rights. Laws need to be practical. Accordingly, the LIV supports the proposal that the laws be incorporated into the *Equal Opportunity Act.*[4]

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2 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 5.

3 Maria Dimopoulos, Deputy Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 4.

4 Jacinta Lewin, Chair, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 39.

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, told the Committee that it was valuable to capitalise on existing community awareness of the EOA and the complaints process to facilitate better outcomes for people with vilification complaints:

> We know from the community that the EOA—the Equal Opportunity Act—is far better known and far better accessed than the RRTA, and we think that this would streamline Victoria's discrimination and vilification framework…our demographic data shows that we receive far more inquiries and complaints under the EOA—I mean it has a broader scope—but certainly also far more engagement with that legislation from Aboriginal and Torres Strait Islander people than the RRTA. So if we were to simplify the legislative framework, make it easier for people to access, make our services easier for people to access, that is one way to improving.[5]

The Committee heard some opposition to streamlining the anti-vilification protections into the EOA, with the Islamic Council of Victoria (ICV) advocating for the RRTA to be retained as a standalone Act for responding to vilification. In particular, the ICV believes that the Act holds symbolic importance to Victoria in promoting social cohesion and multiculturalism, and also provides clarity of purpose on reducing racial and religious vilification.[6] In a public hearing, Adel Salman, the Vice President of the ICV , told the Committee:

> We believe one of the essential requirements is that there is a laser-sharp focus on racial and religious vilification, because we believe that the situation has not improved since the legislation was put in place 17 or 18 years ago—in fact in our case it is now worse—and to remove that focus by broadening the list of attributes may mean that you actually have to make some amendments to the legislation to accommodate the broader list of protected attributes. We believe that that could then remove, as I said, the focus from it. Again, to be very clear, the ICV stands against vilification of any kind, but we do believe that this Act serves a purpose, and it is more required than ever that that Act continues and in fact it is strengthened.[7]

While also acknowledging the symbolic value of the Act, VEOHRC stated in its submission that this value has been undermined by the 'ineffectiveness of the RRTA in its current form'.[8] Other stakeholders proposed for the anti-vilification laws to remain in a standalone act but for the title to be amended to reflect the expansion of protected attributes, if implemented by the Victorian Government. As part of this, some stakeholders sought removal of the word 'tolerance' from the title so to promote respect for diversity, rather than merely tolerance.[9]

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5 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 27.

6 Islamic Council of Victoria, *Submission 45*, received 31 January 2020, pp. 7–8.

7 Adel Salman, Vice President, Islamic Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 42.

8 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 63.

9 ibid.; Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020, p. 12; Law Institute Victoria, *Submission 46*, received 31 January 2020, p. 2.

An alternative proposal presented to the Committee was to place protections for additional attributes in a separate act or in the EOA, while retaining the RRTA as a distinct act. This would ensure that the symbolic focus on racial and religious vilification remain.[10] The Committee considered this proposal but came to the conclusion that establishing two anti-vilification acts risks fragmentation, increased public confusion and complexity in implementation. It would also create issues in relation to permitting complaints made on the basis of more than one attribute as recommended in Chapter 5, for example race and gender, if these are contained in separate acts.

6.1.1 Streamlining anti-discrimination and anti-vilification provisions

The Committee notes some stakeholders who advocated for a standalone anti-vilification act, including the Australian Discrimination Law Experts Group (ADLEG), were of the view that discrimination and vilification are distinct issues and combining them within one framework may serve to undermine and confuse both sets of laws.[11] In its submission, ADLEG explained that while claims may overlap in some cases, there was a meaningful difference between how discrimination claims arise in the context of designated relationships compared to vilification claims that result from public conduct. Consequently, the inclusion of vilification provisions in the EOA could dilute discrimination provisions, especially because issues pertaining to free speech are not relevant in discrimination law:

> In contrast, the RRTA deals with almost all expression that is not private, and its central focus is resolving the tension between the right to equal respect and participation in society, and the right to freedom of expression. We are concerned that adding these provisions to the EOA could have the potential to dilute the EOA's central message and purpose by diverting attention to the conflict with freedom of expression which is not otherwise implicated in its main provisions.[12]

Professor Beth Gaze from ADLEG further explained in a public hearing that it would be easy for free speech objectives to inappropriately spill over into freedom of expression in workplaces, for example in cases of racial discriminatory speech.[13]

Nicole Shackleton, a PhD Candidate at La Trobe University, also indicated that she saw merit in maintaining separation between the discrimination and vilification provisions:

> Integrating it is nice and simple. It is all in the same place. While vilification and discrimination are linked, they are ultimately slightly different things. One is about violent language or incitement language that happens in any kind of public space, and one is about making sure that we can use employment services and services without discrimination equally. So there are differences which potentially might, particularly when you talk about the need to ensure that these laws are not being used against

10 Islamic Council of Victoria, *Submission 45*, p. 10.

11 Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020, p. 7.

12 Ibid., pp. 7–8.

13 Prof. Beth Gaze, Professor, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 18.

> historically marginalised groups, make it harder to put those protections in—if it was integrated rather than a standalone act…[14]

In contrast, Professor Katharine Gelber, Head of School at the School of Political Science and International Studies at the University of Queensland, advised in her evidence that it makes sense to co-locate the provisions because vilification should be understood as a form of discrimination:

> On the whole I think it is very helpful for civil vilification provisions to be co-located in law with other anti-discrimination provisions, because it makes it very, very clear that they are an anti-discrimination provision, that that is their raison d'être. So, I would be generally speaking in favour of the civil laws being co-located.[15]

Kristen Hilton from VEOHRC noted in her evidence that vilification occurs 'alongside a range of other unlawful conduct, like discrimination'.[16] VEOHRC also stated in its submission that in circumstances involving intersectional complaints of vilification, discrimination and harassment, co-location could:

> conciliate complaints together under one law. A similar process could apply at VCAT. A single equality framework would also make it easier for complainants to access and navigate the law.[17]

Establishment of a single equality legal framework in order to strengthen accessibility of anti-vilification laws and simplify the complaints system was considered by various stakeholders as key to co-locating the discrimination and vilification provisions. In a public hearing, Sean Mulcahy, Committee Member of the Victorian Gay and Lesbian Rights Lobby (VGLRL) described how incorporating the RRTA into the EOA could provide the community with a one-stop shop for the complementary legal regimes:

> I suppose we come from the perspective of community members that are trying to access and navigate our complex legal system. Having it be a one-stop shop which contains provisions on discrimination and harassment, as the EOA currently does, plus provisions on vilification would be preferable in that regard.[18]

Jacinta Lewin from LIV similarly stated in her evidence to the Committee:

> The *Equal Opportunity Act* is, in my humble opinion, a good piece of legislation that deals with discrimination in Victoria. It sets out a number of attributes that operate very similarly to the attributes that have been suggested in this Bill, and it makes discrimination against the law. So incorporating this law into the *Equal Opportunity Act* would make sense because they naturally are pieces of legislation that already sit

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14 Nicole Shackleton, PhD Candidate, La Trobe University, public hearing, Melbourne, 12 March 2020, *Transcript of evidence*, pp. 5–6.

15 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 18.

16 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 27.

17 Ibid., pp. 62–3.

18 Sean Mulcahy, Committee Member, Victorian Gay and Lesbian Rights Lobby, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 23.

> alongside each other. It also would be much more consistent with other jurisdictions who have their laws sitting within one piece of legislation. There is a single set of laws that everyone knows they need to refer to.[19]

The Committee agrees with these views and believes that incorporating the anti-vilification provisions into the EOA will achieve better outcomes for communities. This will enhance public awareness and accessibility of the civil provisions by building upon existing community awareness of the EOA. Further, it would create a single equality framework, so that vilification can be considered in the broader context of unlawful behaviour that comprises vilification, discrimination and sexual harassment. The Committee also notes that streamlining the laws will ensure consistency with other jurisdictions, including the Commonwealth, NSW, Queensland, Tasmania and the ACT.

A number of stakeholders, including ADLEG, indicated that should the anti-vilification provisions be incorporated into the EOA, they should be placed in a distinct section of the EOA, separate from the discrimination provisions.[20] Jonathan Medding, the Senior Policy Analyst at Thorne Harbour Health, stated in its submission that this separation would ensure that vilification protections are not limited to certain areas of public life and there is a clear conceptual separation between the two regimes.[21]

The Committee also notes that moving the anti-vilification provisions to the EOA would require significant amendments to the Act. In its submission, VEOHRC explained that the Act's purposes and objectives would require amending to reflect its broader role, including an explanation of the symbolic importance of the RRTA's history and development. Harmonisation of definitions where the anti-vilification and discrimination provisions protect the same attributes would also be required.[22]

Throughout the inquiry, stakeholders also discussed the need to replicate the serious vilification offences, sections 24 and 25 of the RRTA, into the *Crimes Act 1958* (Vic) to enhance their utilisation. This is explored further in Chapter 7.

RECOMMENDATION 14: That the Victorian Government streamline anti-vilification legislation by moving provisions to the *Equal Opportunity Act 2010* (Vic) and review the operation and effectiveness of the laws, as described in this report, in five years.

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19 Jacinta Lewin, *Transcript of evidence*, p. 40.

20 Australian Discrimination Law Experts Group, *Submission 44*; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, received 20 December 2019; Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 10; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, p. 11; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 62.

21 Jonathan Meddings, *Transcript of evidence*, p. 10.

22 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 63.

6.2 Strengthening the Victorian Equal Opportunity and Human Rights Commission's powers and duties

VEOHRC was established to protect Victorian's human rights, to promote the fair treatment of all Victorians and advocate for a diverse and inclusive Victoria.[23] It is responsible for administering the Charter, *EOA* and *RRTA*, and, as described by VEOHRC, it provides the following services to the community:

> The Commission offers an information service to the community which receives over 8,000 enquiries each year via telephone, email, webchat, letter and in-person. This service educates community members about racial and religious vilification in addition to discrimination, sexual harassment, victimisation and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Commission also provides a free, confidential and timely dispute resolution service under the *Equal Opportunity Act 2010* (Vic) and *Racial and Religious Tolerance Act 2001* (Vic). In the 2018 to 2019 financial year we finalised 910 complaint files referred through our dispute resolution service.[24]

Under the EOA, VEOHRC's powers and duties to prevent and address discrimination and sexual harassment are broader than its powers and duties for vilification matters. For vilification, functions are found in both the RRTA and the EOA and are limited to:

- dispute resolution—dealing with complaints through the dispute resolution processes[25]
- education—public education functions, which includes disseminating information and educating the public on the objectives of the RRTA[26]
- reporting—VEOHRC can report to the Attorney-General on issues arising from its education functions.[27] It is also required to present information on its education activities in its annual report.[28]

In contrast, VEOHRC's range of functions under the EOA regarding discrimination and harassment matters include dispute resolution, education and reporting (as above), in addition to the following:

- Investigations—VEOHRC can investigate any matter relating to the operation of the EOA 2010. The matter must be serious, related to a class or group of persons, cannot be reasonably expected to be resolved by dispute resolution or VCAT, with reasonable grounds to suspect contravention of the EOA, and where it would advance the Act's objectives.[29] This allows VEOHRC to investigate serious and systemic issues that cannot be resolved through an individual complaint—typically

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23 Victorian Equal Opportunity and Human Rights Commission, *Our history*.

24 Victorian Equal Opportunity and Human Rights Commission, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, supplementary evidence received 12 June 2020, p. 4.

25 *Racial and Religious Tolerance Act 2001* (Vic), Part 3, Division 1.

26 *Equal Opportunity Act 2010* (Vic), s 156.

27 Ibid. s 158

28 Ibid. s 179

29 Ibid. s 127

referred to as systemic discrimination (discussed further below). Possible breaches can come to the attention of VEOHRC in various ways including through its general inquiry line, media reports, in the course of performing its functions, or through submissions from stakeholders or community groups.[30]

- Issuing practice guidelines—practice guidelines are not legally binding, but a court or tribunal can consider evidence of compliance with them when hearing complaints in these areas.[31]
- Legal intervention—with a court or tribunal's permission, VEOHRC can intervene in legal proceedings on issues of equality, discrimination, sexual harassment or victimisation and can also act as amicus curiae.[32]
- Compliance reviews—VEOHRC can conduct a voluntary compliance review of a person's programs and practices to determine compliance with the EOA 2010.[33]
- Action plans—VEOHRC can provide a person with advice about preparing and implementing an action plan to improve compliance. It can also maintain a Register of Action Plans.[34]
- Research—VEOHRC may undertake research on issues arising from, or incidental to, the operation of the EOA 2010, including to collect and analyse information and data.[35]
- Education—VEOHRC must undertake public education programs on the objectives of the EOA and other relevant matters. It must also notify the Attorney-General and the Minister responsible if it becomes aware of any discriminatory legislation.[36]
- Reporting—VEORHC can report on issues arising from its research or education functions to the Attorney-General, and report on its activities in the annual report. The annual report may include recommendations that VEOHRC considers is required to eliminate or modify discriminatory legislation.[37]

Throughout the inquiry, VEOHRC and numerous other stakeholders advocated for strengthening VEOHRC's powers and functions to enhance the operational effectiveness and enforcement of Victoria's anti-vilification laws, including providing for a 'more robust and effective complaints service'. [38]

In consultations with stakeholders ahead of this inquiry, VEOHRC reported that there was unanimous agreement that strengthening its functions and powers was 'an

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30 *Equal Opportunity Bill 2010* (Vic) Explanatory Memorandum, p 57.

31 *Equal Opportunity Act 2010* (Vic), s 148.

32 Ibid., ss 19–160.

33 Ibid., s 152.

34 Ibid., ss 152–153.

35 Ibid., s 157.

36 Ibid., s 156.

37 Ibid., s 179.

38 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 6.

important way to address systemic hate in the community'.[39] VEOHRC also indicated that enhancing its powers will help reduce the burden of enforcement on individuals and allow the Commission to perform new functions that deal with vilification from a systematic perspective:

> Extending the Commission's full range of functions to vilification would be a practical and effective way of shifting the burden of enforcement in part from individuals to the Commission. It would ensure that the Commission has the ability to proactively support a better understanding of and compliance with the law, undertake research to better understand vilification in the community, and take action if required.[40]

In a public hearing, Kristen Hilton from VEOHRC reiterated that strengthening the Commission's powers in this area is about shifting from a process that burdens individuals to 'creating a system that can drive change'.[41]

Regarding the investigatory function, Carmel Guerra, the Director and Chief Executive Officer of the Centre for Multicultural Youth, advocated for VEOHRC to be empowered to initiate these for vilification matters beyond the limited circumstances currently available.[42] Similarly, Melanie Schleiger, the Program Manager of Equity Law Program at Victorian Legal Aid (VLA) supported VEOHRC having this function due to the ineffectiveness of the existing individual enforcement approach. She advised that VEOHRC should have the power to investigate matters of vilification 'without the additional procedural requirements that are currently present under section 127 of the Equal Opportunity Act'.[43]

Considering the overwhelming support, the Committee believes that VEOHRC's powers and functions as they relate to discrimination should apply to its role in relation to vilification. It is of the view that strengthening VEOHRC's powers will contribute to enhancing the operational effectiveness of the civil provisions and also provide VEOHRC with more opportunities to utilise prevention strategies to address vilification, including systemic vilification. The effectiveness of this recommendation will be further enhanced if accompanied by the other recommendations in this report to improve the legal effectiveness of the provisions and enhance the accessibility of the complaints system to the community.

RECOMMENDATION 15: That the Victorian Government extend current powers of the Victorian Equal Opportunity and Human Rights Commission under the *Equal Opportunity Act 2010* (Vic) to vilification regulation. These powers relate to practice guidelines, research, legal interventions, compliance reviews, action plans and conducting investigations.

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39 Ibid., p. 79.

40 Ibid., p. 80.

41 Kristen Hilton, *Transcript of evidence*, p. 27.

42 Carmel Guerra, Director and Chief Executive Officer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 37.

43 Melanie Schleiger, Program Manager, Equity Law Program, Victoria Legal Aid, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 25–6.

6.2.1 Evolution of the Commission's powers and functions

Another common proposal among inquiry stakeholders was to strengthen VEOHRC's powers in the EOA as they relate to discrimination, sexual harassment and vilification. This is in recognition that the rolling back of VEOHRC's powers in 2011 has limited its capacity to enforce the human rights legislation more broadly.

In 2008, the previous EOA 1995 (predecessor to the current EOA 2010) was reviewed in which significant recommendations were made, including to strengthen VEOHRC's powers and functions. In response, the Equal Opportunity Bill 2010 was introduced to replace the EOA 1995 and included powers and functions for VEOHRC to deal with systemic discrimination, rather than solely deal with individual complaints under dispute resolution. These powers did not extend to vilification matters under the RRTA. The new powers included:

- Investigations—allowing VEOHRC to conduct investigations of systemic discrimination that is serious in nature, related to a class or group of persons and involves possible contraventions.
- Public inquiries—with the consent of the Attorney-General, VEOHRC was empowered to conduct public inquiries into serious, systemic matters of public importance related to the Bill. These could be thematic (such as promoting equality), sectoral (such as the employment of people with disabilities in particular sectors) or in relation to one or more named parties.
- Enforceable undertakings and compliance notices—following an investigation where VEOHRC finds unlawful acts, VEOHRC could accept an enforceable undertaking from a person to take certain actions or refrain from certain actions. VEOHRC was also provided with powers to issue a compliance notice to a person to require an unlawful act to be remedied.
- Powers to compel production of information or documents as part of investigations or public inquiries—similar powers were also available in the EOA 1995. [44]

The following example was provided in the Second Reading Speech for the Bill to demonstrate intended use of these powers in a gradual way:

> For example, a company may have a policy that appears to indirectly discriminate against people with a disability. While the company settles several individual complaints about the policy, the policy has not been changed and continues to disadvantage people with a disability. This is the point at which the commission may step in and gather information about the extent of the problem, and decide whether further action is warranted.
>
> Where the commission's investigation reveals a problem, the commission will be able to engage with the individuals and organisations concerned to collaborate on a solution. This may simply involve an agreement to change a particular practice; or a series of

44 *Equal Opportunity Bill 2010* (Vic). Explanatory Memorandum, p 59.

practical and measurable steps to address the issue. The commission may also accept a more formal undertaking in which the person or organisation agrees to take action or refrain from taking action, and such an undertaking will be enforceable at VCAT if breached.

Where an outcome cannot be reached by agreement, the commission will be able to issue a compliance notice for a person or organisation to remedy a breach of the act. If that notice is not complied with, the commission can apply to VCAT to enforce it. The notice, or any part of it, can also be appealed to VCAT.

Where it is in the public interest, the commission will be able to recommend to the Attorney-General that a broader public inquiry be conducted into a serious systemic matter. [45]

The Bill passed and was given Royal Assent in April 2010. However, prior to its commencement date of 1 August 2011, there was a change in government following an election. In May 2011, the new Victorian Government introduced amendments that removed VEOHRC's powers to conduct public inquiries and amended its powers to conduct investigations, including removing the power to unilaterally compel the production of information or documents and attendance as part of investigations. Instead VEOHRC could apply for such orders through the Victorian Civil and Administrative Tribunal (VCAT).[46] These amendments were passed and still apply today.

In its evidence to the inquiry, VEOHRC recommended reinstating and strengthening such powers under the EOA, which it considers would shift the burden of enforcement from individuals to VEOHRC.

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers, including to:

1. Undertake own-motion public inquiries
2. Investigate any serious matter that indicates a possible contravention of the Act:
    a. Without the need for a reasonable expectation that the matter cannot be resolved by a dispute resolution with VCAT
    b. With the introduction of a 'reasonable expectation' that the matter relates to a class or group of persons
3. Compel attendance, information and documents for any purposes of an investigation or public inquiry without the need for an order from VCAT
4. Seek enforceable undertakings and issue compliance notices as potential outcomes of an investigation or a public inquiry.[47]

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45 Victoria, Legislative Assembly, 10 March 2010, *Parliamentary debates*, Book 3, p. 785.

46 Victoria, Legislative Assembly, 5 May 2011, *Parliamentary debates*, Book 6, p. 1364.

47 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 81.

This was supported by various stakeholders, in addition to extending these powers to the regulation of vilification.[48] For example, in their joint submission, VLA and the Victorian Aboriginal Legal Service considered that Victoria's anti-discrimination and vilification laws should:

- Ensure VEOHRC has the power to investigate acts or practices of its own motion that may be inconsistent with anti-discrimination and vilification laws, without additional procedural requirements such as those present under section 127 of the Victorian Equal Opportunity Act 2010 (Vic).
- Enable VEOHRC to enforce compliance with anti-discrimination and vilification laws following an investigation, including entering into enforceable undertakings, issuing compliance notices and prosecuting breaches of these laws.[49]

In her evidence to the Committee, Melanie Schleiger from VLA indicated that these 'pointy-end powers' are crucial both for general compliance with Victoria's anti-vilification laws and to support VEOHRC's 'softer functions, such as public education'.[50] Liam Elphick from ADLEG similarly advised the Committee that specific enforcement measures, that is the ability to enter into enforceable undertakings and issue compliance notices, was necessary to make the RRTA more operationally effective.[51]

Liberty Victoria and the LGBTIQ Legal Service also supported measures to reduce the burden on individuals to enforce the law. They recommended restoring VEOHRC's powers to conduct public inquiries and issue compliance notices, and to extend these powers to allow inquiries and compliance notices in relation to vilification.[52]

In a public hearing, Jamie Gardiner, Member of the Government Regulation and Equality Committee of Liberty Victoria (and a former Member of VEOHRC from 2000 to 2009) discussed the importance of strengthening VEOHRC's powers to pursue issues of prejudice:

> But the very important matter that has also just been raised is that the Commission needs to have the powers to investigate and to pursue issues of prejudice, whether it is currently defined as discrimination or currently defined as matters under the RRTA. Prejudiced words, spoken or written, and prejudiced materials or activities cause harm to many people, and the Commission needs to have the power—as the 2010 Act as originally enacted gave it—to look into issues where individual complaints are not the appropriate course. We have recommended in here and the Commission recommends—and, I think, everyone thinking about it—that putting the onus of dealing with improper conduct on the victim of that conduct is wrong.[53]

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48 Law Institute Victoria, *Submission 46*, pp. 13–4; Human Rights Law Centre, et al., *Submission 47*; Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 14.

49 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 18.

50 Melanie Schleiger, *Transcript of evidence*, pp. 25–6.

51 Liam Elphick, Adjunct Research Fellow, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 1.

52 Liberty Victoria and St Kilda Legal Services's LGBTIQ Legal Service, *Submission 39*, received 17 January 2020, p. 13.

53 Jamie Gardiner, Member, Government Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 4.

Jamie Gardiner further advised that there are shortfalls with the current individualised approach to complaints, which could be resolved if the powers granted in 2010 and then removed in 2011 are revived:

> The issue of one individual complaint in the current system, whether it is under the RRTA or under the Equal Opportunity Act, can produce a result through conciliation or through mediation; there are a number of different flavours of that, but one or other of those things. But the Commission needs the power, which it does not have, to add to that agreement an enforcement on that respondent, assuming that it is a corporate body, the requirement not to do it again—not to let it happen again. Now, that is not the concern of the original complainant, but it is and should be the concern of the Commission, which it cannot do at the moment because the 2010 powers were cut back in 2011. They need to be brought in. So I think that is basically the answer. The individual process with an individual, usually confidential, settlement may be good for the complainant and respondent, but it does not solve the longer term problem. The longer term problem needs to be fixed because ultimately human rights is something that has to be real for everyone, and that involves a change in culture.[54]

As a decade has passed since these powers were removed from VEOHRC, the Committee believes the Victorian Government should consider reinstating these powers and extending them to vilification.

RECOMMENDATION 16: That the Victorian Government consider reinstating the powers removed from the Victorian Equal Opportunity and Human Rights Commission in 2011 and extend these powers to vilification.

6.2.2 The power to compel

In discussing the need for VEOHRC's powers to be strengthened and reinstated, some stakeholders specifically advocated for VEOHRC to have the power to compel a person to provide information or produce a document relevant to a vilification complaint. In its submission, VEOHRC indicated that not having this power can be a barrier to complaints of both online and offline vilification conduct. For example, where vilification occurrs in public and police have attended, VEOHRC cannot compel Victoria Police to disclose the name of the person. In another example, where vilifying comments are posted online on Facebook, VEOHRC cannot compel Facebook to disclose the name of the account holder.[55]

From July 2013 to June 2019, 23 vilification complaints were not accepted because the identity of the respondent to the complaint was unknown.[56] According to VEOHRC, all other equivalent commissions in Australian jurisdictions are empowered to compel information and documents for conciliating complaints—except in South Australia.

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54 Ibid., p. 7.

55 Kristen Hilton, *Transcript of evidence*, p. 26.

56 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 55.

It also noted that the 1995 iterations of the EOA did provide for the compelling of documents if reasonably necessary for complaints, although this power was not retained in the current EOA.[57] To address this, VEOHRC recommended that it should be empowered to direct a person to provide information or produce a document that is relevant to a complaint, and to enforce such a direction by filing it with VCAT, that is making it enforceable. This reflects the model used in Queensland legislation.

Other stakeholders typically discussed this issue within the context of online vilification and the difficulty of identifying online respondents where they post comments anonymously or under a pseudonym.[58] For example, Nicole Shackleton, Dr Laura Griffin and Danielle Walt, all from La Trobe University, jointly recommended that powers be granted to VEOHRC, Victoria Police and others to compel social media companies and other internet platforms to release information for the purpose of investigating, mediating and prosecuting a complaint.[59]

Some stakeholders referred to the *RRTA Amendment Bill 2019*, introduced by Fiona Patten in the Legislative Council.[60] The Bill provides for VEOHRC to apply to VCAT for an order requiring a person to provide information for the purpose of assisting VEOHRC to identify a respondent in dispute resolution.[61] ADLEG strongly supported these provisions.[62]

The role of this power in addressing online vilification is discussed further in Chapter 9, although the Committee acknowledges here the need for VEOHRC to be granted this power. The Committee believes this will contribute to a higher number of vilification complaints being resolved, and potentially greater utilisation of the anti-vilification laws.

RECOMMENDATION 17: That the Victorian Government enable the Victorian Equal Opportunity and Human Rights Commission to direct a person to provide information or produce a document needed for a complaint and enforce such a direction by filing it with the Victorian Civil and Administrative Tribunal.

6.2.3 Establishing a positive duty

There is currently no positive duty under the RRTA for duty holders to prevent vilification, although a positive duty exists in the EOA for discrimination. In human rights law, positive duties compel states or other entities to proactively uphold a person's human rights rather than respond to a contravention of that person's human rights.

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57 Ibid.

58 Victorian Council of Social Service, *Submission 30*, received 20 December 2020, p. 3; Human Rights Law Centre, et al., *Submission 47*; Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020, p. 20; Greater Dandenong City Council, *Submission 29*, received 20 December 2019, p. 6.

59 Nicole Shackleton, Dr Laura Griffin and Danielle Walt, La Trobe University, *Submission 19*, Attachment 2, received 20 December 2019, p. 22.

60 Greater Dandenong City Council, *Submission 29*, p. 6; JobWatch Inc., *Submission 31*, received 20 December 2019, p. 6.

61 *Racial and Religious Tolerance Amendment Bill 2019* (Vic). Explanatory Memorandum, p3.

62 Australian Discrimination Law Experts Group, *Submission 44*, p. 9.

A positive duty sets the standard of conduct in a systematic way that gives a law a normative value to which everyone is expected to accept and adhere. Without a positive duty, the burden of responsibility to report and address vilification is overwhelmingly on the individual.

Throughout the inquiry, stakeholders discussed establishing a positive duty in general terms, although it was predominantly raised in the context of online vilification where ambiguity remains about the obligations of social media platforms (SMPs) to prevent or address online vilification. This is discussed further in Chapter 9.

Section 15 of the EOA includes a positive duty to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation'.[63] Duty holders include employers, service providers, and clubs and sporting organisations.[64] The Committee is aware that a positive duty is not mere lip service to upholding someone's rights, rather VEOHRC has identified six minimum standards that organisations must meet to comply with their positive duty. These include knowledge of the law, a prevention plan, organisational capability, risk management, reporting and response, and monitoring and evaluation.[65] This demonstrates the rigour involved in fulfilling a positive duty, which VEOHRC has likened in principle and importance to practical workplace health and safety laws.[66]

In the public hearing, Kristen Hilton from VEOHRC stated that any reforms to the RRTA should include a new positive obligation on duty holders:

> We believe that the reform should include a positive obligation on duty holders such as employers to try to prevent hate and vilification before it occurs rather than just responding to it.[67]

Liam Elphick from ADLEG told the Committee that a positive duty can be difficult to enforce, but there are various examples of its successful implementation, such as the Australian Women's Football League:

> Just to give one example, which is not under a positive duty but is in regard to a social example: the AFLW, the women's competition, has been subject to a lot of abuse. The players have been subject to a lot of online abuse. I note that Fiona Patten actually mentioned this in one of her speeches on her bill. Some organisations and media organisations have started to take steps to redress that in some way. I think the Herald Sun has actually completely stopped comments on its articles on the AFLW. The AFLW itself has started to respond directly to vilification online and sort of try and defuse the situation directly and make sure it does not snowball out of control. So there are always going to be different measures implemented by different platforms and organisations,

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63 *Equal Opportunity Act 2010* (Vic). Part 3 Duty to eliminate discrimination, sexual harrasement and victimisation

64 Victorian Equal Opportunity and Human Rights Commission, *Positive duty*, <https://www.humanrights.vic.gov.au/for-organisations/positive-duty> accessed 8 December 2020.

65 Ibid.

66 Ibid.

67 Kristen Hilton, *Transcript of evidence*, p. 27.

> and there is not a one-size-fits-all approach, but what a positive duty would ensure is that they have at least turned their mind to that in terms of what they can do in their particular circumstances to prevent vilification.[68]

The Committee believes that establishing a positive duty is essential to the effective operation of anti-vilification laws, as it is concerned with addressing issues from a systemic perspective.[69] A positive duty also shifts the focus from the individual victim to the broader community, which is important to influencing how the community understands vilification. A positive duty reinforces that preventing vilification cannot be achieved at the individual level but rather is a societal responsibility.

In its submission, VEOHRC explained that vilification laws apply to everyone in Victoria, whereas discrimination, sexual harassment and victimisation laws apply to specific duty holders.[70] VEOHRC advised that it may be impractical to apply a positive duty to prevent vilification to all persons in Victoria, and that the alternative is to apply it to duty holders that already have a positive duty under the EOA.[71] The Committee agrees with this proposal, and is of the view that the six principles that VEOHRC has developed for organisations to fulfil their positive duties under the EOA should be adapted and applied to vilification.

RECOMMENDATION 18: That the Victorian Government implement a positive duty for organisations to take reasonable and proportionate steps to prevent vilification, as is currently the case for discrimination, sexual harassment and victimisation matters under the *Equal Opportunity Act 2010* (Vic).

6.2.4 Resourcing

Recommendations regarding VEOHRC's new powers and duties raises the question of adequate resourcing. The Committee acknowledges that if the recommendations of this report are implemented, VEOHRC's workload should increase in terms of complaints, investigations, education and enforcement, including in online settings.

In response to questions about what resources VEOHRC would require to implement and operate these changes, Kristen Hilton from VEOHRC described the Commission's existing situation:

> we are an organisation currently with about 45 to 50 staff depending on what projects we have on at any given time, and we have a pretty big mandate. So we are stretched and I anticipate that this will drive a demand for services.[72]

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68 Liam Elphick, *Transcript of evidence*; Australian Discrimination Law Experts Group, *Submission 44*, p. 19.

69 Victorian Equal Opportunity and Human Rights Commission, *Positive duty*.

70 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 82.

71 Ibid.

72 Kristen Hilton, *Transcript of evidence*, p. 31.

Kristen Hilton advised that VEOHRC has considered the anticipated increases based on an enhanced mandate for vilification, and significant workflows requiring more resources is expected:

> we can look at what we currently receive in terms of inquiries and complaints and also the education services that we provide as well as our policy and research, and we could say that we anticipate, as a result of education, awareness raising and laws that are easier to access, a 20 per cent increase in inquiries and complaints as well as a 20 per cent increase in the need for education, for example.[73]

Kristen Hilton also reflected on the broader transformation of Victoria's anti-vilification laws towards a preventative approach and commented that this 'preventative bent' may increase demand on VEOHRC's resources in the short term:

> The other thing that I would also say is that where you change the focus of the legislation to give it more of a systemic and preventative bent, or a preventative shift, hopefully in time you will see a drop in the number of individual complaints. Now, I am not confident that that would happen for some time, because in fact where we see that there is increased awareness you will most likely see reports and complaints rise, and that actually is an indication that the awareness raising and the accessibility of the Act is improving. So I do anticipate that there will be a greater demand on our resources, and we would certainly hope that that would be recognised.[74]

In its supplementary submission, VEOHRC highlighted that the following reforms would impact its services and require corresponding resourcing:

- expanding the attributes protected by vilification laws to enable, for example, people with disabilities or members of the LGBTIQ to bring vilification complaints
- lowering the legal threshold of the civil test to make remedies more accessible to people who are harmed by vilification
- enabling the Commission to compel information to identify respondents to complaints
- permitting representative complaints without naming individual complainants.[75]

Dr Bruce Baer-Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School at the University of Canberra, and David Knoll, AM, the Co-President of the Union for Progressive Judaism advocated to the Committee for VEOHRC to be adequately funded and resourced if its powers are extended.[76] David Knoll advised that this was important for avoiding that very problem as experienced in NSW:

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73 Ibid.

74 Ibid.

75 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 4.

76 Dr Bruce Baer Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School, University of Canberra, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 2; David Knoll, Co-President, Union for Progressive Judaism, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 8.

> If you do not fund the power to investigate and to then conciliate, then you send a message out to perpetrators that, 'Although we've got some law, don't worry too much'. We have that problem in New South Wales. The Anti-Discrimination Board is fundamentally underfunded and cannot do its job.[77]

The Committee believes it is imperative that VEOHRC be funded according to its mandate. If the Victorian Government supports the recommendations to strengthen its anti-vilification framework and VEOHRC's enforcement powers, this should be accompanied by an adequate increase in resources.

RECOMMENDATION 19: That the Victorian Government fund the Victorian Equal Opportunity and Human Rights Commission based on the reforms to the anti-vilification legislative framework.

77 David Knoll, *Transcript of evidence*, p. 8.

7 Criminal anti-vilification protections

This chapter explores current anti-vilification protections that are available in Victoria's criminal laws and significant reforms discussed throughout the inquiry to address existing concerns. It focuses on the operation of serious vilification offences under the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), as well as broader issues related to prejudice-motivated crime. Having recommended the expansion of protected attributes in Chapter 3, the Committee reiterates the need for reform in this area to ensure protection for groups commonly targeted by vilification in a consistent manner.

At the outset, it should be noted that offences for serious vilification were intended to apply to only the most extreme forms of vilification, as noted in the Explanatory Memorandum for the Racial and Religious Tolerance Bill 2001 (Vic):

> The Bill also creates a criminal offence of racial and religious vilification. The criminal offence is specified to apply only to the most extreme behaviour. This is behaviour that actively urges or promotes hatred or revulsion towards a person or group on the ground of their racial background or religious beliefs and practices. This behaviour involves threatening harm to persons or property or inciting others to threaten such harm.[1]

This provides a starting point for considering whether current protections have been effective and ways to address gaps identified by stakeholders to the inquiry.

7.1 Overview

The RRTA contains criminal offences for serious racial and religious vilification. For serious vilification on the ground of race, section 24 of the RRTA provides two separate offence limbs in broad terms that:

1. A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely:
   a. to incite hatred against that other person or class of persons; and
   b. to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.
2. A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.[2]

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1 Explanatory Memorandum, Racial and Religious Tolerance Amendment Bill 2001 (Vic), p. 3.

2 *Racial and Religious Tolerance Act 2001* (Vic) s 24.

Section 25 of the RRTA stipulates the same terms with regard to the ground of 'religious belief or activity'.[3] The provisions make clear that 'engage in conduct' includes the use of the internet or email to publish or transmit statements or other material.[4] Conduct may be constituted by a single occasion or multiple occasions over a period of time, and may occur in or outside Victoria.[5] A prosecution for an offence cannot be commenced without the written consent of the Director of Public Prosecutions (DPP). Further, it is irrelevant whether an accused person made an incorrect assumption about the race or religious beliefs or activities of another person or class of persons at the time of the offence.[6]

The Explanatory Memorandum describes the nature of the offences as targeting 'extreme forms of conduct' on the ground of race:

> These offences refer to the extreme forms of conduct which promote and urge the strongest forms of dislike towards a person or group because the race of the person or group. The offender must intend the conduct in the knowledge that the promotion of these feelings of extreme dislike will be the likely result of the conduct.[7]

Similar wording describes serious vilification offences based on religious belief or activity.[8]

7.1.1 Serious vilification offences

Anti-vilification laws perform an important symbolic function by sending a clear message to the community about the unacceptability of prejudice and hateful conduct in Victoria. The Committee heard that this extends to the role of the criminal offences established under the RRTA. Dr Bruce Baer Arnold, Assistant Professor, Canberra Law School at the University of Canberra and Dr Wendy Bonython, Associate Professor, Bond Law School at Bond University stated in their submission:

> The Act was not meant to stifle private speech. Its function was instead to signal to people across Victoria that vilification on the basis of ethnicity or faith is reprehensible. The legislation accompanied rather than replaced community education. In essence it reinforced measures for community awareness and in exceptional circumstances – evident in *Cottrell v Ross* [2019] VCC 2142 – criminalised egregious vilification understood as likely to result in violence or other harm to members of the vilified community. Criminalisation is a legitimate and effective form of signalling in a world where many people regard condemnations by politicians as mere lip-service.[9]

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3 Ibid., s 25.

4 Ibid., ss 24, 25.

5 Ibid., ss 24, 25.

6 Ibid., s 26.

7 Explanatory Memorandum, Racial and Religious Tolerance Amendment Bill 2001 (Vic), p. 8.

8 Ibid., pp. 8–9.

9 Dr Bruce Baer Arnold and Dr Wendy Bonython, *Submission 41*, received 21 January 2020, p. 3.

Discussing this further at a public hearing, Dr Arnold told the Committee that '[t]he value of prosecutions, again, it is law as a matter of signalling. It is a way of communicating to society at large that this behaviour is not appropriate'.[10]

In terms of the practical impact of these laws, the Committee received evidence indicating consistently low numbers of recorded offences and prosecutions for serious vilification. In its submission, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) provided information from the Crime Statistics Agency (CSA) indicating that in 15 years from July 2005 to June 2019, there were 104 serious vilification offences recorded under the RRTA, with an average of seven reports per year.[11] In its joint submission, the Victorian Aboriginal Legal Service (VALS) and Victoria Legal Aid (VLA) provided a table from CSA data of recorded offences and incidents under the RRTA as shown in Table 1.

Table 7.1 **Offences recorded and alleged offender incidents under the *Racial and Religious Tolerance Act 2001* (Vic)—July 2009 to June 2019**

	2009 –2010	2010 –2011	2011 –2012	2012 –2013	2013 –2014	2014 –2015	2015 –2016	2016 –2017	2017 –2018	2018 –2019
Offences recorded	2	6	3	12	4	18	14	8	17	10
Alleged Offender Incidents	<3	6	<3	11	5	14	7	7	8	7

Source: Victorian Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p.14.

VALS and VLA noted that these numbers demonstrate limited effectiveness as there is a stark difference between the number of alleged incidents and subsequent prosecutions:

> The CSA record of alleged incidents is substantially higher than the number of prosecutions. The extreme rarity of prosecutions under the RRTA (three in 18 years), particularly in light of the reported number of alleged offences, suggests that there are significant barriers to prosecuting the RRTA offences, limiting their effectiveness as a deterrent.[12]

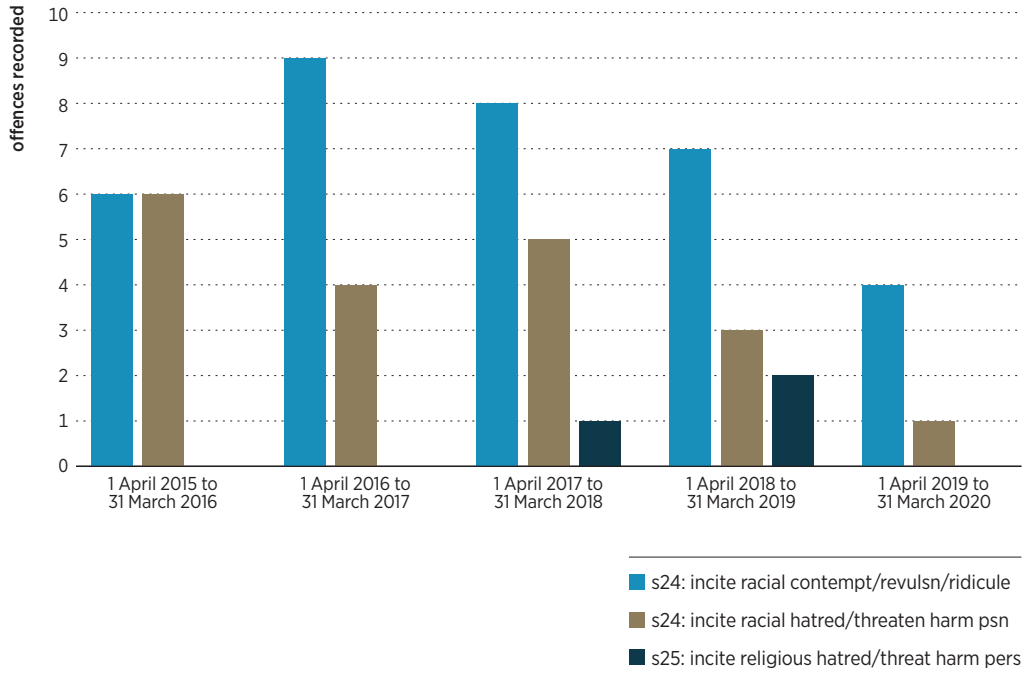
In evidence to the Committee, Assistant Commissioner Luke Cornelius of Victoria Police provided the following data on the number of serious racial and religious vilification offences recorded and investigated over the preceding five-year period, as shown in Figure 7.1.

10 Dr Bruce Baer Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School, University of Canberra, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 3.

11 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 46.

12 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 14.

Figure 7.1 Number of offences recorded under sections 24 and 25 of the RRTA



Source: Assistant Commissioner Luke Cornelius, Victoria Police, PowerPoint presentation at public hearing, 25 June 2020

> Assistant Commissioner Cornelius highlighted the small number of investigated reports during this period as well as the gradual downward trend of recorded offences, stating that: 'it begs the question: why are they low, and why do we in police think that this is the case?'[13]

The Victorian Government told the Committee that there have been two successful criminal prosecutions under the RRTA to date. These cases are outlined below.

13 Luke Cornelius, Assistant Commissioner, Victoria Police, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 2.

BOX 7.1: Criminal prosecutions under the *Racial and Religious Tolerance Act 2001* (Vic)

Case 1: *Cottrell*

In September 2017, three members of the United Patriots Front, a far-right wing group, were found guilty in the Magistrates' Court of Victoria of inciting serious contempt against Muslims under s 25(2) of the RRTA after they enacted and videoed a mock beheading in protest of the planned construction of a Bendigo mosque. The incident was filmed and posted on Facebook. Upon conviction, all three individuals received a $2,000 fine.

The decision was upheld upon appeal in the County Court of Victoria by the Chief Judge in December 2019.

Case 2: *Enrody*

In 2018, Mr Enrody pleaded guilty to one charge of serious racial vilification and one charge of serious religious vilification on the basis of two offensive videos that he had posted to Youtube. The first video, posted on 27 May 2017, involved Mr Enrody making vilifying remarks against Turkish Muslims, Pakistani Muslims and persons of Jewish faith. The second video published on 15 July 2017 involved Mr Enrody making vilifying remarks against non-white persons and Jewish persons.

Both charges were rolled up charges. Mr Enrody was sentenced on 7 August 2018 to an aggregate fine of $1,000.

Source: Victorian Government, *Submission 13*, received 19 December 2019, pp. 20–21.

While a number of submissions to the inquiry referred to *Cottrell*, the Committee did not receive any other evidence regarding the matter of *Enrody*.

In its submission, VEOHRC considered that the extremely low number of successful prosecutions demonstrated the ineffectiveness of the current criminal offences:

> Given the evidence of the ongoing prevalence of hate based conduct in the community and its impact, it is clear that the RRTA is not meeting its intended purpose to provide an adequate means of redress for people who experience racial or religious vilification.[14]

This view was supported by a number of stakeholders, and often cited as one of the most important justifications for reform of Victoria's anti-vilification laws.[15] At a

14 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 46.

15 Chris Christoforou, Executive Officer, Ethnic Communities' Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 10; John Batho, Executive Director, Multicultural Affairs and Social Cohesion, Equality, Department of Premier and Cabinet, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 14; Jewish Community Council of Victoria, *Submission 26*, received 20 December 2019, p. 3; Law Institute Victoria, *Submission 46*, received 31 January 2020, p. 5; Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020, p. 8; Online Hate Prevention Institute, *Submission 38*, received 17 January 2020, p. 5.

public hearing, John Batho, the Executive Director of Multicultural Affairs and Social Cohesion, Equality at the Department of Premier and Cabinet stated that government consultations with stakeholder groups had seen the low number of both vilification complaints and prosecutions 'consistently raised' as evidence of the challenges with the current regime.[16]

In another example, the Australian Discrimination Law Experts Group (ADLEG) noted that '[t]he fact that it has taken over 15 years to bring the first prosecution for an offence under the RRTA suggests that there may have been a failure to adequately plan for the law's enforcement'.[17]

The issue of low prosecution numbers does not appear to be confined to Victoria and is also seen in other Australian jurisdictions, including Western Australia (WA) and New South Wales (NSW), whose offence provisions are discussed in section 7.2.1. As explained in the joint submission of VALS and VLA:

> Most Australian jurisdictions have a specific offence targeting hate crime. As well as Victoria, there are offences in the ACT, NSW, Qld, SA, WA and a Commonwealth offence. However, Victoria is not alone in reporting low charge rates for such incitement of hatred offences, NSW and WA have similarly reported low rates of prosecution for such offences.[18]

> An alternative view was received from the Synod of Victoria and Tasmania, Uniting Church in Australia, who considered that the effectiveness of anti-vilification laws should be judged on the basis of the activities that have been deterred rather than on successful prosecutions. While it acknowledged that this is a difficult measure of success to determine, the submission stated that potential indicators could include, for example, a noticeable decrease in activities by organised hate groups where legislative protections have been introduced.[19]

Commenting further on the utility of the RRTA, Mark Zirnsak, the Senior Social Justice Advocate at the Synod of Victoria and Tasmania, Uniting Church in Australia stated:

> From our experience the Racial and Religious Tolerance Act has had an impact on restraining the ability of hate groups to basically organise and recruit in the open. That we regard as the main benefit of that, and certainly from our community's point of view we have seen that impact, where groups in the past who would have targeted our congregations for recruitment have generally not. I am still aware of some of our members who have joined organisations which in my view hold antisemitic conspiracy theories as part of their view on things, but otherwise largely a lot of activity prior to the entry of this Act has disappeared.[20]

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16 John Batho, *Transcript of evidence*, p. 14.

17 Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020, p. 10.

18 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 14.

19 Uniting Church Australia, *Submission 36*, received 23 December 2019, p. 5.

20 Mark Zirnsak, Senior Social Justice Advocate, Synod of Victoria and Tasmania, Uniting Church in Australia, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 26.

The Committee considers that criminal offences for serious forms of vilification perform an important symbolic function by sending a clear message to the Victorian community about what constitutes unacceptable vilification behaviour. However, there are significant impediments to the use of these provisions in practice, including low numbers of both criminal charges and prosecutions for serious vilification offences, which contribute to their limited operational effectiveness.

7.1.2 Alternative offences

Given the limited use of serious vilification offences in practice, it is also important to outline that general offences can be used as an alternative to serious vilification offences where motivated by prejudice. The *Sentencing Act 1991* (Vic) (Sentencing Act) requires that in sentencing an individual for an offence, courts must consider whether the offence was motivated ,wholly or partly, by hatred or prejudice against a group of people with common characteristics.[21] The use of these sentencing provisions is discussed further in section 7.5 in relation to prejudice-motivated crime.

The Victorian Government's submission highlighted the following as other relevant offences relating to hateful or vilifying conduct:

- It is a summary offence to use indecent or obscene language or insulting words and to behave in a riotous, indecent, offensive or insulting manner (see section 17 of the *Summary Offences Act 1966* (Vic). If vilifying conduct includes the use of offensive or insulting language or infringes any of the other prohibited conduct referred to above, then it may be possible for a person to be charged summarily for breaching section 17 of the *Summary Offences Act 1966* (Vic).
- Further, it is an offence under the Transport (Compliance and Miscellaneous) (Conduct on Public Transport) Regulations 2015 (Vic) to use indecent, obscene, offensive or threatening language on public transport, or to behave in an obscene, offensive, threatening, disorderly or riotous manner.
- The *Criminal Code Act 1995* (Cth) includes offences of urging violence against a group or members of a group that are distinguished by race, religion, nationality, national or ethnic origin or political opinion. [22]

VEOHRC also provided a list of alternative offences under the *Crimes Act 1958* (Vic) (Crimes Act) and the *Summary Offences Act 1966* (Vic) (Summary Offences Act) used by Victoria Police:

- Common assault—section 23, Summary Offences Act
- Aggravated assault—section 24, Summary Offences Act
- Assault—section 31, Crimes Act
- Wilful destruction, damage of property—section 9, Summary Offences Act

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21 *Sentencing Act 1991* (Vic) s 5(2)(daaa).

22 Victorian Government, *Submission 13*, received 19 December 2019, pp. 27–8.

- Obscene, indecent, threatening language and behaviour etc. in public—section 17, Summary Offences Act
- Threats to inflict serious injury —section 21, Crimes Act
- Threats to kill—section 20, Crimes Act
- Threats to destroy or damage property —section 198, Crimes Act
- Affray—section 195H, Crimes Act
- Destroying or damaging property—section 197, Crimes Act
- Causing serious injury intentionally—section 16, Crimes Act
- Causing serious injury recklessly—section 17, Crimes Act
- Violent disorder—section 195I, Crimes Act.[23]

VEOHRC presented further context about the use of alternative offences to prosecute these types of crimes, rather than through the serious vilification offences under the RRTA. It described examples where individuals have instead been charged with offences such as assault, intentionally causing serious injury, and behaving in an offensive manner in public, all of which involved associated prejudice:

- In 2019, a person was charged with assault after allegedly verbally abusing a mother and child on a Melbourne train because of their religion and pulling the hijab off another passenger who tried to help.
- In 2013, a person was charged with a range of offences (including threatening to inflict serious injury, behaving in an insulting manner in public, causing intentional damage, and behaving in an offensive manner in public) after threatening a French woman with violence because of her race on a Melbourne bus.
- In 2007, a person was charged with a range of offences (including theft, intentionally causing serious injury, recklessly causing serious injury and assault) after taking a Jewish man's skullcap, subjecting him to verbal abuse and punching him while he was walking to a synagogue.[24]

Jamie Gardiner, Member of the Government Regulation and Equality Committee at Liberty Victoria, also stated that Victoria Police often rely on broader criminal provisions to pursue serious vilification incidents:

> It does happen. There are examples of Summary Offences Act section 17 being used now to deal with louts hurling abuse at I think it was Jewish elderly people on a coach going to some event, that sort of thing. And I think they have acknowledged that they actually probably do have that power because that legislation would cover similar things where the abuse is homophobic, for example.[25]

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23 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 59.

24 Ibid., pp. 56–7.

25 Jamie Gardiner, Member, Government Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, pp. 9–10.

According to VEOHRC, recourse to alternative options was often viewed by police officers as an 'easier' pathway due to the complexity of prosecuting offences under the RRTA:

> For example, Victoria Police explained that if a person is abusing another passenger on public transport, police can deal with the matter quickly and effectively by issuing an on-the-spot penalty notice for obscene, indecent, threatening in public or common assault. If the assault is more serious (for example, if the victim is injured), the offender may be arrested and the person's attribute (such as their race) can be processed as an aggravation to the assault. This is an easier alternative to processing the offender under the RRTA which is more complex.[26]

Assistant Commissioner Cornelius also gave an example that demonstrates the ease of using alternative offences relating to public transport legislation given the current high RRTA thresholds:

> We also find this in the case of interactions on public transport. Now, of course where we have independent corroborating evidence—we are often now supported with evidence through mobile phones and the like, video evidence—we can certainly take action. But absent that corroborating evidence, and when it does come down to the word of one person against another, we often struggle to meet that intention threshold in relation to the RRTA prosecutions. And if a choate offence is not committed—that is, an assault or another offence that would otherwise be prosecutable—we will then look at other options available to us. So there are provisions under public transport legislation that we can use to, again, hold offenders to account in that space.[27]

The Committee heard from various stakeholders that the use of alternative criminal offences for vilification incidents is inadequate to ensure that vilification and hate conduct is specifically accounted for. For example, VEOHRC considered that the use of summary offences in this way 'does not capture the specific circumstances and impact of hate crime on individuals, community and society more broadly (unless hate or prejudice-motivation is considered in sentencing)'.[28] Similarly, the Victorian Multicultural Commission (VMC) stated that alternative offences 'do not recognise the specific context and impact of hate-motivated crime'.[29]

7.1.3 Role of Victoria Police

The role of Victoria Police in responding to and investigating vilification incidents is significant when considering the effectiveness of criminal laws against vilification. According to the Victorian Government, 'Victoria Police has developed a holistic framework focused on addressing and responding to vilification offences and issues. This is reflected in policies, procedures and education'.[30]

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26 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 57.

27 Luke Cornelius, *Transcript of evidence*, p. 3.

28 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 57.

29 Victorian Multicultural Commission, *Submission 48*, received 31 January 2020, p. 9.

30 Victorian Government, *Submission 13*, p. 27.

Acknowledging this essential role, Assistant Commissioner Cornelius explained its approach in evidence to the Committee:

> Our focus is on reducing prejudice-motivated crime and increasing community confidence to report prejudice-motivated crimes. We do this by working in partnership with the community—we seek to treat victims with dignity and respect—and of course through the application of the victims of crime charter. We respond to reports of prejudice-motivated crime in a timely and professional manner. We look to support the victims, and we are also very conscious of the need to be victim led in our response and the choices we make about possible prosecution and enforcement pathways. We also look to thoroughly investigate all reports of prejudice-motivated crime, and we are looking of course to maximise offender accountability through that process.[31]

Where possible and appropriate, Victoria Police explores non-criminal pathways to remedy certain types of situations. Regarding the incident in the regional town of Beulah, where a local couple displayed a Nazi swastika flag above their property, Assistant Commissioner Cornelius described the role of police in responding to the situation, in collaboration with the local council:

> We worked with the local council in order to have the flag taken down after discussions between ourselves and council representatives. Infringement notices for offensive behaviour were initially considered, and we also looked at the offence but determined that the matter did not meet the criteria of an offence under the Racial and Religious Tolerance Act. Again, it goes to that issue about the threshold. In the end it was building regulations that provided the basis for us to have the flag removed. This is just one example of how we actively pursue all of the options that are open to us in order to achieve an outcome that will address community concerns and hold individuals who are seeking to propagate these malicious and inappropriate views in our community to account.[32]

The Committee also heard, however, of barriers that limit the effectiveness of policing in this area and contribute to the low number of prosecutions. In its submission, VEOHRC noted that its consultations with Victoria Police highlighted that concerns largely relate to the complexity of the RRTA offences and a lack of familiarity with them:

- a lack of awareness and familiarity with the serious vilification offences by frontline police and prosecutors
- the location of the serious vilification offences in the RRTA rather than the Crimes Act which police are more familiar with
- the complexity and high threshold of the offences (part 4.1.5)
- the perception that the RRTA is 'technical, obtuse and esoteric', including difficulty distinguishing between vilification and serious vilification
- the use of alternative 'tried and true' offences – common assault or obscene, indecent, threatening language – that police are familiar with

31 Luke Cornelius, *Transcript of evidence*, pp. 1–2.

32 Ibid., p. 3.

- that the language of 'vilification' is not commonly understood
- a perception by frontline police that section 5 of the RRTA means that vilification is not unlawful (section 5 provides that a contravention of the RRTA does not create any civil or criminal liability except to the extent expressly provided by the Act).[33]

The Committee was provided with a clear example of such barriers manifesting in practice by Charmaine Clarke, a Senior Practitioner with the Aboriginal Family Violence Primary Prevention Innovation Project, who unsuccessfully attempted to work with police officers to report an offence of serious racial vilification:

> Without being besmirching, the police officer I worked with, the senior sergeant—I felt that it was absolutely new for him. In all honesty, we both looked at the legislation and scratched our heads collectively. We did not understand—what is the approach? Does this statement counter that? Does it meet the certain standards? One of the things that I would like to see is that police are actually trained around race discrimination, around the Act and around the gathering of information. Without saying anything too inflammatory, I felt that he, being a non-Indigenous person, was somehow biased—there was a certain bias there as well, and how can I sort of counter that? That also added to my distress and my frustration as well, trying to convey to him, because this is a small community. They all know each other. They all grew up together at primary school. They are generationally connected, and I am trying to point at that one particular individual in their family. And it is really difficult to navigate that with local police when they have their own social connections to each other, particularly to this family as well. And their lack of understanding of the Act as well is really quite a challenge. I will be honest; I was not satisfied with the explanation as to why it did not meet the threshold, because they gave none, really.[34]

In light of these issues, and particularly noting that the legislative provisions themselves cause difficulty for police to administer the laws, the Committee considers it important to examine how the provisions can be improved to ensure more effective and practical responses to criminal vilification incidents.

Further, the role of Victoria Police in building trust and improving relationships with communities to encourage reporting of vilification incidents is discussed in detail in Chapter 8.

7.2 Reform of offence provisions

Inquiry stakeholders proposed a range of reforms to address concerns about the limited effectiveness of the current criminal anti-vilification provisions, including both strengthening legislative protections and improving enforcement.

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33 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 56.

34 Rachel Gleeson, Solicitor, Civil and Human Rights Practice, Victorian Aboriginal Legal Service, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 25.

The Committee was also interested to hear a range of views about the appropriateness of criminal provisions, particularly where they do not involve incitement to acts of violence or hatred. For example, the Institute of Public Affairs considered that the first limb of offences under sections 24(1) and 25(1) is appropriate, while the second limb is not. It contended that the use of criminal law is appropriate where violent or physically destructive acts are concerned, but that its broader use for circumstances of incitement of serious contempt, revulsion or severe ridicule (as contained in sections 24(2) and 25(2) of the RRTA) is an unjustified prohibition on freedom of speech.[35]

Similar sentiments were expressed by Sean Mulcahy, Committee Member of the Victorian Gay and Lesbian Rights Lobby (VGLRL):

> We generally oppose criminal offences as there are concerns about the record of the police in LGBT relations and because criminal offences are often ineffective in dealing with vilification. As other submissions have argued, sections 24(2) and 25(2) of the Racial and Religious Tolerance Act which criminalise severe ridicule are unjustified and, in the case of the latter concerning religion, could be seen as a de facto blasphemy law. As other submissions have argued, there is a clear difference between the incitement of violence and hatred towards others, and engaging in conduct that is likely to invite severe ridicule of someone. The criminal law should be primarily concerned with deterring acts of violence. Existing laws adequately deal with threats and incitement of harm—so, for example, incitement to harm is already dealt with under the Crimes Act and the Summary Offences Act—and for this reason we recommend that there should not be criminal sanctions for vilification.[36]

In outlining the importance of having criminal laws for serious vilification in place, Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences at the University of Queensland, emphasised that 'the criminal law should only be used in the most egregious of instances, so it has to have a high threshold. It should have a threshold that includes threatening conduct, actual or threatened violence, in the context of vilification'.[37]

Some stakeholders outlined potential concerns with criminal offences that apply a harm-based standard given the significance of criminal penalties. The joint submission of the LGBTIQ Legal Service and Liberty Victoria recommended changes in civil protections to focus on harms rather than incitement, but stated that '[w]hile it is our view that such conduct should be unlawful, we do not consider that this broader definition be the basis for criminal offending'.[38] Jonathan Meddings, a Senior Policy Analyst at Thorne Harbour Health, told the Committee that the current delineation between vilification and serious vilification was appropriate:

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35 Institute of Public Affairs, *Submission 18*, received 19 December 2019, p. 5.

36 Sean Mulcahy, Committee Member, Victorian Gay and Lesbian Rights Lobby, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 24.

37 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 20.

38 Liberty Victoria and St Kilda Legal Services's LGBTIQ Legal Service, *Submission 39*, received 17 January 2020, p. 12.

> As I noted in my statement, we support retaining the offence of serious vilification. As for why we would not support criminal penalties for vilification, simply I think that it is too low a bar to warrant criminal penalties for such actions. That is why we have the distinction between vilification and serious vilification. In my mind it is serious vilification that warrants the criminal offence. Also, more of a pragmatic argument, the criminal law has proven to be ineffective at dealing with vilification more broadly, so I think that going down that path of criminalisation will not really help. It is much better to focus on education when it comes to this sort of thing.[39]

These various views highlight the importance of ensuring that criminal laws are appropriately calibrated to ensure robust protections are in place that still maintain a balance to protect against overcriminalisation. The Victorian Government's submission did not take a position on these matters.

7.2.1 Thresholds and elements of the offences

A key reform proposed by several inquiry stakeholders was to change the thresholds set by the RRTA offences under sections 24 and 25, which were viewed as being too complex and setting too high a bar for the successful investigation and prosecution of serious vilification incidents. As explained by VEOHRC, the offences include a number of distinct elements which may be difficult to prove to the criminal standard of proof beyond reasonable doubt:

> The criminal offences for serious racial and religious vilification under sections 24 and 25 of the RRTA are complex and set a high threshold. The offences require proof beyond reasonable doubt that an alleged offender intentionally engaged in conduct because of a person or group's race or religion, that they knew was likely to:
>
> - incite hatred and threaten or incite others to threaten physical harm to a person or group or their property; or
> - incite contempt for, revulsion or severe ridicule of a person or group of people.
>
> Proving that an alleged offender intentionally engaged in conduct that they knew was likely to incite serious negative emotions may be a difficult element to prove beyond reasonable doubt. Whether this can be established may depend on whether the alleged offender can be shown to have understanding of the 'audience' that their conduct was directed at and the consequences of their conduct…[40]

Similarly, the joint submission of VALS and VLA noted the complexity of the offences which 'require proof of multiple elements relating to the defendant's subjective motivations and awareness'.[41] This complexity was confirmed by Assistant Commissioner Cornelius, who acknowledged that the high thresholds had contributed to the low number of prosecutions(as well as under-reporting):

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39 Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 11.

40 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 54.

41 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 15.

> I think the other piece that is driving it is that the standard for prosecutions under this Act are very high, and the test in relation to intent is a challenging test to satisfy in terms of us discharging our prosecutorial burden in terms of proving intention. And I suspect that the difficulties that we have encountered in prosecuting these offences because of evidential challenges in that regard have had a chilling effect on us bringing prosecutions under this legislation.[42]

The Victorian Government's submission also acknowledged difficulties with prosecuting serious vilification incidents under the current offences:

> The offences of serious racial or religious vilification also contain an incitement test. Criminal offences must be proved 'beyond reasonable doubt', which is a harder threshold to meet than proving incitement 'on the balance of probabilities', which is required for civil remedies.
>
> There have been two successful criminal prosecutions since the RRTA's introduction in January 2002. The difficulties … in relation to proving incitement are even more of a barrier when they must be proved 'beyond reasonable doubt'. It may be possible that the high threshold of the incitement requirement in the offences is a deterrent to prosecuting complaints of serious vilification.[43]

To address these issues, options canvassed by stakeholders include reforming current Victorian offences to lower the thresholds and adopting offences used in NSW or WA. These approaches are discussed in the following sections.

New South Wales

Some stakeholders suggested that it would be useful to consider recent reforms undertaken in NSW.[44] Prior to 2018, NSW had serious vilification offences that were similar to the Victorian RRTA provisions. Following a 2013 inquiry report, *Racial vilification law in NSW*, undertaken by the NSW Parliament's Standing Committee on Law and Justice, and a subsequent *Report on consultation on serious vilification laws in NSW* in 2017, the NSW Parliament passed a series of reforms under the Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018 (NSW). These included:

- moving offences from the *Anti-Discrimination Act 1977* (NSW) to the *Crimes Act 1900* (NSW)
- expanding the list of protected attributes
- amending the threshold test to include 'recklessness' as a standard to establish intent and prohibit conduct that threatens or incites violence.

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42 Luke Cornelius, *Transcript of evidence*, p. 2.

43 Victorian Government, *Submission 13*, p. 20.

44 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 74–5; Victorian Government, *Submission 13*, p. 29.

The criminal vilification offence under section 93Z of the *Crimes Act 1900* (NSW) now provides:

> A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence…[45]

This offence is therefore focused on threats of, or incitement to, violence, and does not criminalise any other form of conduct related to inciting hatred, serious contempt, revulsion or severe ridicule, as is the case in Victoria. A report published by the Centre for Independent Studies in 2019, *Criminalising Hate Speech: Australia's crusade against vilification*, considered that other Australian jurisdictions should consider implementing the NSW offence:

> To ensure minorities and free speech are protected, vilification offences should maintain incitement and threats to violence as the threshold for proving an offence. Anti-vilification laws are designed to protect community safety and provide recourse to victims who have been vilified on the basis of a protected attribute. The NSW Act satisfies these requirements.
>
> The case for Australian jurisdictions adopting the framework established by the NSW Act rests on four main points. The NSW Act:
>
> - Makes threatening or inciting violence the threshold for proving an offence;
> - Adequately protects free speech;
> - Sufficiently protects minorities from harm; and
> - Vests investigative powers to the police.[46]

The NSW reforms were supported by some inquiry stakeholders. National Better Balanced Futures considered that Victoria could 'add value' to its laws by 'embracing some of the upgrades that NSW Parliament made to the Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018'.[47] The Australian Jewish Association (AJA), which does not support the RRTA in its current form, suggested that the NSW offence is preferable as it is focused on acts that threaten or incite violence:

> 5.4 In the event the Victorian Parliament maintains its support for a punitive approach to bigoted speech, the AJA believes that New South Wales legislation presents a more free-speech-friendly model that is preferable.
>
> 5.5 Section 93Z of the Crimes Act 1900 (NSW) constitutes a superior approach that preserves freedom of expression by confining criminal sanctions to acts that "threatens or incites violence". This approach balances freedom of speech and community security considerations in a manner that does not infringe excessively on the civil liberties of groups and individuals.[48]

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45 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 74–5.

46 Monica Wilkie, *Criminalising Hate Speech: Australia's crusade against vilification*, The Centre for Independent Studies, 2019.

47 National Better Balanced Futures, *Submission 56*, received 25 February 2020, p. 4.

48 Australian Jewish Association, *Submission 55*, received 12 February 2020, p. 9.

In his evidence to the Committee, David Knoll AM, Co-President of the Union for Progressive Judaism (UPJ), discussed the organisation's support for the WA model (discussed below), but also noted that the NSW model 'is still more effective and easier to prosecute than the Victorian version':

> you have to prove two intentions in Victoria to prosecute: you have to prove 'intentionally engage in conduct'; and there has to be actual knowledge that the offender knows the effect of inciting hatred or that threatening physical harm is going to happen. It is extremely easy for a defendant to say, 'I really didn't know there was going to be violence that would follow'. It makes prosecution very difficult.
>
> In New South Wales, a similar problem existed in the old section 20D of the Anti-Discrimination Act. The New South Wales government agreed to remove that, because once you have got a double-intention element—and in fact I think Victoria realistically has three levels of intention you have to prove—your prospects of a prosecution go to zero or below.[49]

However, the Committee also received evidence that the threshold established by section 93Z is still too high and has been a barrier in the prosecution of serious incidents. In evidence to the Committee, Julie Nathan, Co-Convenor of the Australian Hate Crime Network (AHCN), provided the following example:

> A well-known right-wing activist in New South Wales posted many comments online in support of violence and killing, especially of Jews. In one comment he wrote 'it is time to legalise the Kike Cull'. The word 'kike' is a highly derogatory term for Jew and the word 'cull' refers to mass killings, normally in the context of animals such as kangaroos and horses. He also posted about the need to 'cleanse the world of the Zionist Jew', and one of his other posts called to, 'Give us back our guns, kick the Zionist Jews out of their positions of power', and for people 'to pick up a rifle before it's too late'. He used the hashtag #BringOnRahowa—'rahowa' stands for racial holy war—and he used the hashtag #HitlerWasRight. These are the words that the DPP determined did not breach section 93Z. Accordingly, the neo-Nazi Antipodean Resistance poster calling to 'Legalise the Execution of Jews', which you should have with you, is also not a breach of section 93Z, and this has been confirmed by New South Wales police familiar with the case. The other Antipodean Resistance poster that you have, calling to 'Get the Sodomite filth off our streets' may also not be in breach of 93Z, despite it also showing the shooting of a person. So the threshold is set so high that the DPP apparently did not consider that in this case, calling for the killing of people of a specific ethnicity, was an actual threat to commit violence, and considered that it fell short of incitement to violence.[50]

Western Australia

In contrast with Victoria, WA does not have a civil complaints system for vilification matters and only regulates vilification through a series of offences for 'Racist harassment and incitement to racial hatred' in Chapter XI of the *Criminal Code*

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49 David Knoll, Co-President, Union for Progressive Judaism, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 6.

50 Julie Nathan, Co-Convenor, Australian Hate Crime Network, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 26.

Compilation Act 1913 (WA).[51] It sets out a two-tiered approach of traditional offences with higher penalties and strict liability offences which do not require intent to be established. The traditional offences include:

- conduct intended to incite racial animosity or racist harassment (section 77)[52]
- possession of material with intent to publish and intent to incite racial animosity or racial harassment (section 79)[53]
- conduct intended to racially harass (section 80A).[54]

According to the Explanatory Memorandum to the Criminal Code Amendment (Racial Vilification) Bill 2004 (WA), strict liability offences (accompanied by a number of defences) are in place for:

- conduct that is likely to incite racial animosity or racial harassment (section 78)
- possession of material that is likely to incite racial animosity or racial harassment and with intent to publish (section 80)
- conduct likely to racially harass (section 80B)
- possession of material for display that is likely to racially harass (section 80D).[55]

Two stakeholders were supportive of this two-tiered model of offences, including the UPJ and the Executive Council of Australian Jewry (ECAJ). David Knoll from the UPJ explained the reasoning for this:

> We are very explicit that the Western Australian model is the gold standard. The reason it is the gold standard is that it provides for two separate categories of offence. The more serious offence is the one for which intention is a necessary element…
>
> [The less serious offence] is based on an effects test. It has a lower penalty regime… in WA the effect required is 'to create, promote or increase animosity', which is defined as hatred or serious contempt. So you still have to find in a court that there was hatred or serious contempt as an effect of the action that you are prosecuting, and you have to find that it deals with the persons… so it is serious contempt, for example, towards or harassment of a racial group or a person as a member of a racial group…. But its enormous benefit is that you have a lower class of criminal offence where you are in effect deterring conduct that is likely to undermine our social fabric by promoting contempt or serious contempt for a racial group, just to stick to that language.[56]

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51 *Criminal Code Act Compilation Act 1913* (WA), Chapter XI – Racist harassment and incitement to racial hatred.

52 Ibid., p. 77.

53 Ibid., p. 79.

54 Ibid., p. 80A.

55 Explanatory Memorandum, Criminal Code Amendment (Racial Vilification) Bill 2004 (WA).

56 David Knoll, *Transcript of evidence*, p. 6.

Peter Wertheim, co-Chief Executive Officer of ECAJ, expressed its support for the focus on terminology of 'harassment' in the WA model:

> Incitement focuses on the effect of words on an audience, a third party, and what harassment does—and this is a concept that is imported into the Western Australian legislation in addition to incitement—is to focus on the effect on the actual target. 'Harassment' is actually defined in the Western Australian legislation. It includes threats and substantial and serious abuse and severe ridicule.[57]

While the 2013 Parliamentary inquiry report on *Racial vilification law in NSW* considered the potential for a 'racial harassment' provision, it ultimately did not recommend its introduction due to concerns that it would criminalise racial abuse which did not lead to incitement. The report concluded this could unduly infringe on freedom of expression.[58]

Reform of the Victorian criminal offences

The Committee heard a variety of proposals to simplify and lower criminal offence thresholds. In contrast, some stakeholders expressed caution or opposition to lowered thresholds. Ultimately, the Committee agrees that the thresholds are currently too complex and require reform to ensure better understanding and greater consistency of application to all serious vilification incidents.

As discussed above, some stakeholders recommended adoption of provisions similar to those used in WA or NSW. The Committee considers that while there are positive components of the recent NSW reforms, including the extension of the provision to additional protected attributes, it is undesirable to restrict the content of criminal offences only to conduct that threatens or incites violence against another person or a group of persons. With regard to WA's reforms, the Committee considers that the inclusion of racial harassment offences in Victorian criminal law is likely to unreasonably infringe on freedom of expression.

There was support among stakeholders to simplify the current Victorian offences and lower the associated thresholds to ensure more prosecutions can take place.[59] As proposed by VEOHRC, this would involve having a single offence to prohibit serious vilification on the basis of all protected attributes (including additional attributes recommended to be protected in Chapter 3). In terms of the thresholds, VEOHRC proposed the following changes:

- the fault element be amended to 'intentionally or recklessly' (rather than solely 'intentionally' as currently provided)
- the subjective test of conduct that 'the offender knows is likely to incite' be replaced with an objective test of conduct that 'is likely to incite'

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57 Peter Wertheim, co-Chief Executive Officer, Executive Council of Australian Jewry, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, pp. 17–18.

58 Parliament of Parliament of New South Wales, Standing Committee on Law and Justice, *Racial vilification law in New South Wales*, 2013, p. 67.

59 Law Institute Victoria, *Submission 46*, p. 3; Human Rights Law Centre, et al., *Submission 47*, p. 16; Islamic Council of Victoria, *Submission 45*, received 31 January 2020, p. 9; Online Hate Prevention Institute, *Submission 38*, p. 5.

- the offence be amended to prohibit threats or incitement (rather than threats and incitement).[60]

It provided the following proposed wording for the revised offence:

> A person must not, intentionally or recklessly, engage in conduct that:
>
> 1. is likely to incite hatred, serious contempt for, revulsion or severe ridicule; or
> 2. threatens violence or property damage towards another person or group of people on the ground of the following attributes ...[61]

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, indicated that this proposal would strike an appropriate balance between capturing only the most serious forms of conduct and ensuring that the criminal test and evidentiary threshold was not too high.[62]

There was strong support for this or similar changes among inquiry stakeholders, including the group submission of the Human Rights Law Centre (HRLC), GetUp!, Anti Defamation Commission, Victorian Trades Hall Council (VTHC) and the Asylum Seeker Resource Centre (ASRC), as well as the Law Institute of Victoria (LIV) and the Islamic Council of Victoria.[63] The ICV stated in its submission:

> The ICV believes the existing criminal offence threshold should be amended to lower the threshold for criminal incitement. The current test should be replaced with an objective test of conduct that 'is likely to incite'. Further, whether the offence is considered a threat or an incitement, they should both be prohibited. In addition, s.24 should be amended to include reckless conduct, not merely intentional conduct.[64]

Jennifer Huppert, President of the Jewish Community Council of Victoria (JCCV), noted that these reforms would maintain an appropriate balance given the severity of using the criminal law to deal with vilification:

> In relation to the criminal offence, we do need to lower the barrier. Obviously we still need to have a fairly high burden, because it is a criminal offence, and the impact of being found guilty of a criminal offence is significant. But if we could include 'likely to incite' rather than 'incite' and 'reckless' as well as 'intentional', move the offence so that it is part of the Crimes Act and deal properly with what is a public act and what is a private act, I think that would address some of those issues.[65]

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60 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 74.

61 Ibid., p. 26.

62 Ibid.

63 Similarly supported by Liam Bywater, *Submission 20*, received 20 December 2019; Casey Multi Faith Network, *Submission 24*, received 20 December 2019, pp. 1–2; Liberty Victoria and Service, *Submission 39*, p. 12; Islamic Council of Victoria, *Submission 45*, pp. 9–10; Law Institute Victoria, *Submission 46*, p. 11; Human Rights Law Centre, et al., *Submission 47*; Victorian Multicultural Commission, *Submission 48*, p. 11; Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020, pp. 16–7; Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 15; Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 54,5–6,74–5; Equality Australia, *Submission 53*, received 3 February 2020, p. 5.

64 Islamic Council of Victoria, *Submission 45*, p. 10.

65 Jennifer Huppert, President, Jewish Community Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, pp. 25–6.

Some of these changes are in similar terms to those proposed by Fiona Patten MLC in the Racial and Religious Tolerance Amendment Bill 2019 (Vic). Alistair Lawrie, a long-term advocate for the lesbian, gay, bisexual, transgender and intersex and queer (LGBTIQ+) community, supported the Bill:

> These amendments would add the words 'or recklessly' to, and remove the words 'the offender knows' from, the fault element of this offence.
>
> I support both changes. The first change would help create consistency with the offences established in other jurisdictions (including the recently-introduced NSW Crimes Act 1900 provisions).
>
> The second would remove the 'offender knows' subjective test from this offence, which is important because such harmful conduct should be prohibited irrespective of whether the specific offender knew that was the likely outcome.[66]

Some stakeholders were opposed to the Bill's proposals, considering that they lower the threshold too far.[67] For example, the Catholic Archdiocese of Melbourne considered that including the standard of 'recklessness' would ignore intentions, which it argued are 'important in determining the degree of personal responsibility of the accused (as in the distinction between murder and manslaughter)'. It stated that a 'deliberate choice' to incite is more serious than recklessness and is thus 'a more reasonable threshold'.[68] Similarly, the Australian Christian Lobby considered that the Bill's proposals would introduce uncertainty which 'will make the law more subjective rather than introduce any objectivity in determining whether vilification was intended'.[69]

The Committee considers there is a key need to simplify and streamline the current criminal anti-vilification provisions to ensure they can be used effectively to prosecute serious vilification offences. In order to strengthen Victoria's approach, the Victorian Government should amend the provisions to have a single offence that prohibits serious vilification, lowers the evidentiary thresholds, and protects all listed attributes including those recommended for inclusion in Chapter 3.

RECOMMENDATION 20: That the Victorian Government reform the current criminal offences of serious vilification to simplify and lower the thresholds, and in particular, to specify that: A person must not, *on the ground of one of the protected attributes, intentionally or recklessly* engage in conduct that—

a. is likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons; or

b. to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.

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66 Alastair Lawrie, *Submission 17*, received 19 December 2019, p. 4.

67 Catholic Archdiocese of Melbourne, *Submission 33*, received 20 December 2019, p. 2; Australian Christian Lobby, *Submission 35*, received 21 December 2019, p. 7; Institute of Public Affairs, *Submission 18*, pp. 5–6.

68 Catholic Archdiocese of Melbourne, *Submission 33*, p. 2.

69 Australian Christian Lobby, *Submission 35*, p. 7.

7.2.2 Consent from the Director of Public Prosecutions

Serious vilification offences currently require the DPP to consent before a prosecution can commence.[70] The Committee understands that this requirement, or alternatively, consent from the relevant Attorney-General, appears across other jurisdictions with criminal anti-vilification laws, including WA and NSW. This requirement was identified by some stakeholders as impacting the effectiveness of the offences. For example, VEOHRC stated in its submission:

> Stakeholders identified another potential barrier to prosecution in the requirement for police to obtain the written consent of the DPP to commence a prosecution under the RRTA (or at least the perception by police that this requirement is complex and burdensome). The Commission understands that this is different to most summary offences which are usually prosecuted by police without the need for DPP consent.[71]

Various stakeholders supported the removal of this requirement in order to improve the operational effectiveness of the offence provisions. For example, the joint submission of VALS and VLA stated that this is not usually a requirement for comparable offences:

> The low maximum penalty makes the RRTA incitement offences summary offences that are heard in the Magistrates' Court. Summary offences are usually prosecuted by Victoria Police, rather than the Office of Public Prosecutions. Despite this, the consent of the DPP is required to initiate a prosecution. This may act as a barrier to police prosecutions, who are rarely required to seek DPP consent to file charges for comparable offences.[72]

Professor Gelber from the University of Queensland explained that, while there needs to be a high threshold for criminal offences, the consent of the DPP is not a necessary safeguard within the anti-vilification framework:

> I do, however, think it that would be good for a prosecution not to require the active consent of the DPP, because I think that is an unnecessary burden. Those kinds of provisions were put in to, I guess, give succour to free speech advocates who were worried about the impact of these laws on free speech. My project with Professor McNamara showed conclusively that there is no evidence of a chilling effect in Australia—that public policy matters are discussed extensively and rigorously in Australian public debate and there is no evidence that free speech has been unfairly or unduly or overly or over broadly restricted by laws of this nature. Therefore I think that not having a requirement for a DPP to consent is a good idea, but similarly, because of course criminal conduct can result in a jail term, and this is a very significant thing, it needs to be a high threshold. So it needs to be threatening conduct, it needs to be actual or threatened physical violence, it needs to be done in the context of vilifying behaviour and so on.[73]

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70 *Racial and Religious Tolerance Act 2001* (Vic) ss 24(4),5(4).

71 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 56.

72 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 16.

73 Professor Katharine Gelber, *Transcript of evidence*, p. 20.

Julie Nathan from the AHCN provided an example of how the comparable NSW requirement has provided a barrier to prosecution of offences contained in section 93Z of the *Crimes Act 1900* (NSW):

> I am familiar with one case that was investigated by New South Wales police. They considered this case to be the strongest one they had and were preparing to prosecute. However, section 93Z requires the approval of the Director of Public Prosecutions before any charges can be laid. In this particular case the DPP did not give his approval, and so the case had to be dropped. The requirement for DPP approval is a major drawback of section 93Z.[74]

The Committee considers that the legislative requirement for the DPP to provide written consent prior to commencement of prosecution of a serious vilification offence could constitute an unnecessary burden and could impact the overall operational effectiveness of the anti-vilification framework. In the absence of evidence regarding any arguments towards retaining this provision, the Committee considers that the Victorian Government should further review it to ensure that this requirement is still fit for purpose.

RECOMMENDATION 21: That the Victorian Government review the requirement for the written consent of the Director of Public Prosecutions before commencing a prosecution for serious vilification.

7.2.3 Penalties

As part of the inquiry, the Committee was required to consider the appropriateness of sanctions in delivering upon the RRTA's purpose. The current maximum penalties for the criminal offence are:

- 300 penalty units for a body corporate ($49,566 as at 1 July 2020)
- for an individual, 6 months' imprisonment and/or 60 penalty units ($9,913.20 at 1 July 2020).[75]

Some stakeholders advised that these penalties should be reviewed and increased to be in line with other jurisdictions and comparable offences.[76] In its submission, VEOHRC provided examples of the penalties for similar offences in other Australian jurisdictions.

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74 Julie Nathan, *Transcript of evidence*, p. 26.

75 *Racial and Religious Tolerance Act 2001* (Vic) ss 24,5.

76 Islamic Council of Victoria, *Submission 45*, pp. 14–15; Online Hate Prevention Institute, *Submission 38*, p. 9.

Table 7.2 Penalties for comparative vilification offences

Jurisdiction	Offence	Maximum penalties
Victoria	Serious vilification	Individual: 60 penalty units ($9,913) and/or six months' imprisonment Corporation: 300 penalty units ($49,566) (*Racial and Religious Tolerance Act 2001* (Vic) ss 24, 25)
NSW	Publicly threatening or inciting violence	Individual: 100 penalty units ($11,000) and/or three years' imprisonment Corporation: 500 penalty units ($66,000) (*Crimes Act 1900* (NSW) s 93Z)
SA	Racial vilification	Individual: $5,000 and/or three years' imprisonment Corporation: $25,000 (*Racial Vilification Act 1996* (SA) s 4)
WA	Conduct intended to incite racial animosity or racist harassment	Individual: 14 years' imprisonment (*Criminal Code Act Compilation Act 1913* (WA) s 77)
	Conduct likely to incite racial animosity or racist harassment	Individual: Five years' imprisonment (or two years imprisonment and $24,000 for a summary conviction) (*Criminal Code Act Compilation Act 1913* (WA) s 78)
Qld	Serious vilification	Individual: 70 penalty units ($9341.50) or six months' imprisonment Corporation: 350 penalty units ($46,707.50) (*Anti-Discrimination Act 1991* (Qld) s 131A(1))
Cth	Urging violence against groups	Individual: Five years' imprisonment and seven years imprisonment where it would threaten peace, order and good government (*Criminal Code Act 1995* (Cth), 80.2A)
	Urging violence against members of groups	Individual: Five years' imprisonment and seven years imprisonment where it would threaten peace, order and good government (*Criminal Code Act 1995* (Cth), 80.2B)

Source: Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p.58.

VEOHRC indicated that the current penalties act as an incentive for Victoria Police to instead prosecute offenders using alternative offences:

> The penalties for serious vilification under the RRTA are out of step with penalties for comparative offences in Australia and alternative offences used by police… undermining their deterrent effect. The relatively low penalties under the RRTA explains in part why police may choose to use alternative offences for hate crime and sends an unintended message to the community about the seriousness of the offence compared to other crimes.
>
> The Commission heard from Victoria Police that the penalties for serious vilification are 'underwhelming', particularly compared to the penalties for other summary offences.[77]

77 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 57.

Recommending a review of maximum penalties, VALS and VLA noted the importance of setting appropriate penalties as a signal of the 'perceived seriousness' of the offences:

> The RRTA offences serve an important educative function and as a social condemnation of harmful behaviour that incites hatred and violence. Maximum penalties serve as a guide for the perceived seriousness of this conduct, both for individuals and the target community as a whole. A maximum penalty of 6 months imprisonment does not effectively highlight the serious harm of hate speech and vilification, potentially undermining the deterrent force of the offences.
>
> It may be appropriate for serious vilification offences to match other similar offences in the Crimes Act 1958 (Vic), such as causing injury recklessly, threats to inflict serious injury, conduct endangering persons, and assault, which all carry a maximum penalty of 5 years' imprisonment.[78]

The Committee considers that penalties for serious vilification offences should be commensurate with comparable offences and believes this issue should be reviewed by the Victorian Government. More appropriately weighted penalties would provide greater incentive for Victoria Police to pursue prosecution using serious vilification offences rather than alternative offences, in recognition of the significant societal harms that flow from this type of conduct. In conjunction with other proposed changes, such as reviewing the requirement for the DPP to provide written consent prior to commencing prosecution, and simplification of the thresholds and elements of the offence provisions, this could improve utilisation of criminal anti-vilification provisions.

RECOMMENDATION 22: That the Victorian Government review maximum penalties for serious vilification offences.

7.2.4 Conduct

Recommendation 13 of this report recommended that anti-vilification laws be amended to expand the scope of conduct that is prohibited through providing for a definition of 'public act' modelled on section 93Z(5) of the *Crimes Act 1900* (NSW). The Committee considers it important that this amendment be made in respect of both civil and criminal provisions to ensure consistency. This was recommended by stakeholders including VEOHRC, LIV and the group submission of HRLC, GetUp!, Anti Defamation Commission, VTHC and ASRC.[79]

7.3 Location of offences

Another key recommendation among stakeholders was to change the location of criminal offences to the Crimes Act, similarly to amendments in NSW as part of its

78 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, pp. 15–16.

79 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 77; Law Institute Victoria, *Submission 46*, p. 10; Human Rights Law Centre, et al., *Submission 47*; Australian Muslim Women's Centre for Human Rights, *Submission 49*.

2018 reforms. This was seen as an important step to ensure police and prosecutors are familiar with the offences and to encourage greater use in practice. For example, VEOHRC conveyed Victoria Police's suggestion that moving the offences would increase their visibility and reinforce their status as a crime.[80]

Similarly, the joint submission of VALS and VLA stated:

> While a symbolic statement of the importance of condemning racial and religious intolerance, it may be that separating serious vilification offences from the majority of prosecuted offences contributes to them being less readily accessible to police officers laying charges and preparing briefs. Placing the offences in the Crimes Act 1958 (Vic) would both clearly highlight their criminality and increase visibility to the investigating police officers.[81]

Jennifer Huppert of JCCV argued that moving the provisions would elevate their importance:

> In terms of the criminal offence, I think it would also be very useful if the criminal offence were included in the Crimes Act. It would lend strength to Victoria Police; it would make it easier for them to deal with those types of offences. It would raise the importance of that offence to that of the other offences that are contained in the Crimes Act, rather than sidelining it to a separate piece of legislation.[82]

Rather than specifying one location for the offences, the Committee also heard support from some stakeholders to duplicate offences in the Crimes Act, rather than to move them completely. For example, the ICV, which supported retention of the RRTA, recommended that 'criminal provisions be replicated in the Crimes Act to facilitate police to investigate and prosecute, and ultimately prevent, religious hate crime'.[83] The LIV and HRLC in its group submission with other organisations also recommended that criminal provisions be duplicated.[84] In addition, VEOHRC considered there should be a cross-reference to the offences in the *Equal Opportunity Act 2010* (Vic) (EOA), as well as to the ability for VEOHRC and Victoria Police to cross-refer matters.[85] This recommendation highlights the importance of ensuring that offences are appropriately referred to in all relevant Acts.

The Committee considers that criminal provisions should be duplicated in the Crimes Act. This will be of practical benefit in ensuring serious vilification offences are appropriately considered by police officers in the normal course of their duties. As the Committee has recommended moving the civil provisions to the EOA, duplication and cross-referencing across the relevant Acts will ensure that there is a comprehensive suite of protections in the EOA as well as being readily available within the Crimes Act for ease of access by Victoria Police and prosecutors.

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80 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 78.

81 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, p. 16.

82 Jennifer Huppert, *Transcript of evidence*, p. 18.

83 Islamic Council of Victoria, *Submission 45*, p. 15.

84 Law Institute Victoria, *Submission 46*, pp. 10–11; Human Rights Law Centre, et al., *Submission 47*; Australian Muslim Women's Centre for Human Rights, *Submission 49*.

85 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 79.

RECOMMENDATION 23: That the Victorian Government duplicate criminal anti-vilification offence provisions in the *Crimes Act 1958* (Vic).

7.4 Public display offence

A key proposal raised during the inquiry was to create an additional offence to criminalise the public display of vilifying materials. One such incident was a couple in Beulah who in January 2020 displayed a Nazi swastika flag from their property. It caused significant community distress and resulted in international media headlines. A concern emerged as to what steps could be taken by authorities to remove the symbol. In response to such incidents, the issue of banning its public display has been raised in the Victorian Parliament, including to refer to the work of this inquiry.[86]

The group submission of HRLC, GetUp!, Anti Defamation Commission, VTHC and ASRC recommended the creation of a standalone criminal offence prohibiting the public display of vilifying materials such as the swastika to enable Victoria Police to intervene in such circumstances:

> This law reform is needed because the swastika symbol represents hate, genocide and trauma for many people around the world, including members of Victoria's Jewish community – which has one of the largest populations of Holocaust survivors and descendants in the world. It has also become a calling card for the Far Right. Neo-Nazi groups sport swastika iconography on armbands and flags. From two men wearing shirts with the swastika on them during the ChillOut Festival in Daylesford, to children's playgrounds in Melbourne being spraypainted with the swastika, its use in public spaces is on the rise. There should be no place for this symbol in Australia, except in educational settings or for artistic purposes.[87]

VEOHRC also recommended that the Victorian Government consider a complementary offence to criminalise the possession, distribution or display of hateful material:

> In Victoria, this type of conduct can be captured by the RRTA if it meets the threshold for incitement – that is, if the conduct is capable of inciting other people to hatred because of race or religion.
>
> The Commission's recommended reforms to the law will support the ability for a person to more effectively seek redress for the possession, distribution or display of hateful material (such as the swastika) and for police to prosecute this type of conduct. However, in cases where the distribution or display of hateful material is not capable of inciting hatred in other people, alternative offences may be a more effective way of combatting hate.[88]

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86 Victoria, Legislative Assembly, 17 March 2020, *Parliamentary debates*, pp. 974,9; Hon Daniel Andrews MP, Premier, hearing, response to questions on notice received 19 March 2020.

87 Human Rights Law Centre, et al., *Submission 47*.

88 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 75.

Stakeholders presented different views on the construction of such an offence in terms of the scope of symbols included, with two particular options—through a broad offence in relation to hateful or threatening materials, or through the banning of specific symbols. The Committee also heard from some stakeholders about related issues that need to be considered, such as enforcement and the need to be balanced in approach. In its supplementary submission, VEOHRC summarised these considerations:

> Victoria should also consider whether to legislate against specific hate symbols and materials that are commonly recognised (such as the Swastika), or to criminalise hate materials in a way which enables the law to evolve and capture new and emerging symbols. In the case of Germany, neo-Nazi groups have used new less recognised hate materials and symbols to covey messages of hate, to avoid being captured under Germany's strict laws.
>
> Any drafting should also be careful to ensure that only the most egregious and harmful forms of hate material are captured by new laws. These laws would need to be properly balanced with other fundamental human rights, also taking care not to discriminate against members of certain religious groups.[89]

The Committee agrees that these are important considerations. The proposals for a targeted approach and a broad-based approach are discussed in the following sections.

7.4.1 Targeted approach

Some stakeholders advocated for a ban on the Nazi swastika or Nazi symbols. In its submission, the Victorian Association of WW2 Veterans from the ex-Soviet Union considered the open display of Nazi symbols unacceptable and proposed that the legislation should be changed to prevent this, noting the existence of such laws in Germany, Ukraine, Russia, Austria and France.[90] Dr Dvir Abramovich, Chairman of the Anti Defamation Commission, strongly supported a specific ban on the Nazi swastika:

> It is hard to believe that those who are inflamed with virulent bigotry and who are using the swastika as a rallying cry to celebrate the legacy of the Third Reich have the law on the side. These violent final solutionists, who seek to destroy the touchstone of our democracy and our way of life, would exterminate each one of you if they had the means to do so. We do not need a Christchurch in our city to realise the fierce urgency of this moment. And so a good place to start is to ban once and for all the public display of the Nazi swastika. You and your colleagues have the opportunity to right a wrong, to shout down the Neo-Nazis and to affirm the ideals and principles that we all cherish.[91]

89 Victorian Equal Opportunity and Human Rights Commission, *Supplementary submission regarding the inquiry into anti-vilification protections in Victoria*, supplementary evidence received 12 June 2020, p. 3.

90 Victorian Association of WW2 Veterans from the ex-Soviet Union, *Submission 54*, received 10 February 2020, p. 2.

91 Dr Dvir Abramovich, Chairman, Anti-Defamation Commission, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 44.

When asked whether he supported a ban on the swastika, Adel Salman, Vice President of the ICV stated:

> Yes, I do. No-one can claim that that is a neutral symbol. Everyone understands what that symbol represents. It represents mass murder on a scale that we have rarely seen in human history. How could anyone possibly defend that under the banner of free speech? No, that is not right.[92]

However, various stakeholders did not support use of this targeted approach. For example, Ruth Barson, Joint Executive Director of the HRLC considered that a principles-based approach would be more effective than a straightforward ban on the Nazi swastika:

> It was really coming from a drafting position whereby ideally Parliament drafts laws based on principles as opposed to them being based on trying to outlaw something that is happening right here, right now. If you draw out the Nazi swastika and say, 'What are the principles that we are trying to prohibit?', that is a better approach to drafting law because then it allows for unforeseen similar things to eventuate in the future. It kind of future-proofs the law if you draft it from the perspective of principles rather than from the perspective of saying, 'Just prohibit the Nazi swastika'. That was a conversation that we had had with the Jewish Community Council of Victoria, actually, that really opened our eyes to the importance of not just prohibiting this single symbol but recognising that we only know what we know right now and we want laws that in the future have the potential to also prohibit equally offensive and harmful symbols.[93]

In addition, Equality Australia acknowledged that while the swastika is a deeply offensive symbol, it is important to recognise that imposing a ban may have significant unintended consequences:

> The public display of vilifying and intimidating materials which contain the swastika and other symbols of hate may fall under existing anti-vilification prohibitions more broadly, depending on how they are used in offending conduct. We remain open to seeing how a criminal offence could be framed which prohibits the public display of vilifying and intimidating materials, such as the swastika. However, we are concerned that prohibiting a particular symbol of hate may unintentionally give that symbol more currency and power as a recruiting tool.[94]

7.4.2 Broad approach

In contrast with a focus on the Nazi swastika specifically, some stakeholders supported a broader approach. This included HRLC in its group submission with other organisations and VEOHRC, both of which highlighted two particular models that use a broad approach. One model related to offences proposed under the Racial and Religious Vilification Bill 1992 (Vic), which lapsed prior to a state election. The other

92 Adel Salman, Vice President, Islamic Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 44.

93 Human Rights Law Centre, et al., *Submission 47*, pp. 34–5.

94 Equality Australia, *Submission 53*, pp. 6–7.

related to offences in WA for the possession of material for dissemination with intent to incite racial animosity or racist harassment, and possession of material for dissemination that is likely to incite racial animosity or racist harassment under sections 79 and 80 of the *Criminal Code Act Compilation Act 1913* (WA).[95]

Vivienne Nguyen, Chair of the VMC, supported a broad ban on these types of materials, rather than a focus on solely the swastika:

> We support the ban of the swastika flag but doing that in a comprehensive context so that anything that incites hatred in the community is considered under the legislation, and that members of the community benefit from such action as opposed to an individual flag whereby there might be unintended consequences towards the community that supports the banning of the swastika flag.[96]

The Union of Progressive Judaism (UPJ) supported the introduction of offences in a similar form to those in WA, and considered that 'it is not sufficient to focus on specific types of Antisemitic behaviour, such as the display of a swastika'.[97] In his evidence to the Committee, David Knoll from the UPJ expanded on this point, and described how the swastika could be incorporated into legislative materials:

> If, for example, you were drafting your legislation and you were to incorporate a provision very like section 78 in the Western Australian criminal code and you put in the statutory notes and identified 'for example, displaying a swastika is intended to be prohibited by this provision', you would achieve not only the effect on the swastika but you would identify it as an example of something. And other communities who have symbols that would cause them offence would also then be covered by the law. And as I say, we do not want only offence to the Jewish community to be dealt with by this law. We agree with you: it should be dealt with, and we think the simple way to do it is to adopt section 78 and identify in the legislation this example as an example of what section 78 is driving at.[98]

Using the Nazi swastika as an example in legislative drafting was similarly suggested by Ruth Barson from HRLC.[99]

The Committee requested information from HRLC about whether the relevant WA offences had resulted in prosecutions, who provided:

> To the knowledge of the Human Rights Law Centre, there have been no prosecutions or cases tried under the relevant provisions of the Western Australian law referred to by the Chair, being sections 79 and 80 of the *Criminal Code Act Compilation Act 1913* (WA) (the Act) and referenced at paragraph [92] of our joint written submission to the Inquiry.

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95 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 75–6; Human Rights Law Centre, et al., *Submission 47*.

96 Vivienne Nguyen, Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 3.

97 Union for Progressive Judaism, *Submission 57*, received 12 March 2020, p. 3.

98 David Knoll, *Transcript of evidence*, p. 7.

99 Human Rights Law Centre, et al., *Submission 47*, p. 35.

> For completeness, we note there is one case we have located which cites the racial animosity and racial harassment provisions of the Act, being O'Connell v Western Australia [2012] WASCA 96. This case does not, however, consider the relevant public display provisions referred to by the Chair.[100]

The Committee also heard from stakeholders that a standalone ban on the swastika is unlikely to be effective and any future offences should more carefully focus on all symbolism associated with Nazi-ideology. Jennifer Huppert from the JCCV, provided an example of the importance of this approach:

> There are examples of people who are just choosing the swastika, but if you just ban the swastika they will find another symbol, be it that white supremacist hand movement. There was a soldier who was filmed making that symbol. That was the hand movement made by the perpetrator of the massacre in Christchurch. You ban a swastika and then something else will come in its place, so my concern is that it is a broader offence that relates to hateful material, not necessarily just a swastika, because people find ways of expressing the same view in a different way. The swastika is easily recognisable, but they will find another means of expressing the same thing in a different way. It might be the SS symbol—you know, the double Ss that were on the SS uniform, which were equally as offensive.[101]

7.4.3 Carve outs, defences and enforcement

Some stakeholders noted specific drafting complexities and potential enforcement issues related to public display offences. In its submission, Equality Australia considered that any new offences would need to carefully consider how the banned material would be defined and any exceptions to the prohibition,such as for news or satire; how prescription of particular symbols would avoid politicisation and becoming out of date; and the possibility of ordinary symbols being used in a hateful manner in an attempt to circumvent their prescription as a banned symbol.[102]

Mark Zirnsak from the Synod of Victoria and Tasmania, Uniting Church in Australia, described challenges of drafting legislation in this area, including how to include appropriate exceptions and the seriousness of adopting criminal laws:

> I think there are going to be some real challenges about getting that legislation right. Some of the balancing factors in this might be ease of prosecution versus the context and what you are actually trying to achieve. Are we trying to prevent people who might see a public display of a hateful symbol being harmed by it? Are we trying to say people who hold hateful views should not be allowed to publicly express them? Depending on what you are trying to achieve, you might design that quite differently.
>
> Ease of prosecution, you could make it a strict liability offence to display a swastika or a Nazi flag, but then I am going to say, 'Okay, well, what do you then do' and then we

100 Catherine Dixon, Executive Director, Victorian Equal Opportunity and Human Rights Commission, Inquiry into anti-vilification protections hearing, response to questions on notice received 30 June 2020.

101 Jewish Community Council of Victoria, *Submission 26*, p. 23.

102 Equality Australia, *Submission 53*, p. 6.

> start talking about exemptions. The movie poster for Inglourious Basterds has a swastika on it, so then you give an artistic exemption, okay. But I can take you down to model shops or games shops selling World War II simulation games that have Nazi symbols on them, so we are now giving exemptions for some of these things. I can take you down to miniature war games groups who might have model armies of World War II Nazi forces that have Nazi flags, okay, we are going to give an exemption for them. What about re-enactors—people who want to dress up? I have checked: there are people, and fortunately a very small group. I cannot imagine why you would want to don a Nazi uniform, but if I am a re-enactor and I am wearing it for the purpose of some historical interest, do we give an exemption there? If you start giving all those exemptions, do you open up loopholes for people who are expressing hate to make suddenly a claim against the exemption? So drafting this would need some careful consideration. I know there is already a possession offence in WA. Looking at the drafting now, I actually am worried that it would be pretty easy to escape prosecution… [103]

In its supplementary submission, VEOHRC similarly noted issues arising from carve outs and defences that have been included in criminal offences adopted in international jurisdictions:

> Some carve outs include where the materials or conduct is being used for educational, theatrical or research purposes, and defences include where the conduct occurred in private, or is lacking intention. Some countries apply their laws very strictly and give less weight to intention. Germany has used its Criminal Code to prosecute individuals acting anti-constitutionally by distributing or displaying the Swastika, even where no ill-intention was behind the conduct. In 2018 Hans Burkhard Nix was prosecuted for publishing Nazi-era image of an SS chief wearing a swastika armband on his personal blog. He was convicted and sentenced to a suspended sentence which he appealed to the European Court of Human Rights, arguing it violated his right to freedom of expression. The court found that although Nix did not intend to 'distribute totalitarian propaganda, incite violence, or utter hate speech', Nix had still violated German domestic laws by displaying Nazi ideology without clear opposition to it. This and other cases have been controversial and have raised questions in Germany about protecting individuals from hate crime, and balancing other human rights, such as the freedom of expression.[104]

Mark Zirnsak from the Uniting Church in Australia also described the difficulty in deciding which symbols would be covered by a broad-based offence provision, using examples of the Confederate flag and the Eureka flag as symbols that are in dispute between different groups about their meaning, intentions and what in particular they represent.[105] In addition, he described the question of when the state should intervene to restrain a person from committing these types of offences, and try to combat ingrained views using punitive means, as a 'threshold test':

> While generally we would say do not do it at all, because ultimately, like, go back to the couple who were flying the Nazi flag. If you now say, 'Well, we're going to make it illegal for you to do that', presumably initially you might say, 'Well, that's a fairly minor offence'.

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103 Mark Zirnsak, *Transcript of evidence*, pp. 27–8.

104 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*.

105 Mark Zirnsak, *Transcript of evidence*, pp. 27–8.

> But if they are belligerent and they say, 'Well, I'm not going to remove it', and the police come and take a flag away and the next day they have gone and bought another one and popped it up again, eventually you are going to send them to prison. So I have got to think through what behaviour is so bad that I actually am happy to see someone who is completely belligerent and locked in their ideology being sent to jail as the only way of stopping them from their behaviour.[106]

In discussing its recommendation for inclusion of a new harm-based civil test for vilification, Bill Swannie, a lecturer at the Victoria University School of Law and Member of LIV's Human Rights Committee, explained that this could potentially capture use of the swastika as it would allow the courts to take 'context into account', including the 'history and the associations which a particular word or a particular symbol has'.[107] He stated that as the subjects, platforms and means of hate speech change over time, there is a 'strong argument for keeping the legislation framed in broad principles and broad terms in order that courts can apply this legislation to evolving circumstances'.[108]

The Committee also received evidence from the Yarriambiack Shire Council on practical enforcement issues that need to be considered in drafting a provision to capture materials, in light of their recent experiences in dealing with the Beulah incident. The Chief Executive Officer, Jessie Holmes, described that offences should be clear and recognisable, but that enforcement can be difficult due to the need to weigh up the costs associated with pursuing a matter with the outcomes to be achieved.[109] Gavin Blinman, the Director of Community Development & Wellbeing at Yarriambiack Shire Council, agreed with the idea of a simple mechanism, such as to confiscate a Nazi symbol and a Nazi flag, as 'something we could work with, because it really has to be black and white for us'.[110]

7.4.4 International evidence

Some jurisdictions have implemented laws to regulate the public display of symbols, particularly in regard to Nazism and Communism. Germany is the most well-known example for laws regarding the public display of symbols, under section 86a of the Criminal Code on the dissemination of propaganda material of unconstitutional organisations.[111]

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106 Ibid., p. 30.

107 Bill Swannie, Member, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 42.

108 Ibid.

109 Jessie Holmes, Chief Executive Officer, Yarriambiack Shire Council, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 19.

110 Gavin Blinman, Director, Community Development and Wellbeing, Yarriambiack Shire Council, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 21.

111 Bundesamt für Verfassungsschutz, *Right-wing extremism - Signs, symbols and banned organisations*, 2018, <https://www.verfassungsschutz.de/en/public-relations/publications/publications-right-wing-extremism/publication-2018-10-right-wing-extremism-signs-symbols-and-banned-organisations> accessed 1 February 2021.

In 2018, the Government issued a brochure on *Right-wing extremism - Signs, symbols and banned organisations* that explains the applicable law. Regarding the use of symbols, anyone who distributes or publicly uses (in a meeting or in written materials) symbols of unconstitutional organisations is liable to prosecution, with penalties up to three years imprisonment or fines. Symbols include flags, insignia, uniforms, slogans and forms of greetings. It also includes symbols which are so similar as to be mistaken for them. Prohibited symbols are not specifically designated but are decided on a case-by-case basis. The legislation contains exceptions, for example where used in civic education, to avert unconstitutional activities, to promote art or science, research or teaching, the reporting of current or historical events or similar purposes.[112]

The brochure listed 49 organisations that are considered unconstitutional, for example Nationalist Socialist and Communist Party organisations.[113] It also outlined a range of symbols connected to these organisations that are liable to prosecution when publicly used including the Nazi swastika, the Celtic cross, illustrations of Adolf Hitler, forms of greeting such as the Kuhnen Salute or Hitler salute, the book Mein Kampf, Odal rune, German Reich war flag, Black Sun, Sig Rune, SS death's head symbol and slogan, Triskele, and Wolfsangel.[114] The use of such symbols depends on the context and also continues to change. For example, in 2018 it was reported that a total ban on Nazi symbols being displayed in computer games since the 1990s was lifted by the relevant German industry body.[115] There are other ways in which the implementation of the laws is complicated, for example in relation to social media or where people own goods branded with swastikas or other symbols.[116]

Another country that has banned the display of Nazi symbols is Austria, which has a law that is more administrative compared to Germany. The 1960 Insignia Law is aimed at combating right-wing extremist acts and bans the public use of symbols belonging to prohibited Fascist or Nazi organisations, including similar symbols and those used as a substitute. It is punishable by a fine of up to EUR 4,000 or up to one month imprisonment. In March 2019, Austria banned symbols belonging to 13 extremist organisations, some of which are unrelated to fascism, including the Croatian Ustashas and the Muslim Brotherhood.[117]

The Committee understands that a number of countries also have laws in place that do not specifically ban Nazi symbols but which relate to public order or propaganda. For example, in the UK, under section 18 of the *Public Order Act 1986,* it is an offence to use threatening, abusive or insulting words/behaviour, or to display written material

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112 Bundesamt für Verfassungsschutz, *Right-wing extremism: Signs, symbols and banned organisations*, 2018, p. 17.

113 Ibid., p. 82.

114 Bundesamt für Verfassungsschutz, *Right-wing extremism: Signs, symbols and banned organisations*, pp. 75–80.

115 BBC News, 'Germany lifts total ban on Nazi symbols in video games', 10 August 2018, <https://www.bbc.com/news/world-europe-45142651> accessed 1 February 2021.

116 DW.com (Deutsche Welle), 'Germany's confusing rules on swastikas and Nazi symbols', 14 August 2018, <https://www.dw.com/en/germanys-confusing-rules-on-swastikas-and-nazi-symbols/a-45063547> accessed 1 February 2021.

117 The Ministry of Foreign Affairs of the Russian Federation, *Regarding the situation with the glorification of Nazism and the spread of Neo-Nazism and other practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2019, <https://www.mid.ru/en/foreign_policy/humanitarian_cooperation/-/asset_publisher/bB3NYd16mBFC/content/id/3193903#6> accessed 1 February 2021.

that is threatening, abusive or insulting if intended to stir up racial hatred or is likely to do so. The *Public Order Act 1986* also contains a broader offence under section 5 relating to the display of any writing, sign, or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm, or distress.[118]

7.4.5 Reform around hateful materials in Victoria

The Committee has sought to present the wide range of evidence it received on this complex policy and legislative reform issue. The Committee heard from a variety of stakeholders expressing support for different approaches, as well as more practical concerns about drafting, enforcement and balancing rights.

The Committee acknowledges the support among some stakeholders for a broad-based offence targeted at hateful materials. However, it considers it important to send a clear message to the community that Nazi symbolism is not acceptable in any form and has wide-ranging, negative societal impacts. There are a vast range of symbols and images that represent Nazi ideology and are used by many and diverse groups to subjugate, vilify and threaten members of the community. The Committee therefore recommends that the Victorian Government establish a criminal offence that prohibits the display of symbols of Nazi ideology. Noting the position of the swastika as a primary symbol of hate, but that it is far from the sole representation of this ideology and many secondary and associated symbols are currently used by far-right groups in Victoria, the Committee considers that the swastika could be used as an example in legislative drafting of an offence.

The Committee considers that a ban on Nazi symbolism on its own cannot be effective in reducing the display of hateful materials or messaging in the community. In her evidence, Ruth Barson from HRLC highlighted the importance of a ban forming part of a comprehensive suite of reforms:

> Banning the swastika is just one step in doing that and should not be done in isolation, because what we ultimately want is best practice laws that see a reduction in hateful conduct and that are accessible to affected communities. Simply banning the swastika is not going to get us there, and there is a risk that if we rush that reform, that single step, we miss all the other really equally important steps that need to be taken and we miss the opportunity that is currently before Victoria, which is to introduce best practice anti-hate laws.[119]

The Committee strongly advocates that the Victorian Government implement the broad range of reforms to the anti-vilification framework recommended in this report in order to meaningfully prevent and respond to hate conduct in Victoria.

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118 Article 19, *United Kingdom (England and Wales): Responding to 'hate speech'*, United Kingdom, 2018, p. 21.

119 Human Rights Law Centre, et al., *Submission 47*, p. 31.

RECOMMENDATION 24: That the Victorian Government establish a criminal offence that prohibits the display of symbols of Nazi ideology, including the Nazi swastika, with considered exceptions to the prohibition.

In addition, the Committee considers that the Victorian Government should carefully monitor the use of the proposed offences in practice in order to determine whether they could potentially be expanded to include other hateful materials. This would acknowledge that subjects of hate change over time, as do the means and methods of vilifying them, and any offences should therefore remain responsive to the needs of those targeted by hate conduct.

RECOMMENDATION 25: That the Victorian Government, in addition to implementing recommendation 24, monitor the public display of other hateful symbols to determine whether they should also be prohibited.

7.5 Prejudice-motivated crime

Prejudice-motivated crime (also referred to as hate crime) is generally understood as crime which was motivated by an element of prejudice or hatred because of a person's characteristic, as described on the Victoria Police website:

> A prejudice motivated crime is a crime motivated by prejudice or hatred towards a person or a group because of a particular characteristic such as sexual orientation, gender identity, religion, race, sex, age, disability or homelessness.
>
> Many crimes can be motivated by prejudice, including harassment, threats, verbal abuse, destroying or damaging property, and in more serious cases, physical violence.
>
> An example of a prejudice motivated crime:
>
> A vehicle parked overnight in the front yard of a property was spray painted with the words, 'kill all blacks'.
>
> In this case, the damage to the property was motivated by prejudice against the owner of the vehicle, because of his/her race. This prejudice motivated crime not only affects the direct victim of the crime, but all people that identify with the victim's race.[120]

Prejudice-motivated crime includes and is linked to serious vilification offences under the RRTA, noting that VEOHRC defined hate crime as 'any prejudice-motivated crime (including serious vilification under the RRTA and any other crime that is motivated by hate or prejudice)'.[121] However, it can be motivated by a broader range of characteristics,

120 Victoria Police, *Prejudice and racial and religious vilification*, 2020, <https://www.police.vic.gov.au/prejudice-and-racial-and-religious-vilification> accessed 14 December 2020.

121 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 16.

such as sexual orientation, gender identity, religion, race, sex, age, disability or homelessness.[122] The Victorian Government's submission stated that these issues are conceptualised in the Victoria Police Manual:

> The Victoria Police Manual (VPM) contains a detailed overview for considering and responding to alleged offences that may constitute a prejudice motivated crime. In defining prejudice motivation the VPM links to offences under sections 24 and 25 of the RRTA.[123]

A 2018 report by HRLC, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, noted that they comprise two elements—a criminal offence, and prejudice or bias motivation:

> Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice which can be pervasive in the wider community. Specific laws that address hate crime are necessary to demonstrate our society's condemnation of crimes committed based on prejudice. Such laws would acknowledge that hate crimes have a greater impact and affect a broader community's sense of safety, while also recognising the increased culpability of the offender.[124]

The Committee understands that in 2010, Victoria Police became the first jurisdiction to implement a strategy for combatting hate crimes, but which was found to have limited effect:

> In 2010, Victoria Police became the first police force in Australia to develop a specific strategy for combatting hate crimes. The strategy aimed to better identify, record and reduce hate crime recognising the unique needs and vulnerabilities that arise for people who experience hate crime
>
> A review of the strategy identified that it has had a limited effect which is compounded by longstanding issues that marginalised communities have raised about being under-protected and over-policed, including young South Sudanese Victorians, LGBTIQ people and Aboriginal Victorians.[125]

The Committee is unclear of the current status of this strategy.

7.5.1 *Sentencing Act 1991* (Vic)

Following a report by the Sentencing Advisory Council in 2009, the Victorian Sentencing Act was amended to provide for sentence aggravation in instances of prejudice-motivated crime. Section 5 outlines a number of sentencing guidelines to be accounted for in sentencing an offender for the commission of an offence. Under section 5(2)(daaa), a court is required to consider the following:

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122 Victorian Government, *Submission 13*, p. 27.

123 Ibid.

124 Human Rights Law Centre, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, HRLC, Melbourne, 2018, p. 3.

125 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 86.

> 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.[126]

If the court finds this was the case, 'it is as an aggravating factor, which increases the gravity of the offence and the moral culpability of the offender'.[127] VEOHRC noted that the requirement is not limited to particular groups but there is some guidance in the Attorney-General's Second Reading Speech about which groups would be captured:

> The provision does not identify or limit the groups that it protects. However, the Attorney-General's Second Reading Speech noted that the amendment was intended to protect groups with common characteristics such as 'religious affiliation, racial or cultural origin, sexual orientation, sex, gender identity, age, impairment (within the meaning of the *Equal Opportunity Act 1995*) and homelessness'.[128]

The Victorian Sentencing Manual notes that the provision is intended to apply widely:

> Parliament intended this section to apply broadly by noting that a victim might be:
>
> - a member of the group;
> - a 'Good Samaritan' coming to the assistance of a member of the group during an offence;
> - an advocate or lobbyist for the group;
> - someone in employment related to the group;
> - an acquaintance or family member of a group member who is victimised due to hatred or prejudice against the group.[129]

The Committee understands that this sentencing provision is rarely used in practice. VEOHRC advised that they were only aware of nine judgments that had considered the provision, and of those, conduct was found to be partially motivated by prejudice in four matters (two crimes motivated by race and two by homosexuality).[130]

This was also noted in the *End the Hate* report:

> Victoria's hate crime legislation was introduced in 2010 to allow for heavier sentences to be imposed for crimes motivated by prejudice but has rarely been used. Reasons for this include under-reporting, failure to identify and record crimes as hate crimes by police, difficulties locating perpetrators, reluctance by prosecutors to raise the provision and the high threshold of proving prejudice motivation in court.[131]

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126 *Sentencing Act 1991* (Vic) s 5(2)(daaa).

127 Judicial College of Victoria, *Victorian Sentencing Manual: Hate crimes*, 2011, <http://www.judicialcollege.vic.edu.au/eManuals/VSM/5331.htm> accessed 19 September 2019, 5.2.5 – Hate Crimes.

128 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 23.

129 Judicial College of Victoria, *Victorian Sentencing Manual*, 5.2.5 – Hate Crimes.

130 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 59–60.

131 Human Rights Law Centre, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, p. 2.

The Committee heard that prejudice-motivated crime is often under-reported for a number of reasons, which influences how the provisions are used in practice. In addition, the Committee heard that the mechanisms for ensuring consistent recording of prejudice as an aggravating factor may be inadequate. Issues related to under-reporting as well as accurate police recording of prejudice-motivated crime are discussed in more detail in Chapter 8.

Other proposals

The Committee was told of international models of dealing with hate crimes which could also be further explored. Professor Gail Mason of AHCN discussed approaches to hate crime laws in the United Kingdom (UK) and the United States (US):

> Currently Victoria has no laws that allow such offenders to be explicitly charged, prosecuted and convicted for the hateful sentiments that drive their hostility. In effect, this places Victoria 30 years behind international best practice, and I will mention most other Australian jurisdictions fall into this category as well. Why I say that is because the UK, the US and many European nations have enacted distinct hate crime laws that publicly name and denounce this type of crime. The network believes that this inquiry is an opportunity for the Victorian Government to introduce a more comprehensive suite of laws capable of sending the crucial public message that as a society we strongly condemn the prejudice that drives all forms of hate crime, not just vilification.[132]
>
> ...
>
> The US does have hate crime laws in all jurisdictions. They are quite restrictive and they are not used to anywhere near the same extent as the laws in the UK. So if we were to be asked about what would be a preferred model for hate crime legislation, I would definitely recommend the Victorian government look to the UK model rather than the US.[133]

Professor Mason also stated that in terms of policing hate crime, the UK is 'generally seen as world leaders' on the basis of its victim-centred approach. She described how this influenced reporting:

> For example, if the victim or any other witness to a crime believes that it was a hate crime, then the police are required to record it. The reason for that is that it takes away police discretion and potential, I guess, police indifference, which has been a huge problem in the UK in the past. I am not saying it is now, but it has been in the past. So the UK have quite a different policing approach, and as I say, one that is seen as—globally—best practice, whereas in the US they use a more restrictive definition. They have a much narrower method of recording hate crime by police.[134]

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132 Professor Gail Mason, Co-Convenor, Australian Hate Crime Network, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 24.

133 Ibid.

134 Ibid., p. 27.

In its submission, VEOHRC also noted UK's approach in terms of mandatory recording of incidents by police.[135]

In another proposal, Thorne Harbour Health suggested that the test for prejudice motivation in the Sentencing Act should be lowered:

> Currently, however, the motivation test for prejudice-motivated crime under s5(2)(daaa) of the Sentencing Act 1991 (Vic) is too high and difficult to prove. We support a reasonableness test for determining whether a crime was prejudice-motivated. For example, if someone shouts a homophobic or transphobic slur while assaulting someone they believe to be gay or trans or gender diverse, then it can reasonably be assumed that their motivation was prejudice-motivated.[136]

VEOHRC also noted issues with the current test in its submission, and outlined relevant sentencing remarks that demonstrated difficulties in interpretation. It quoted from the *End the Hate* report, which identified further operational concerns:

> 'Prejudice motivation in the courts is difficult as prosecutors have not always raised the provision as a consideration in sentencing and there has been judicial reluctance to find that a crime was motivated by hate or prejudice. This is partly the case where there are multiple or complex motivations involved, difficulties in establishing proof 'beyond reasonable doubt' and where courts hold the view that prejudice was the motivation only in the absence of an alternative motive'.[137]

The Committee received limited evidence regarding these proposals, and recommends that the Victorian Government explore them further.

RECOMMENDATION 26: That the Victorian Government investigate issues related to prejudice-motivated crime such as:

- the test for motivation under section 5(2)(daaa) of the *Sentencing Act 1991* (Vic)
- international models such as the United Kingdom's approach to hate crimes.

135 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 88.

136 Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 10.

137 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 60.

8 Reporting and data

The Committee heard throughout the inquiry that vilification in Victoria is prevalent, yet under-reported to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), Victorian Civil and Administrative Tribunal (VCAT) and Victoria Police. This chapter provides an overview of some of the challenges around reporting, including awareness of legislative provisions and the availability of culturally-appropriate support services to assist individuals to make a complaint. It discusses the role of Victoria Police in building trust with communities in order to encourage reporting of vilification offences, as well as the importance of improved recording of prejudice-motivated crime. In addition, third-party reporting mechanisms are considered as a supplementary means of data and information collection.

The Committee is aware that comprehensive data collection on the nature and prevalence of hate conduct and vilification is critical for improving responses to these types of behaviour. This chapter discusses the means of data collection and information sharing in Victoria and how this can be improved to inform future policy and policing and other responses.

8.1 Challenges around reporting vilification

The consequences of under-reporting vilification can be serious. Where targeted individuals or groups seek not to report or pursue a remedy for the harms they have experienced, the conduct has the potential to go unacknowledged, and can become normalised and further entrenched. For example, the *Islamophobia in Australia* report uses the example of 'continuous anti-Muslim sentiment in political and media discourse' as normalising discriminatory speech within society and discouraging victims of abuse from reporting.[1] The research also found that in 49% of reported cases of Islamophobia, other people passed by without paying any attention to the incident. Further, 60% of incidents took place in guarded or patrolled areas, where police officers, security guards, track-work personnel, and other workers or officials were present or security cameras were deployed.[2] These figures suggest that anti-Muslim rhetoric and behaviour may not only be becoming normalised, but that the public may also be becoming desensitised in witnessing it. Zakariah Halabi described these concerns in their submission to the inquiry:

> I have seen a lot of discrimination, particularly towards black people, in Australia and it is going unnoticed. People of colour, as well as Muslims, are slowly becoming desensitised which isn't right at all. It forces a "false-peace" upon us...[3]

1 Dr Derya Iner, *Islamophobia in Australia - II (2016-2017)*, Charles Sturt University, Sydney, 2019, pp. 3-4.

2 Ibid., pp. 6-7.

3 Zakariah Halabi, *Submission 37*, received 15 January 2020, p. 1.

While the extent of under-reporting is unknown, Victoria Police acknowledged that it is likely to be substantial:

> we think there is significant under-reporting in this space, and so we remain committed to constantly engaging the community through peak councils and local communities in relation to the pathways for making reports to us about these criminal offences.[4]

There are many factors that impact on the ability and willingness of individuals or groups to seek support or remedy in relation to vilifying conduct. These include awareness of the relevant protections; a lack of culturally appropriate support services, or under-resourcing of services; reluctance of targeted communities to engage with police or the criminal justice system; or broad community tolerance of racist incidents due to the normalisation of harm or violence. Other contributing factors may be a fear of victimisation or retaliation in response to a complaint, or a community-wide retributive fear; or acute difficulties in accessing the law for some multifaith and multicultural communities.

8.1.1 Awareness of protections

The Committee heard from a number of stakeholders that there is a broad lack of public awareness among multifaith and multicultural communities regarding the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), its protections and the complaints processes.[5] This acts as a barrier to affected communities to exercise their rights under Victorian law. The Victorian Multicultural Commission (VMC) described the level of awareness as 'extremely low', including among community leaders and representatives.[6] Similarly, Reconciliation Victoria reported that many Aboriginal and Torres Strait Islander Victorians they had spoken to had not heard of the RRTA, and those that were aware of protections under the Act were unsure of the processes to access them.[7] In its submission, the Ethnic Communities' Council of Victoria (ECCV) provided findings from consultations undertaken with communities, in collaboration with the Department of Justice and Community Safety, ahead of this inquiry. The ECCV reported that a lack of awareness of the illegality of vilification under the RRTA, as well as the process for making a complaint, were two of the main reasons people do not report vilification.[8]

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, stated that while there was still low community awareness of Victoria's broader equality framework, which includes the *Charter of Human Rights and Responsibilities*

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4 Luke Cornelius, Assistant Commissioner, Victoria Police, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 2.

5 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, received 31 January 2020, p. 83; Ethnic Communities' Council of Victoria, *Submission 15*, received 19 December 2019, pp. 3-4; Australian Muslim Women's Centre for Human Rights, *Submission 49*, received 31 January 2020, p. 7; Centre for Multicultural Youth, *Submission 14*, received 19 December 2019, p. 2.

6 Vivienne Nguyen, Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 3.

7 Diana David, Chief Executive Officer, Reconciliation Victoria, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, pp. 26–7.

8 Ethnic Communities' Council of Victoria, *Submission 15*, p. 5.

Act 2006 (Vic) and the *Equal Opportunity Act 2010* (Vic) (EOA), the RRTA is the least utilised of them all.[9]

Further, the Committee heard that there is broad confusion around legislative terminology and how it applies to individual experiences. Shashwat Tripathi, a Youth Volunteer with the Centre for Multicultural Youth (CMY), stated that marginalised communities have often not heard of the term vilification:

> Marginalised communities do not even know that there is something called vilification. A lot of them are not even aware of this term. They do not even know that it is a human right to their integrity that they should seek support and help from the government. We need more awareness. We need educational campaigns. We need people to understand that it is their right to seek help from the government.[10]

Professor Gail Mason, the Co-Convenor of the Australian Hate Crime Network (AHCN), described the outcomes of focus groups undertaken as part of a 2017 study into police responses to hate crimes, conducted in collaboration with researchers from the University of Sydney, Monash University and Victoria Police. It found that terms such as 'vilification' and 'prejudice-motivated crime' were not well understood by individuals participating on behalf of minority communities.[11] The Committee notes that if these terms are not easily identifiable to those who are most likely to need to invoke their legislated protections, then there are clear limitations in the application of the laws.

The Committee heard from a number of stakeholders that there is a need for improved public education and awareness campaigns to increase public knowledge of the anti-vilification framework and how it works. VEOHRC advised that this would be even more important following any legislative reform stemming from the inquiry process.[12] Community engagement, education and awareness-raising is discussed in detail in Chapter 4, including a recommendation for the Victorian Government to develop community education campaigns on vilification and hate conduct.

Consolidating the legislative provisions contained in the RRTA into the EOA and the *Crimes Act 1958* (Vic) was also considered by some stakeholders to likely improve public awareness and understanding of anti-vilification provisions. This includes in relation to the overlapping framework of anti-discrimination and anti-vilification laws.[13] The proposal to streamline the provisions by moving them into other statutes is considered further in Chapter 6.

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9 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 28.

10 Shashwat Tripathi, Youth Volunteer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 38.

11 Professor Gail Mason, Co-Convenor, Australian Hate Crime Network, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 27.

12 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 83.

13 Maria Dimopoulos, Deputy Chair, Victorian Multicultural Commission, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 4.

8.1.2 Onus on individuals

Various stakeholders told the Committee that placing the onus on individuals to initiate a complaint was a barrier to reporting vilification and enforcing the RRTA. The Law Institute of Victoria (LIV) stated in its submission that the civil complaint process 'requires the vilified individual to have the resources, knowledge and time to be able to enforce their rights'.[14] At a public hearing, Alastair Lawrie argued that placing this burden on individuals was problematic and a fundamental weakness of the Act:

> [O]ne of the fundamental weaknesses of antidiscrimination and antivilification laws … is that as an individual complaint-based system the onus or the burden is placed on the person who has been the victim or has experienced that discrimination and vilification, and in many cases it is quite understandable that the person who has been the victim of or experienced it does not want to be engaged in a legal case for six, 12, 18 months but would prefer to move on. That does not mean that the discrimination or vilification should be acceptable.[15]

Professor Beth Gaze from the Australian Discrimination Law Experts Group (ADLEG), explained to the Committee that this was a longstanding topic of debate among law experts, citing the perseverance needed to make a complaint and see it through to resolution:

> And as to the individual enforcement, it has been a topic of debate amongst discrimination lawyers and academics for a very long time that the enforcement under these laws is quite slow and quite burdensome. Because there are conciliation processes in the commission, and then there are conciliation processes in VCAT. And eventually one might get to a hearing if one has got that sort of stamina.[16]

Chris Christoforou, the Executive Officer of the ECCV, indicated that people were reluctant to make complaints due to this individual burden, and because they do not feel safe navigating the legal system or have confidence in the outcomes it will provide.[17] Melanie Schleiger, Program Manager of the Equity Law Program at Victorian Legal Aid (VLA), explained in evidence to the Committee that the requirement for an individual to 'pursue a complaint and hold perpetrators to account' is 'incredibly ineffective' in responding to vilification and promoting equality.[18]

Similarly, Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences at the University of Queensland, advised the Committee that individuals are not best placed to bring forward complaints:

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14 Law Institute Victoria, *Submission 46*, received 31 January 2020, p. 12.

15 Alastair Lawrie, *Submission 17*, received 19 December 2019, p. 10.

16 Professor Beth Gaze, Professor, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 19.

17 Chris Christoforou, Executive Officer, Ethnic Communities' Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 14.

18 Melanie Schleiger, Program Manager, Equity Law Program, Victoria Legal Aid, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 25.

> the current complaint system which rests on one individual making a complaint about another individual kind of individualises or personalises what is essentially a public wrong. The reason that we legislate against vilification is because we regard it as a public wrong. It does harm to our community. It does harm to the targets, but through them it does harm to our community. And we think our community would be stronger and better off if we could address vilification.[19]

The Committee is aware that placing the burden on the individual to report vilification and continue through the dispute resolution process can have significant implications, including in relation to time, financial and other resourcing costs, as well as reliving emotional and psychological distress. This in turn has ramifications for the utilisation of the RRTA and its overall effectiveness.

Availability of support services

In supporting persons and communities affected by vilification, and minimising the long-term harms discussed above, the provision of accessible and holistic support services is crucial. This includes, for example, mental health support and legal assistance.

Culturally appropriate services can help individuals to navigate reporting processes when incidents occur. Both civil and criminal complaints processes can be time-consuming, resource-intensive and emotionally draining for persons who are likely to have already experienced significant harm as a result of an incident. Sam Elkin, Coordinator of the LGBTIQ Legal Service, provided the following in relation to his experiences of conciliation processes:

> people do not make complaints lightly. They are really stressful, unpleasant processes, and I constantly have to say to people, 'This is going to have an emotional impact on you, so please think of yourself first before making this decision'.[20]

Marsha Uppill, Co-founder and Director of Arranyinha, described to the Committee the difference that culturally-informed support can provide to people. In particular, appropriately trained or culturally authorised persons can help to create an atmosphere that allows individuals to feel safe and able to move forward through complex processes such as complaints procedures.[21]

Gemma Cafarella, Chair of the Government Regulation and Equality Committee at Liberty Victoria, highlighted the importance of legal services in not only assisting clients in individual cases, but also addressing systemic issues of discrimination and prejudice:

> We are seeing a situation in which many of the legal services that can assist people through these processes are chronically underfunded, overworked and not actually

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19 Professor Katharine Gelber, Head of School, School of Political Science and International Studies, Faculty of Humanities and Social Sciences, University of Queensland, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 18.

20 Sam Elkin, Coordinator, LGBTIQ Legal Service, St Kilda Legal Service, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 7.

21 Marsha Uppill, Co-founder and Director, Arranyinha, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 14.

> able to assist as many people or assist people in the meaningful way that they might need assistance … I really do think it is important to flag the work that those specific organisations do with their community, which I think is a very important way that we actually get systemic change.[22]

The Committee heard, however, that there is a lack of culturally appropriate services that can support access to the RRTA's protections, creating a 'massive disconnect between the law and the community'.[23]

Stakeholders told the Committee that in order to empower communities, initiatives need to go beyond often-used rhetoric of 'resilience building'. Diana Sayed, Chief Executive Officer of the Australian Muslim Women's Centre for Human Rights (AMWCHR), advocated for targeted resources and community education for at-risk groups such as Muslim women, to empower them to identify and respond to the harms they experience:

> It is not really up to us to build resilience around the discrimination and hate that we experience. That is not our burden to bear. We should not have to have an enabling environment that normalises that sort of behaviour. However, there is a current enabling environment that does embolden hate speech, Islamophobia and racism, so what we want are very specific ways to identify, for women to understand and have the language and the vocabulary to understand what is happening to them and to understand what their recourse for redress is. So very clearly outlining, 'If you have experienced X, you can go and do X', outlining counselling services—and that is trauma-informed for our communities because we also represent migrant and refugee communities who are already experiencing trauma.[24]

Adel Salman, Vice President of the Islamic Council of Victoria (ICV), also advocated for targeted services in this area that could adequately respond to the precise nature of hate conduct:

> There are support services available—psychological support services, social workers, youth workers et cetera—but we believe this requires specialist services and we would like the Government to actually establish clear requirements that are then reflected in the establishment of services for this space. Because we believe that people who are traumatised by anti-Muslim sentiment, and it would be similar for other hate, require specific support and advice, and we do not believe that that currently exists now. There are some people who can provide services but that is almost ad hoc. We would like it to be systematised so we have a framework of support services just like dealing with, and I hate to use this comparison, domestic violence, for example.[25]

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22 Gemma Cafarella, Chair, Goverment Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 9.

23 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 48.

24 Diana Sayed, Chief Executive Officer, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 5.

25 Adel Salman, Vice President, Islamic Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 41.

Some culturally diverse communities face acute difficulties in accessing the law. This could be in relation to language barriers, unfamiliarity with the legal system (particularly for newly arrived persons) or other cultural perspectives. Victoria Police can make arrangements for interpreters to participate in reporting processes, permit an independent third person to provide victim support, or gain assistance from a specialist internal liaison officer, although these supports may not be well known.

This absence of adequate support is particularly important in light of Professor Katharine Gelber and Professor Luke McNamara's 2015 research that found anti-vilification cases are most successful where an individual applicant is resourced and backed by a well-respected organisation.[26] These findings were on the basis of interviews with litigants and members of targeted communities. In evidence to the Committee, Professor Gaze from ADLEG, supported this view, noting that where there is no central community organisation to support a claim, the burden of pursuing a matter is borne by individuals, which can have considerable financial and resourcing costs.[27]

These accounts support the view that well-resourced and culturally appropriate community service organisations are an important element of accessibility to protections. In the context of Aboriginal and Torres Strait Islander groups, the Committee notes that Priority Reform Three of the National Agreement on Closing the Gap includes a commitment to 'embed high-quality, meaningful approaches to promoting cultural safety' in interactions with government agencies. This could be implemented in a variety of ways, such as ensuring staff undergo cultural awareness training.[28] The Committee considers that this reform area is critical in ensuring that persons targeted by vilification feel able and supported to report incidents of vilification or hate conduct to the relevant authorities.

The Committee considers that the overarching burden of responsibility on individuals has reduced the operational effectiveness of Victoria's anti-vilification laws, in that it heavily impacts the willingness of many in the community to report vilification incidents. However, introducing measures to strengthen VEOHRC's powers, as discussed in Chapter 6, alongside increased community awareness of legislative protections will assist to overcome this issue. The Committee also believes that prioritising widespread availability of support from culturally appropriate services, will make an important contribution towards improving accessibility.

26 Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia', *Law & Society Review*, vol. 49, no. 3, 2015, p. 646.

27 Professor Beth Gaze, *Transcript of evidence*.

28 Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments, *National Agreement on Closing the Gap*, July 2020, p. 11.

RECOMMENDATION 27: That the Victorian Government fund services to provide support to impacted communities who experience vilification including:

a. services and programs that provide counselling and other support, and

b. services and programs providing legal information and assistance to navigate the system for reporting vilification.

Establishing a strategic litigation fund

One recommendation made by some stakeholders was for the Victorian Government to fund strategic litigation for vilification incidents. This would allow for the development of a body of case law in this area, which is currently lacking due to the low number of prosecuted matters since the RRTA's introduction. The Committee is aware that funding this type of strategic litigation has the potential to raise awareness of anti-vilification laws and remove some of the burden from targeted individuals and communities to pursue prosecutions. It would also assist in combating the outcome deficit discussed in Section 8.1.4 and restore faith in the ability for individuals to achieve outcomes from the complaints process.

In its submission, ADLEG explained what strategic litigation would involve:

> This would require the addition of new provisions for public enforcement to enable the development of the law and improve awareness of its norms through strategic enforcement in chosen matters. Such public enforcement could be achieved through selective strategic enforcement, in order to develop the case law in the most effective way, and could involve the bringing or funding of cases by the VEOHRC or Victoria Legal Aid.[29]

Liam Elphick from ADLEG, stated that strategic litigation would assist legal services to provide advice to clients and encourage further reporting of incidents:

> the lack of litigation in Australia is a problem, not just in vilification protections but in discrimination protections too… if you are a lawyer representing someone who wants to bring a vilification complaint or you are just a vilification complainant who is unrepresented, then you are going to look at the existence of the cases we have—the very few cases we have had in the last 19 years—and say: is this really worth your time? If we have more of those high-profile cases, we can start to see more deterrence but also start to see more complainants empowered to bring their own cases as well.[30]

Professor Gaze from ADLEG argued that strategic litigation is particularly important to remove the burden from individuals in severe or particularly significant incidents of vilification, with particular matters 'strategically identified and acted against'.[31]

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29 Australian Discrimination Law Experts Group, *Submission 44*, received 24 January 2020, p. 9.

30 Liam Elphick, Adjunct Research Fellow, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 19.

31 Professor Beth Gaze, *Transcript of evidence*, p. 19.

At a public hearing, Jonathan Meddings, Senior Policy Analyst at Thorne Harbour Health, also supported this proposal:

> I note that the Australian Discrimination Law Experts Group suggested an organisation like Victoria Legal Aid could also be funded to engage in strategic litigation in this area and represent individuals. This is something they could be funded to do for vilification complaints whether or not they involve an online component, and I personally think this is an excellent suggestion.[32]

Jonathon Meddings emphasised that, if implemented, it is essential that adequate resourcing be provided to the organisations directed to undertake this type of litigation.[33]

The Committee considers that funding appropriate organisations to undertake strategic litigation would help to develop a body of case law in relation to vilification offences, deter future incidents and raise awareness of anti-vilification provisions. It would also encourage persons targeted by this type of conduct to report vilification incidents and help to alleviate some of the onus on individuals to pursue matters.

RECOMMENDATION 28: That the Victorian Government fund organisations such as Victorian Legal Aid and the Victorian Aboriginal Legal Service to engage in strategic litigation on vilification matters to develop practice in this area.

8.1.3 Victimisation and other negative consequences

The Committee heard that another reason people are unwilling to report vilification is a fear of victimisation or other negative personal or professional consequences, such as losing one's job or employment opportunities.[34] The Committee notes that the RRTA prohibits the victimisation of another person due to a complaint of vilification being made or any other action being taken under the Act.[35] However, this protection may not be well known and may not be seen to be an accessible or meaningful protection in these circumstances.

Springvale Monash Legal Service told the Committee in its submission that its clients were of the view that making a complaint 'would invite further harm or scrutiny', which reflected an overall 'head down' approach to settlement in Australia as the safest option for themselves and their families.[36] In a joint submission, the Victorian Aboriginal Legal Service (VALS) and VLA told the Committee that clients found bringing a complaint stressful and they are often concerned about the impact on their reputation or are

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32 Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 10.

33 Ibid.

34 Ghassan Kassisieh, Legal Director, Equality Australia, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 5; Kristen Hilton, *Transcript of evidence*, p. 27.

35 *Racial and Religious Tolerance Act 2001* (Vic). s 13.

36 Springvale Monash Legal Service, *Submission 43*, received 24 January 2020, p. 6.

fearful of victimisation.[37] They referred to research that showed Aboriginal or Torres Strait Islander people in Victoria are more likely to ignore or confront a perpetrator, as opposed to making a complaint or taking legal action.[38]

Jennifer Huppert, President of the Jewish Community Council of Victoria (JCCV), provided an example of how recent and widely-reported antisemitic incidents in Victorian public schools had prompted discussions within the community around the prevalence of this type of conduct and the hesitation of many of those targeted to make a complaint:

> When the media reports of these particular instances came out, people in the community talked to representatives of the youth movement to gauge if they thought these were widespread, and they reported that there were widespread examples of antisemitism in schools but they did not feel comfortable making complaints. Now, I know one of the ways that this is being addressed is that the department is setting up a hotline so that it will be easier for families and students to raise these issues with the education department if they do not want to take it up with the school that they are at. That is one solution, but that is just an example where people have said they are not comfortable moving forward.[39]

The Committee heard that a fear of victimisation was distinctive for the disabled community. Felix Walsh, Policy and Law Reform Officer at the Disability Discrimination Legal Service, explained that the disabled community is already disadvantaged in terms of their knowledge and resources to consider issues of vilification. He stated that these difficulties can be further exacerbated by actual or perceived fear of victimisation, creating a genuine and profound barrier for the disabled community:

> We also think it responds to a fear, and again we think this probably extends out beyond the disabled community—because of the history of neglect in this area in the way complaints are dealt with there is a fear of victimisation. So when a complaint is made and nothing happens it gives a signal to the perpetrator that you can do this again and nothing is going to happen, and often they will take it out on the individual that is complaining and make it worse, so we think that if you enable representative bodies to do this it will take the pressure off individual complainants. We also think it will deal with the problem of the fear, either in reality or hypothetical, of victimisation occurring from a complaint.[40]

The requirement under the RRTA to name an individual complainant (or each complainant in relation to complaints by representative bodies) can act as a particular deterrent to reporting. The Committee acknowledges that this can be on the basis of a fear of victimisation, or community-wide retributive fear, such as is highlighted in the examples above.

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37 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 16.

38 Ibid.

39 Jennifer Huppert, President, Jewish Community Council of Victoria, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 24.

40 Felix Walsh, Policy and Law Reform Officer, Disability Discrimination Legal Service, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 24.

Allowing anonymous representative complaints

Under the RRTA, a representative body may bring a dispute to VEOHRC for resolution in certain circumstances, provided that the individual person is 'named'. The body must have a 'sufficient interest' in the dispute, such as, that the vilification conduct is a matter of genuine concern for the body and their interests.[41]

The Committee heard that the ability for representative bodies to make a complaint to VEOHRC without the need to name an individual complainant would provide assurance to individuals who fear reprisal and encourage increased reporting of incidents. VEOHRC stated:

> we heard about an employee who was concerned about a post on their employer's Facebook page which vilified Muslim people, but they were not prepared to complain because they thought they might lose their job and they could not do so anonymously. If representative complaints were possible under the RRTA, an organisation such as the Islamic Council of Victoria could complain or bring a complaint on behalf of the Muslim community and seek that the post be removed. This would encourage reporting—we know that this sort of conduct is vastly underreported at the moment—it would alleviate that fear of victimisation and it would improve redress available for groups who experience hate.[42]

Jennifer Huppert from the JCCV agreed that representative organisations should be supported to bring complaints and recognised that this was an issue for many diverse communities:

> We think it would be useful … for a representative organisation to be able to bring forward examples of antisemitism, because there are people who are very concerned at coming forward. I think this is particularly in cases where these communities have a long history of discrimination and vilification, not just the Jewish community but the many other communities in Victoria where there is a long history of generational trauma, where people's parents or grandparents have experienced severe trauma in other countries. That message is passed down, and then people from the next generation are very hesitant to individualise reports of vilification because of their family history.[43]

Ghassan Kassisieh, Legal Director at Equality Australia, stated that a core concern for many people targeted is that 'the process of engaging leads to further victimisation' and for that reason, other Australian jurisdictions permit a representative complainant to bring an action on behalf of a class of complainants.[44] He described how this could work in practice:

> So what that would mean is, for example, rather than having a range of individuals with similar complaints about potentially the conduct that is complained about, you could have a body like a not-for-profit that represents that interest bringing a complaint.

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41 *Racial and Religious Tolerance Act 2001* (Vic). s 20.

42 Kristen Hilton, *Transcript of evidence*, p. 27.

43 Jennifer Huppert, *Transcript of evidence*, p. 24.

44 Ghassan Kassisieh, *Transcript of evidence*, p. 5.

> Obviously those processes have to be carefully structured so that they do not change the balance in a discrimination setting or a vilification setting to allow large corporations, for example, to use the mechanisms. But there are examples in the commonwealth law—for example, a trade union being able to bring a complaint on behalf of workers. So you could see an example there where, you know, a class of workers are affected by the same kinds of treatment that is the subject of the complaint. And it can be a tool for redressing the imbalance between complainant and defendant so that the resources of a representative complainant can be brought to bear in a way that an individual might not be able to.[45]

Allowing anonymous representative complaints, including on behalf of a particular class of people, reinforces that when a perpetrator vilifies an individual on the basis of a particular attribute, they are in fact dehumanising an entire community or class of people. As argued by Professor Gelber from the University Queensland, addressing vilification is about recognising it as a 'public wrong' that 'does harm to our community'.[46] Preventing and addressing vilification is, therefore, a collective exercise, and in some ways a complainant can represent the protected attribute for which they have been vilified. Further, Jamie Gardiner, Member of the Government Regulation and Equality Committee at Liberty Victoria, told the Committee that the equality framework should focus on creating systemic change, rather than deal with individual complaints:

> The individual process with an individual, usually confidential, settlement may be good for the complainant and respondent, but it does not solve the longer term problem. The longer term problem needs to be fixed because ultimately human rights is something that has to be real for everyone, and that involves a change in culture … The Equal Opportunity Act is no longer fit for purpose because it is still using 'an individual must complain and only the individual complaint is dealt with'. It could be better. Please recommend it. [47]

In its submission, LIV emphasised the time, resourcing and knowledge required for an individual to make a complaint and advocated for the RRTA to be amended to permit a vilification complaint to be made without the need to identify the complainant.[48] It stated that such a provision could be modelled on s 46PB of the *Australian Human Rights Commission Act 1986* (Cth), which allows lodgement of representative complaints that 'describe or otherwise identify the class members'.[49]

The Committee considers that allowing anonymous representative complaints could be an effective means for assisting individuals or a particular class of persons to raise complaints. It would provide victims with expert support throughout the dispute process and ease concerns around potential victimisation or other negative consequences for either themselves or their broader community. This reflects a more

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45 Ibid.

46 Professor Katharine Gelber, *Transcript of evidence*, p. 18.

47 Jamie Gardiner, Member, Government Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 7.

48 Law Institute Victoria, *Submission 46*, pp. 12–13.

49 Ibid., p. 13.

victim-centred approach that considers the interests of those affected by vilification and acknowledges that some may not want to re-live experienced harm. In addition, introduction of this type of mechanism would provide further potential for representing the concerns of a particular group or class of persons and working towards more systemic change.

RECOMMENDATION 29: That the Victorian Government enable a representative complaint to be made to the Victorian Equal Opportunity and Human Rights Commission without the need to name an individual complainant.

8.1.4 Trust and outcome deficits

Trust deficits

The Committee heard that distrust or a lack of confidence in the police or public institutions was a key factor in under-reporting vilifying conduct.

Professor Mason from the AHCN identified findings of the 2017 study into police responses to hate crimes that prejudice-motivated crime was 'both under-reported to police and under-recorded by police'.[50] The study stated that minority communities had highlighted that they:

> want to feel safe from prejudiced abuse – both from police and the mainstream public – and to trust that police will play an active and positive role in helping engender such safety. Securing this kind of trust is imperative if Victoria's minority communities are to gain the confidence to report crime … which comes down to the belief that police will treat their complaints fairly and effectively.[51]

It is crucial for communities to feel empowered and supported in engaging with public authorities. AMWCHR explained in its submission how previous negative experiences with police can deter targeted groups from reporting further incidents:

> I think initially the police sound like a really great place to report especially incidents of violent discrimination, but when a community has faced several different incidents of discrimination from police themselves, going to police is not a viable option. So I think for a lot of communities there is quite a lot of mistrust in police. We have had an incident where police have told young women that they just needed to ignore what was happening to them on trains. This was after the Sydney incident at Lindt Cafe, when young girls were having their hijabs pulled off on trains, and police told them to just ignore it. So there is that sort of level of complacency from police around these issues, and young people are just not seeing the police as a viable option.[52]

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50 Professor Gail Mason, *Transcript of evidence*, p. 24.

51 Gail Mason, Jude McCulloch and JaneMaree Maher, 'Policing hate crime: markers for negotiating common ground in policy implementation', *Policing and Society*, vol. 26, no. 6, 2016, p. 683.

52 M.Y., Young Women's Program Coordinatior, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 7.

The ECCV reported that in its consultations, participants relayed concerns around police treatment and profiling of particular groups:

> Most participants identified the police as the institution to which they should report an incident, but mentioned that given the perceived racial profiling experienced by groups such as young men of African background, they find it hard to trust that the police will support them if they do decide to speak up.[53]

Reconciliation Victoria told the Committee that historic distrust of law enforcement by Aboriginal and Torres Strait Islander people was well-founded, and until truth-telling and acknowledgment took place, there would 'always be unrest between First Nations people and the people in power'.[54] This was also conveyed by Marsha Uppill from Arranyinha, who explained that Aboriginal Australians feared the personal consequences of reporting unlawful or criminal behaviour. She stated that systemic failures in the treatment of Aboriginal and Torres Strait Islander people had led to widespread uncertainty in who could offer support:

> You do not know what systems to trust. You do not know where you can actually say, 'I need some support in this', because the lived experience of my community, my people, my family has obviously been one where we have constantly been failed by systems.[55]

The Victorian Government stated in its submission that stakeholders informed it during consultation that some migrant communities who have experienced state-sanctioned persecution historically in their countries of origin are reluctant to report hate conduct to public authorities.[56]

These trust deficits are similarly prevalent for other communities not currently protected by anti-vilification provisions. A research report published by La Trobe University in 2018, *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians*, canvassed the views of LGBTQI+ young people and members of Victoria Police on relationships and engagement between the two. Of the young people surveyed, almost 60% either disagreed or strongly disagreed that Victoria Police understand issues facing LGBTQI+ youth. Respondents reported 'low levels of comfort' around police and did not consider they would be treated with respect or taken seriously when reporting offences, particularly in relation to prejudice-motivated crime.[57] Approximately half stated they were unlikely to report prejudice-motivated crime to police in the future.[58]

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53 Ethnic Communities' Council of Victoria, *Submission 15*, p. 5.

54 Diana David, *Transcript of evidence*, p. 27.

55 Marsha Uppill, *Transcript of evidence*, p. 10.

56 Victorian Government, *Submission 13*, received 19 December 2019, p. 28.

57 William Leonard and Bianca Fileborn, *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians*, Australian Research Centre in Sex, Health and Society, La Trobe University,, Bundoora, 2018, p. iv.

58 Ibid.

Maxim Thomas, Co-convenor of the Victorian Gay and Lesbian Rights Lobby (VGLRL), told the Committee that there was a particular hesitancy among the elder generation of the LGBTIQ community to report any type of crime to the police, due to historical factors.[59]

Outcome deficits

Further to the trust deficit, the Committee also heard that outcome deficits played a role in under-reporting. That is, a lack of confidence in the capacity of public institutions to respond to vilification. In particular, there are perceptions that complaints will not provide an effective remedy or another positive outcome. This results in under-reporting as individuals may feel that there is little point to reporting, or that the process will be too difficult or time-consuming for the predicted outcome. The Springvale Monash Legal Service provided a case study of community perceptions of accessing vilification protections:

> During a community legal education session to a group of recently arrived Rohinga Muslim women, various stories emerged of individual experiences of racism, open abuse, and other vilification. As one woman told her story, other participants would add their own, from mildly offensive 'othering' statements to deeply painful and upsetting experiences creating real fear among the group.
>
> Despite many in the group knowing about the [RRTA], they expressed a sense of hopelessness regarding the complexity of the process and the belief that making a complaint would invite further harm or scrutiny. Many were of the view that proving the offence would be 'almost impossible'. Overall, it seemed that a 'head down' approach to settlement in Australia was the safest for them and their families.[60]

Adel Salman from the ICV offered a similar perspective with regard to targets of Islamophobic incidents:

> I think the confidence—they do not have confidence that anything will be done… unfortunately a lot of Muslims now feel that is just the way it is. It is just normalised; that is just the way it is. And they feel they do not have any recourse, nothing can be done, no-one will be there to support them.[61]

Similarly, JCCV stated in its submission:

> Some people experiencing antisemitism do not feel there is any value in making a report as 'nothing can be done'. Others, particularly those who have experienced trauma based on antisemitism, such as survivors of the Holocaust, or migrants from the former USSR, may have a distrust of authority or be reluctant to publicly identify as Jewish.[62]

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59 Maxim Thomas, Co-convenor, Victorian Gay and Lesbian Rights Lobby, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 25.

60 Springvale Monash Legal Service, *Submission 43*, pp. 5–6.

61 Adel Salman, *Transcript of evidence*, p. 40.

62 Jewish Community Council of Victoria, *Submission 26*, received 20 December 2019, p. 2.

Abiola Ajetomobi, Director of Social Innovation at the Asylum Seeker Resource Centre (ASRC), told the Committee that there was often a lack of clarity around what outcomes communities could expect from making a complaint:

> What I would like to add to this list is the lack of justice and also lack of appropriate understanding of what the outcome of the process looks like. So when people make complaints and there is no clarity on what is going to happen and the consequence of their actions for the people if they are found to be guilty, which has not been very successful given the grey nature of the legislation—I think those are the things that are deterring people from actually being able to express themselves and seek justice.[63]

Gemma Cafarella from Liberty Victoria, described the outcome deficit as having a 'sliding doors' effect on her organisation, in terms of whether or not they decide to encourage clients to proceed through the complaint process.[64]

For some communities, there is also a different conceptualisation of what outcomes are satisfactory or effective. The ECCV emphasised that its stakeholders were not necessarily looking for punitive measures, but for opportunities to strengthen social cohesion as a result of negative experiences of vilification. This was the kind of outcome deficit that also stopped people from reporting vilification:

> Here community members expected more than an individualised resolution between a victim and perpetrator. Their desired outcomes included opportunities to celebrate differences, interfaith practice, better information, fairness and education through media, more open discussions, and mandatory intercultural training for councils, schools, universities, police, and government departments, amongst other things.[65]

Two important ways of combating the outcome deficit are ensuring available legislative protections are as effective as they can be; and meaningful engagement with, and communication about, the availability of outcomes to affected communities.

The Committee strongly believes that potential outcomes of complaints processes will improve if many of the recommendations made in previous chapters, towards improving the legal and operational effectiveness of Victoria's anti-vilification legislative framework, are implemented. This includes, for example, lowering the threshold of both civil and criminal incitement tests, introducing a complementary harm-based provision, and strengthening VEOHRC's powers. Improved community engagement, including through school and community education initiatives as discussed in Chapter 4, will also play a crucial role in restoring community faith in what can be expected and achieved through complaints processes into the future.

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63 Abiola Ajetomobi, Director of Social Innovation, Asylum Seeker Resource Centre, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 32.

64 Gemma Cafarella, *Transcript of evidence*, p. 5.

65 Ethnic Communities' Council of Victoria, *Submission 15*, p. 5.

8.2 Victoria Police and reporting

This section discusses how Victoria Police is working to improve community relations and combat the trust and outcome deficits that impact on how hate incidents are reported. It also considers how prejudice-motivated crime is recorded by police officers and the need for improved data collection, as well as the provision of education and training for police officers, prosecutors and members of the judiciary.

8.2.1 Building and re-building trust

The Committee recognises the invaluable role played by Victoria Police, including its flexibility in responding quickly and innovatively to address community concerns and to maintain regular contact with various communities. Victoria Police has a primary function in ensuring the Victorian community feels safe and protected from serious vilification behaviour and the Committee heard that there is significant work underway to improve responses.

Victoria Police has established a number of portfolio reference groups, comprised of peak bodies and community organisations, to improve engagement with diverse communities. These groups focus on priority areas for improving engagement with particular communities, including disability, LGBTIQ+, multicultural groups and youth. They also undertake awareness-raising programs in collaboration with tertiary institutions to inform international students as to how police can support victims of prejudice-motivated crime or vilifying behaviour.[66]

The Community Liaison Officer Program is similarly designed at improving relationships between police and different communities across Victoria. This program includes both Aboriginal community liaison officers and LGBTIQ liaison officers, who provide a point of contact for their community and provide advice and assistance to Victoria Police on the needs of these communities.[67] In a public hearing, Assistant Commissioner Luke Cornelius outlined the role of liaison officers for First Nations communities:

> We certainly seek to work through our PALOs (Police Aboriginal Liaison Officers) and our ACLOs (Aboriginal Community Liaison Officers) in assisting First Nations peoples in engaging with us and bringing their concerns to us, and the ACLOs and the PALOs play a critical role in helping First Nations people to navigate the criminal justice system with us, particularly where they are the victims but also where they may find themselves being the subject of the criminal justice system.[68]

66 Luke Cornelius, *Transcript of evidence*, p. 2.

67 Victoria Police, *LGBTIQ liaison officers*, 2020, <https://www.police.vic.gov.au/LGBTIQ-liaison-officers> accessed 25 November 2020.

68 Luke Cornelius, *Transcript of evidence*, p. 4.

In addition, Assistant Commissioner Cornelius informed the Committee that they work with community-based organisations to identify areas of acute concern, such as where there is an increase of prejudicial or hate-related conduct, and establish a local police response in that area:

> So we have regular and ongoing contact with both local and peak community representative bodies, whether they are, if you like, in the multicultural space but also our contacts with local First Nations communities. Where we get information and intelligence about behaviours that are prejudice- or race-based we will certainly look to task a local policing response and also look to reach out to the people who are being targeted by that behaviour so that we can understand what the behaviour looks like but also identify who the offenders are so that we can then hold them to account.[69]

Under Priority Reform Three of the National Agreement on Closing the Gap, the Committee notes that the Victorian Government has committed to identifying and eliminating institutional racism, discrimination and unconscious bias in government agencies and ensuring that these spaces embed and practice meaningful cultural safety.[70] Outcome 10 of the Agreement, which aims to ensure Aboriginal and Torres Strait Islander people are not overrepresented in the criminal justice system, specifies the completion of cultural competency training by police.[71]

More broadly, members of Victoria Police are provided with instructions on how to respond to incidents of prejudice-motivated crime and provide victim support, including:

- gather information sensitively, identifying and mitigating any risks to the victim such as continued threats or repeat victimisation
- explain to victims how police will proceed with any investigation
- arrange for an interpreter or an independent third person if necessary
- activate assistance from a specialist internal liaison officer (such as a Multicultural Liaison Officer). This includes dedicated officers for Aboriginal and LGBTIQ communities.[72]

Despite these initiatives, Assistant Commissioner Cornelius acknowledged that there was still substantial work to be done in building trust with communities:

> I would be the first, though, to say that we have a great deal more work to do in relation to building confidence on the part of many peoples—First Nations peoples but also people from CALD communities and more recently arrived communities—because of a long history of a troubled relationship with police. So, Victoria Police certainly does have a strong focus on looking to build confidence among vulnerable communities so that

69 Ibid.

70 Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments, *National Agreement on Closing the Gap*, p. 11.

71 Ibid., p. 26.

72 Victorian Government, *Submission 13*, p. 27.

> those communities can understand that we are there for them and that when they come to us for help we will absolutely give them the help that they are looking for.[73]

In relation to the LGBTIQ+ community, the Human Rights Law Centre's (HRLC) *End the Hate* report stated that while LGBTIQ liaison officers have improved confidence of the LGBTI community in police, access to them is limited, particularly in rural and regional areas.[74] Further, referral to liaison officers may not yet be common. In the 2018 La Trobe report, *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians*, 78.6% of police surveyed stated that they had never consulted a LGBTIQ liaison officer on an issue related to LGBTIQ communities.[75]

The VGLRL and the LGBTIQ Legal Service agreed there was improvement in Victoria Police's communication and relationship with LGBTIQ people, including through the relevant portfolio reference group. Jamie Gardiner from Liberty Victoria similarly reported positive outcomes in this area:

> One of the things I do is I am a member of the LGBTIQ priority reference group of the Priority Communities Division of Victoria Police. Victoria Police have been working slowly but over a long time to get better at a lot of things. I have been agitating with them to do so for 40 years, so I know how slow it is. But I am very, very encouraged these days by the work that is being done within Victoria Police, both in developing policy and in improving their internal training to deal with communities affected by prejudice. The reference groups in the Priority Communities Division include LGBTI. There is the human rights group and there is a CALD group. There are about 10 groups. Anyway, in a way it is the obvious ones. There is roughly one reference group for each of the Equal Opportunity Act attributes. And there is serious work going on within Victoria Police to think through how to deal with prejudice-motivated conduct—particularly crime, of course.[76]

Similarly, Maxim Thomas, Co-convener of VGLRL, provided a positive outlook on recent initiatives to improve community relations:

> So it was only my first meeting, but what I can say from that first meeting is I was really impressed by all the people at Victoria Police who are really committed to improving relations with our community first and foremost. I think the fact that they have got people employed on a full-time basis there to improve relations with our community says a lot. There is a long way to go—there is no hiding that—but it is progress. So that is definitely something to look at as a positive.[77]

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73 Luke Cornelius, *Transcript of evidence*, p. 4.

74 Human Rights Law Centre, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, HRLC, Melbourne, 2018, p. 15.

75 William Leonard and Bianca Fileborn, *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians*, p. iii.

76 Jamie Gardiner, *Transcript of evidence*, p. 9.

77 Maxim Thomas, *Transcript of evidence*, p. 26.

Stakeholders made a number of recommendations for improvements in reporting processes with Victoria Police. The ICV advocated for the establishment of an impartial complaints mechanism and agency, that would be responsible for investigating complaints mishandled by Victoria Police, with the aim of improving public confidence. This agency would also investigate and provide recommendations to address under-reporting of vilification or prejudice-motivated incidents.[78] Other recommendations included additional training for police officers around cultural competency and recording prejudice-motivated crime,[79] and mandatory recording of prejudice-motivated crime.[80] The role of Victoria Police in responding to serious vilification is discussed further in Chapter 7.

Gemma Cafarella from Liberty Victoria stated that Victoria Police could build trust by being responsive to all types of vilification complaints, rather than viewing civil matters as falling outside of their authority.[81] The Committee heard that there is a memorandum of understanding between VEOHRC and Victoria Police in relation to the RRTA. This concerns circumstances where either body receives a complaint that may be more appropriately dealt with by the other, or any community engagement on the RRTA that may be undertaken.

On the possibility of improvements to the ways that Victoria Police and VEOHRC collaborate and refer matters to each other, Assistant Commissioner Cornelius stated:

> So there are opportunities for us to cross-refer, for example—that is, to report matters to VEOHRC so that civil action can be taken by VEOHRC, and vice versa, for VEOHRC to report matters to us so that we can pursue matters through the criminal justice system. There remain open to us any number of opportunities for us to continue to improve our work in that space.[82]

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, similarly acknowledged that improvements to this relationship were needed:

> There have been very few referrals, and partly that is because we do not get as many complaints of serious vilification and because of the complexity of the test, particularly in relation to the criminal offences and the burden of proof that is required to establish serious vilification. So the preponderance of inquiries that we receive or complaints relate to the civil provisions. So the memorandum of understanding is there. Is it as effective as we anticipated that it would be? No, it is not, and any changes to the system will have to involve really good cross-referral and partnerships with Victoria Police.[83]

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78 Islamic Council of Victoria, *Submission 45*, received 31 January 2020, p. 14.

79 Ethnic Communities' Council of Victoria, *Submission 15*, pp. 5–6; Islamic Council of Victoria, *Submission 45*, p. 13; Nicole Shackleton, Dr Laura Griffin and Danielle Walt, La Trobe University, *Submission 19*, received 20 December 2019, p. 1; Human Rights Law Centre, et al., *Submission 47*, received 31 January 2020, p. 17; Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 26.

80 Islamic Council of Victoria, *Submission 45*, p. 5.

81 Gemma Cafarella, *Transcript of evidence*, p. 10.

82 Luke Cornelius, *Transcript of evidence*, p. 4.

83 Kristen Hilton, *Transcript of evidence*, p. 32.

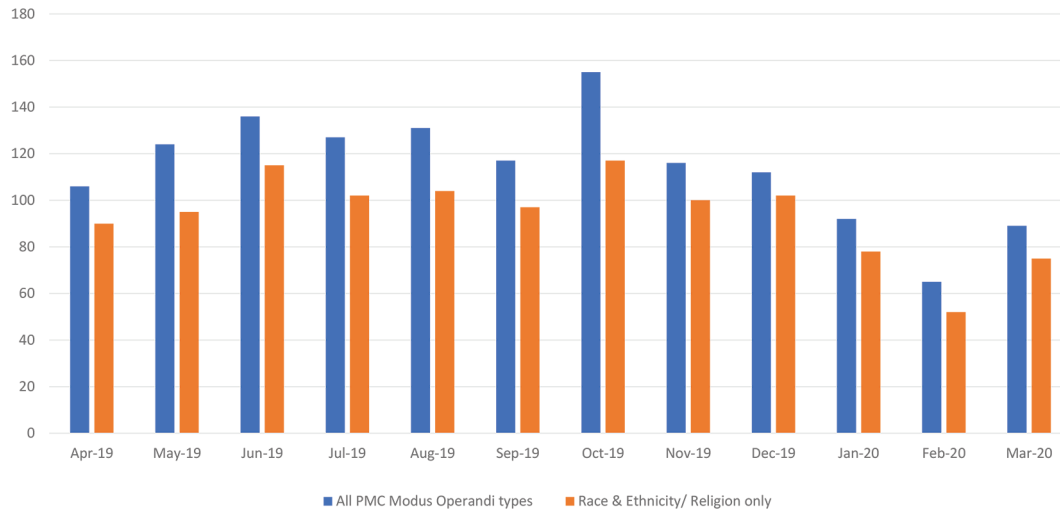
The Committee considers that strong engagement and collaboration between these two bodies is critical in building trust within communities that are commonly targeted by vilifying conduct. This should take place in conjunction with appropriate community bodies.

RECOMMENDATION 30: That the Victorian Equal Opportunity and Human Rights Commission and Victoria Police strengthen working relationships, information sharing and cooperation to ensure all reports or complaints about vilification are appropriately addressed. This should also include relevant peak and community organisations where appropriate to share research, data and information.

8.2.2 Prejudice-motivated crime

As discussed in Chapter 7, prejudice-motivated crime is any crime that is motivated by prejudice or hatred towards a person or a group because of a particular characteristic, such as race or sexual orientation.[84] Under the *Sentencing Act 1991* (Vic), courts must take into consideration whether an offence was motivated by hatred of prejudice, which is an aggravating factor for the purpose of sentencing. This is inherently linked to anti-vilification provisions, as serious vilification offences under the RRTA constitute one form of prejudice-motivated crime. However, this provision is not often used in practice.[85] At a public hearing, Assistant Commissioner Cornelius provided data on offences recorded by Victoria Police with the modus operandi code of 'prejudice motivated crimes', as well as those that were recorded as prejudicial on the basis of race and ethnicity or religion. These figures are shown in Figure 8.1.

Figure 8.1 Offences recorded with the modus operandi code of 'prejudice motivated crimes'



Source: Assistant Commissioner Luke Cornelius, Victoria Police, PowerPoint presentation at public hearing, 25 June 2020

84 Victoria Police, *Prejudice and racial and religious vilification*, 2020, <https://www.police.vic.gov.au/prejudice-and-racial-and-religious-vilification> accessed 14 December 2020.

85 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 59–60.

Assistant Commissioner Cornelius explained the context of these numbers to the Committee, including how they compare to the number of prosecutions under the RRTA:

> You can see there that the number of matters over the years and over the months has certainly remained at a much more significant number than what you will see with prosecutions specifically brought under the religious and racial intolerance legislation. For example, in March 2020 we saw just on 90 matters where prejudice-motivated crime was identified as [a modus operandi]. We have seen just over 70 matters where race and ethnicity or religion was identified as being a potential aggravating factor. What we seek to do with these cases is certainly bring these issues to the attention of the court in order to maximise the offender accountability around that aggravating factor, and we have found considerably more success in achieving offender accountability through this pathway than we have been able to achieve through the religious and racial intolerance legislation.[86]

In its submission, VEOHRC provided data on police recording of prejudice-motivated crime, stating that these recorded numbers have not led to an increase in prosecutions under the RRTA or alternatively, been adequately used in sentencing:

> In the 15 years from July 2004 to June 2019, Victoria Police recorded a 'prejudicially motivated crime' code alongside offences related to:
>
> - sexual orientation (total of 908 offences recorded)
> - disability (total of 296 offences recorded)
> - political beliefs/activity (total of 581 offences recorded)
> - race/ethnicity (total of 5,369 offences recorded)
> - religion (total of 1,113 offences recorded).
>
> Note: Victoria Police may select multiple codes for an offence so offences may be counted more than once in the figures stated above.[87]

The wishes of persons affected by prejudice-motivated crime, regarding whether or not this motivation should be considered as an aggravating factor in sentencing, are a key factor in the disparity between the number of offences recorded with prejudice as a motivation and the number of prosecutions where this is identified. Assistant Commissioner Cornelius explained this at a public hearing:

> One of the features of racial vilification and prejudice-motivated crime is that the victim feels very dislocated by the behaviour, feels their place in our community devalued and is of course very concerned about how they are going to be perceived and how the courts might deal with the matter. Some victims do say to us that they do not want to play the race card. Now, we do everything we can to reassure them of both our support and the criminal justice system's support for offenders to be held to account in relation

86 Luke Cornelius, *Transcript of evidence*, p. 3.

87 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 60.

> to prejudice-motivated behaviour. But in the end we do need to pay regard to the wishes of victims, and so we certainly take into account the views of the victim in terms of the enforcement and prosecution pathway that we select.[88]

Like vilification incidents, under-reporting of prejudice-motivated crime is common and influences the above figures.[89] Throughout the inquiry, stakeholders raised various proposals to improve responses across the justice system to prejudice-motivated crime.[90]

Recording prejudicial motivations

A central issue relates to the recording of incidents by Victoria Police officers. In its submission, the Victorian Government provided an overview of this process as set out in the Victoria Police Manual:

> Where the victim or investigating member believes that prejudice is a motivating factor in the criminal offence under the RRTA, police members must complete an incident report (Form L1) along with an Offence Against the Person Form (Form L2A) and/or Offence Against Property (Form L2B), as applicable. The Victoria Police member must ensure that on the Form L2A and/or L2B that the categories of 'prejudice motivated crime' are recorded correctly.
>
> Victoria Police also has a role in respect to prejudice motivated incidents, where no criminal offence is immediately apparent and is perceived by the victim, or any other person, to be motivated by a hostility or prejudice based on the victim's actual or perceived characteristics. In these circumstances, the incident may not meet the threshold for constituting a prejudice motivated crime. In this case, an Information Report is drafted and the 'motivation' for the incident is classed under the following headings: 'political', 'sexual', 'racial', 'hate', 'religious', 'terrorism', and 'financial'.[91]

As noted by the Victorian Government, a court's consideration of prejudice motivation as part of sentencing 'can be informed by Victoria Police's recording'.[92] In explaining Victoria Police's approach to recording data, Assistant Commissioner Cornelius stated that clear processes exist, however, there remain concerns about whether this data capture is accurate:

> We have very clear policy in relation to capturing the data, and so when a crime report is taken we have very specific requirements in relation to capturing what I have already referred to as the MO, or the modus operandi, information, particularly capturing the aggravating factors. The other thing too is that we do collect data that is relevant to particular vulnerabilities that the victim may have, including whether it is a protected

88 Luke Cornelius, *Transcript of evidence*, p. 3.

89 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, pp. 49–50.

90 Australian Muslim Women's Centre for Human Rights, *Submission 49*, p. 18; Victorian Gay and Lesbian Rights Lobby, *Submission 27*, received 20 December 2019, p. 12; Human Rights Law Centre, et al., *Submission 47*, p. 17; Equality Australia, *Submission 53*, received 3 February 2020, p. 6.

91 Victorian Government, *Submission 13*, p. 27.

92 Ibid., p. 28.

> attribute and whether there is a cultural or a race-based background that might heighten that vulnerability and so trigger some obligations that we have under the victims' charter legislation.
>
> But the reporting piece remains a concern for us, which is why we remain committed to an ongoing program of education not only of our recruits but also of our supervisors and more experienced members. The data I have shown you in the two tables, to my mind, underscores two key things. One is under-reporting, but the other is the need for us to improve our focus and our attention to data capture. We have the tools in place to capture the data; it is certainly down to us to keep working on having those requirements carried through by our members.[93]

As well as under-reporting of incidents to police, there are concerns that under-recording of prejudice motivation by police officers is also common. The Victorian Government's submission explained that this process is currently optional for police officers, and that the low numbers of offences recorded as prejudicially motivated crime (0.17% of total offences in 2018) should therefore be 'read with caution'.[94]

Similarly, VEOHRC's submission stated that the data collection process is ineffective due to the lack of a consistent recording process or definitions. It further stated that there is a lack of clarity around when and where hate crimes occur, and it is not possible to identify geographical patterns from available data.[95] At a public hearing, Kristen Hilton from VEOHRC expanded on this, noting that it is crucial to accurately record hate crime where it occurs so as to understand its prevalence in the community and develop appropriate responses.[96]

To address issues around consistency of recording prejudicial motivations, the ICV advocated for mandatory recording in order to build community trust in reporting processes, facilitate effective judicial processes and ensure accurate data collection:

> The [Islamic Council of Victoria] understands that Victoria Police crime recording systems include categories around racial and religious vilification that are optional. Currently when a person reports an incident of anti-Muslim abuse, the frontline police officers fill in check boxes to record crimes. There is no mandatory requirement to always fill them in. When police record prejudice motivated crimes they may choose either the racial offences category or the religious offences, and they are not required to include the details of the incident reported. We believe the current offence categories in the reporting forms do not include sufficient categories to reflect the gravity of the religious vilification incidents reported and are therefore not geared towards successful prosecution. This then discourages the reporting of anti-Muslim abuse and diminishes public trust in the police. Australian research shows that prejudice motivated crime is less likely to be reported to police than other crimes.[97]

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93 Luke Cornelius, *Transcript of evidence*, p. 5.

94 Victorian Government, *Submission 13*, p. 28.

95 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 88.

96 Kristen Hilton, *Transcript of evidence*, p. 28.

97 Islamic Council of Victoria, *Submission 45*, pp. 12–13.

The Committee agrees that accurate recording of prejudice-motivated crime is essential and should be a mandatory requirement for police officers. Noting that there is a need to ensure consistency in how such crimes are dealt with, standards for recording and detailed training for officers are also required to accompany such changes.

RECOMMENDATION 31: That the Victorian Government make the recording of prejudice-motivated crime mandatory by Victoria Police officers. This requirement should be accompanied by sufficient training, resources and procedures, as well as the establishment of relevant guidelines and standards to ensure standardization of record keeping processes.

Education and training

Advocating the need for a change in practice, Professor Mason from the AHCN, elaborated on some of the findings of her 2017 study into policing responses to hate crime. The research indicated that frontline police officers 'do not always feel confident, they do not feel they have the skills to identify and record prejudice-motivated crime'.[98] In line with these findings, Assistant Commissioner Cornelius echoed the importance of training and education for police officers on recording prejudice-motivated crime: '[w]e have the tools in place to capture the data; it is certainly down to us to keep working on having those requirements carried through by our members.[99]

In its submission, the Victorian Government outlined current training arrangements for Victoria Police personnel in relation to prejudice-motivated crime and the RRTA. This includes through initial training for police recruits, as well as additional measures for senior staff:

> Police recruits receive one session dedicated to understanding and acting on reports of prejudice motivated crimes. This session also introduces participants to the RRTA and explains the context of vilification in a law enforcement setting. Education and capacity building continues for Police Managers and through internal online resources available in their application of legislation and policies related to vilification issues.[100]

The Committee heard that training in this area could be improved. For example, Adel Salman from the ICV advocated that there should be additional focus on vilification offences:

> We also believe police require specific training on how to apply the Act—how do they apply the Racial and Religious Tolerance Act? We believe they need specific training on that—not just general awareness training, not cultural sensitivity training, not training on dealing with racism but actually training on how to apply the Act, because what we believe is that whilst the police are very familiar with the Crimes Act and how to apply the Crimes Act, they are not very familiar with how to apply the Racial and Religious Tolerance Act.[101]

98 Professor Gail Mason, *Transcript of evidence*, p. 24.

99 Luke Cornelius, *Transcript of evidence*, p. 5.

100 Victorian Government, *Submission 13*, pp. 27–8.

101 Adel Salman, *Transcript of evidence*, p. 39.

However, the Committee also heard that improving education initiatives can be challenging. Professor Mason outlined some of her research results regarding the difficulties around training frontline police officers:

> [Victoria Police] have actually integrated into their training for recruits a program on prejudice-motivated crime, or a module on prejudice-motivated crime. What we did in our research project was we assessed the impact of that training module on a survey of 1600 recruits with Victoria Police. We basically looked at their understanding of prejudice-motivated crime before they did the training, which was a 4-hour module as part of the recruit training, and then we assessed their understanding after the training.
>
> The bad-news story is that the training did not have a positive impact on their capacity to identify prejudice-motivated crime or hate crime, and I think that really brings to the fore the difficulty in this area. So it was not for want of trying; Victoria Police were integrating this training into their overall package, but it was not working. The main conclusion from the research was that the training was confusing recruits. If you think about it, a recruit has a whole heap of information coming at them at one time and they have got to digest a lot. So I guess that that research is instructive because it shows that, yes, training is essential but training is difficult. So, again, we need to look at international best practice, and there is a significant amount of evidence on what does work in training for police, particularly coming out of Europe and the UK.[102]

In *Policing Hate Crime: Understanding Communities and Prejudice*, Mason et al concluded their review of Victoria Police's hate crime strategy with particular recommendations aimed at improving education and training initiatives. These include that training programs:

- are stimulating and incorporate personal experience and victim-centric approaches
- align with professional conduct standards and clearly state how the training integrates into broader performance indicators, such as human rights principles
- equip officers with the skills, confidence and ethics to ask the right questions of victims and witnesses.[103]

Importantly, training should be delivered in a formal setting, but also reinforced through regular capacity-building processes, such as through internal communication and media. In addition, Mason et al state that using even best practice approaches will be insufficient where 'dissonance between the world-view of police officers and the key underpinnings or organisational view of hate crime'.[104] It is therefore crucial that the importance of, and reasoning behind, these types of training programs is clearly communicated to all staff.

In addition to police training, VEOHRC stated in its submission stated that education and training for prosecutors and the judiciary was needed to ensure appropriate understanding of vilification throughout all stages of the criminal justice process.

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102 Professor Gail Mason, *Transcript of evidence*, pp. 27–8.

103 Gail Mason, et al., *Policing Hate Crime: Understanding Communities and Prejudice*, 1st edn, Routledge, London, 2017, p. 167.

104 Ibid.

It argued that this would ensure that courts and tribunals have 'a working knowledge of Victoria's reformed vilification laws and the prejudice-motivated sentencing provision' as well as appreciation of the nature and impact of these types of offences for targeted communities.[105] This recommendation was similarly supported in the group submission of HRLC, GetUp!, Anti Defamation Commission, Victorian Trades Hall Council and ASRC.[106] In a related suggestion, Thorne Harbour Health recommended the development of prosecutorial guidelines for prejudice-motivated crime.[107]

The Committee agrees that the use of relevant sentencing provisions and offences would be greatly strengthened through improved training and education within all parts of the justice system, particularly police, prosecutors and the judiciary. Given the significant legislative reforms being proposed in this inquiry, such education and training will be essential to ensure that the strengthened criminal anti-vilification protections are well understood and applied in practice.

RECOMMENDATION 32: That the Victorian Government strengthen education and training on responding to vilification and prejudice-motivated crime. This could include comprehensive and ongoing education and training for police officers as well as members of the judiciary on serious vilification offences, sentencing provisions and investigating and prosecuting prejudice-motivated crimes.

8.3 Third-party reporting

As a result of some of the barriers to reporting discussed above, the Committee heard that many individuals are more likely to report vilification incidents to community groups or bodies that have built trust and confidence over time within the communities they work with. Recognising this gap, community-led mechanisms have been created to monitor racist and religious vilification. For example, the Islamophobia Register of Australia provides an online platform for reporting anti-Muslim incidents, with the ability to submit anonymous reports.[108] The Executive Council of Australian Jewry utilises information recorded by volunteer Community Security Groups and official Jewish state roof bodies to report annually on antisemitic incidents across Australia.[109]

The ICV provided in its submission:

> Third party reporting is one approach used internationally to circumvent the limitations of police reporting of bias crime. This approach would encourage more reporting by putting the interests of the victims at the heart of policing and to assist police to take action against offenders and reduce hate crime.[110]

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105 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 86.

106 Human Rights Law Centre, et al., *Submission 47*, p. 17.

107 Thorne Harbour Health, *Submission 34*, received 20 December 2019, p. 11.

108 *Islamophobia Register Australia*, <https://www.islamophobia.com.au> accessed 23 December 2020.

109 Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2019: 1 October 2018 – 30 September 2019*, ECAJ, 2019, p. 2.

110 Islamic Council of Victoria, *Submission 45*, p. 17.

Individuals may feel that third party reporting tools are more accessible due to legislative barriers under the RRTA, such as the incitement threshold or the requirement for a complainant to name a respondent when making a complaint to the VEOHRC. The Committee acknowledges that identifying the person responsible for vilifying conduct can be difficult where an incident occurred in a public place, such as public transport, or on online forums. Further, VEOHRC does not have the power to compel identifying information about a person where it would assist with conciliation processes.

One international example is the United Kingdom's (UK) online reporting tool, True Vision, which allows victims, witnesses and other persons (such as family members) to report incidents on the basis of a number of attributes, including race, religion, disability, sexual orientation and transgender status. The tool is supported by police and incidents can be investigated even if a person chooses not to provide contact details.[111] This provides the option to report incidents without having to visit a police station or otherwise engage with public bodies unless the person reporting chooses to do so.

In 2019, VEOHRC introduced its Community Reporting Tool to complement existing options for making complaints and address barriers to reporting. The Community Reporting Tool consists of a short online form through which individuals can log a report of an incident and opt whether or not to have a VEOHRC staff member follow up the matter. Information submitted helps to inform incidence data of discrimination, sexual harassment and vilification matters. Importantly, the tool can also be hosted on third-party websites, such as community organisations and local councils, and is available in a number of languages.[112] In evidence to the Committee, VEOHRC reported that use of the tool had doubled since March 2020.[113]

VEOHRC contended in its submission that if vilification laws were extended to additional groups, this tool should be tested and promoted to those communities.[114]

The Victorian Government acknowledged in its submission the intrinsic value of community-led reporting mechanisms, and the role these could play in improving data capture and reporting practices:

> Statutory reporting and community-led reporting could be better aligned to build a more comprehensive and fulsome picture of the problem in Victoria. There may be opportunities for these efforts to better complement each other.[115]

Third party reporting tools have the potential to improve the collection and recording of vilification incidents in Victoria. Various stakeholders advocated for Victorian Government support for community-led mechanisms that could assist existing pathways for reporting crimes and other incidents.[116] The Committee believes that

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111 True Vision, *Report a hate crime*, 2020, <https://www.report-it.org.uk/your_police_force> accessed 29 September 2020.

112 Kristen Hilton, *Transcript of evidence*, p. 30.

113 Ibid., p. 25.

114 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 84.

115 Victorian Government, *Submission 13*, p. 26.

116 Islamic Council of Victoria, *Submission 45*, pp. 17–18.

implementing third party reporting mechanisms in existing and trusted community organisations will facilitate increased reports of incidents and enhance public awareness of the mechanisms available.

RECOMMENDATION 33: That the Victorian Government implement third party (community-led) reporting mechanisms in trusted community organisations as an additional avenue to report vilification and hate crimes to relevant authorities—the Victorian Equal Opportunity and Human Rights Commission and Victoria Police.

8.4 Data and information sharing

Comprehensive and accurate data recording surrounding vilification and related incidents is central to understanding the extent and nature of hate conduct in the community and designing policy and policing responses. This includes data on civil and criminal vilification incidents and prejudice-motivated crime.

VEOHRC currently includes data on complaints made under the EOA and RRTA, searchable by area and attribute, in its annual reports. It also includes data on issues raised from enquiries.[117] However, this is the only data made public in its annual reports. In contrast, at the national level, the Australian Human Rights Commission (AHRC) publishes a document compiling complaints statistics with its annual reports. The document includes a brief overview and analysis of complaints received during the preceding reporting period and information on the outcomes of complaints, including the numbers finalised by conciliation and mediation. It also includes select demographic data and information on the timeliness of the complaints process.[118] In addition, the AHRC publishes a Conciliation Register which includes summaries of a selection of complaints that have been resolved through its conciliation process. These can be filtered by the relevant Act each claim was made under (such as those relating to the *Racial Discrimination Act 1975*). These summaries are de-identified, provide an indication of how the matter was resolved, and are intended to 'assist people involved in complaints to prepare for conciliation'.[119]

Victorian crime data is published regularly by the Crime Statistics Agency (CSA). This includes quarterly releases (for datasets such as recorded criminal incidents and recorded offences) and annual release (for datasets such as unique offenders and unique victims). CSA receives raw data from Victoria Police's Law Enforcement Assistance Program (LEAP), which it checks for data quality before applying the national counting rules and publishing the final datasets.[120] Racial and religious

117 Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2018-19*, VEOHRC, Carlton, October 2019, Appendix 1: Complaints and enquiries data.

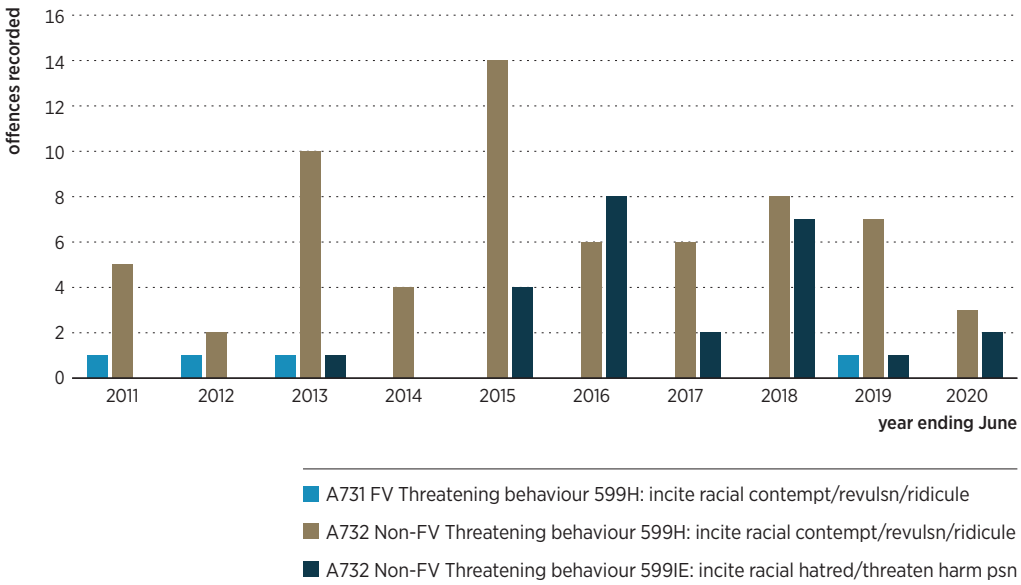
118 Australian Human Rights Commission, *2019-20 Complaint Statistics*, 2020.

119 Australian Human Rights Commission, *Conciliation Register*, <https://humanrights.gov.au/complaints/conciliation-register> accessed 14 December 2020.

120 Crime Statistics Agency, *How the data is collected and processed*, 2020, <https://www.crimestatistics.vic.gov.au/about-the-data/how-the-data-is-collected-and-processed> accessed 9 December 2020.

vilification offences under the RRTA are included in these datasets. For example, the below image displays data visualisation of offences recorded as inciting racial contempt or hatred between 2011 and 2020.

Figure 8.2 Data visualisation of offences recorded—inciting racial contempt or hatred



Note: FV represents offences related to family violence.

Source: Crime Statistics Agency, 'Recorded Offences', Offences Recorded - Tabular Visualisation, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-1>.

However, recorded motivations for criminal offences (and in particular, prejudice as a motivation) are not incorporated into these datasets. This leads to an incomplete picture of the nature of hate-motivated crime in the community.

As noted in Section 8.3, these data sources are supplemented by community-led databases (such as the Islamophobia Register of Australia and reports by the Executive Council of Australian Jewry) which provide additional evidence regarding the prevalence of vilification in communities. The Committee believes that incorporating third-party reporting mechanisms alongside existing reporting pathways will supplement current datasets and enable a more comprehensive picture of vilification in Victorian communities.

The Committee heard from various stakeholders throughout the inquiry that there is limited data or gaps in the data relating to vilification in Victoria.[121] In its submission, the Victorian Government referred to the need to consult with stakeholders and community organisations due to 'gaps in the evidence-base as a result of limited data available'.[122]

121 Maria Dimopoulos, *Transcript of evidence*, pp. 3, 7; Adel Salman, *Transcript of evidence*, pp. 37–8; Ghassan Kassisieh, *Transcript of evidence*, p. 3; Dr Bruce Baer Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School, University of Canberra, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 3; Professor Gail Mason, *Transcript of evidence*, p. 24; Felix Walsh, *Transcript of evidence*, p. 22.

122 Victorian Government, *Submission 13*, p. 6.

VEOHRC also agreed that existing data collection was inadequate:

> Despite efforts to collect data on hate in the Victorian community, there is a lack of an integrated coordinated approach to data collection in Victoria and nationally. This includes a lack of consistent categories and definitions for hate crime, which makes it difficult to integrate, compare and analyse data.[123]

The impacts of poor data practices include the potential for poorly-targeted policy responses and the inability to properly understand the forms of hate most prevalent in the community.

8.4.1 Prejudice-motivated crime

Further to the earlier discussion regarding mandatory reporting of prejudice-motivated crime, the Committee also heard from various stakeholders that data on the prevalence and types of prejudice-motivated crime should be made public, such as through quarterly reports by CSA. In evidence to the Committee, Professor Mason from AHCN stated that regular reporting would assist public understanding of hate conduct:

> there is a lack of data, as we have already said, and I am sure you have read before in other submissions. And this is not peculiar to Victoria; this is across Australia. Sure, we have police forces that collect hate crime data, and of course human rights agencies collect their own data as well, but we have no way of putting those together. We also have no consistency nationally, for example, on the definition of 'vilification' or the definition of 'hate crime'. So having a national database or register of hate crime would be ideal, and I would be happy to talk about that as well.
>
> ...
>
> I think that in Victoria, yes, it would be incredibly valuable if reports of prejudice-motivated crime, if that is the category that Victoria Police will continue to use, could be pulled out of the data and reported annually and publicly, and reports of vilification as well, because one of the things that we lack here—well, lack in Australia generally—is not just good police data but the public availability of the data. Again, if we compare ourselves to the UK or the US, there you have annual reports; so the Home Office in the UK produces an annual report every year with hate crime data, and that is publicly available. I guess one caveat I would put on that is it is easier in the UK to do that because they have those very specific hate crime laws, so they have already got the legislative basis for the police to record the data and then for the Home Office to prepare the reports.[124]

Adel Salman from the ICV similarly agreed with a proposal for regular reports to be provided by CSA on hate crime issues.[125] In its submission, the ICV also considered that '[a]ccurate crime data educates the public and reduces vilification' and recommended enhanced sharing of data by VEOHRC and Victoria Police with CSA.[126]

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123 Victorian Equal Opportunity and Human Rights Commission, *Submission 51*, p. 87.

124 Professor Gail Mason, *Transcript of evidence*, p. 28.

125 Adel Salman, *Transcript of evidence*, p. 43.

126 Islamic Council of Victoria, *Submission 45*, pp. 13–14.

Australian jurisdictions adhere to the National Crime Recording Standard (NCRS) in the recording and counting of criminal incidents for statistical purposes. The NCRS promotes uniform practices in initial police recording processes to enable interjurisdictional comparison of recorded crime data. However, the Australian Bureau of Statistics states that there is some variability in the interpretation of the rules. For example, Victoria differs from the standard in the way in which incidents of assault are recorded on the police crime recording system.[127]

At a public hearing, Assistant Commissioner Cornelius indicated that while Victoria Police was bound by national crime recording requirements, there was capacity to further report on collected data:

> To a certain extent we are bound by the national counting rules, as they are called, in relation to crime statistics, and so we are bound by that framework. As I have already indicated, it is certain open to us to track prejudice and race-related aggravating factors through our LEAP records and our record keeping that way. So it is certainly open to us … to report on racially motivated property damage, for example, because we do have that information searchable and available to us so long as our members tick the box, which is why we need to stress the education piece. The other piece is having that information actually is invaluable to us in terms of our local police tasking and in terms of understanding what is driving, for example, the crime of property damage.[128]

The Committee agrees that improving the availability of information and data about prejudice-motivated crime would enhance public knowledge and awareness of these issues. The provision of regular reports would complement and feed into data collection and publicisation of vilification incidents. The Committee considers that strong data collection practices significantly contribute to improving Victoria's ability to deal with prejudice-motivated crimes.

8.4.2 Vilification incidents

Some stakeholders considered that VEOHRC could play a greater role in publicising further data and information regarding reports of vilification. One of the key issues in this area is that conciliation or mediation undertaken by VEOHRC is confidential between the parties and the details of these proceedings are often unable to be disclosed. However, Gemma Cafarella from Liberty Victoria stated:

> having some reporting of the number of matters that are going before the Commission and the outcomes would be helpful, if not statements of law maybe put out by the Commission or the like, to really reflect what is actually happening when matters are getting to the Commission rather than only the matters that do not actually manage to settle and someone is kind of brave or bold enough to push on to get in law.[129]

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127 Australian Bureau of Statistics, *Recorded Crime - Victims, Australia methodology*, 2020, <https://www.abs.gov.au/methodologies/recorded-crime-victims-australia-methodology/2019> accessed 14 December 2020.

128 Luke Cornelius, *Transcript of evidence*, p. 6.

129 Gemma Cafarella, *Transcript of evidence*, p. 8.

Similarly, ADLEG stated that despite the 'reasonable number' of complaints made to VEOHRC over the years, there is no public analysis of the character of these complaints, or the manner of their resolution (such as through conciliation) and any agreed outcomes.[130] At a public hearing, Professor Gaze from ADLEG, acknowledged that funding limitations could play a role in what information or data VEOHRC analysed and released, and stated that the academic community could assist in analysing existing information.[131]

In research into the ways in which confidentiality is embedded in the enforcement, process, and outcomes of equality law in Australia and the UK, researchers from Melbourne Law School and Monash University explored how equality agencies publish data on complaints, conciliation and related matters. The authors, Dominique Allen and Alysia Blackham, concluded that:

> even recognising the problems raised by [privacy legislation and statutory confidentiality provisions], there is far more scope for the release of data about the claims that are made and resolved through conciliation than is currently taking place. Releasing more information would facilitate a better understanding of the prevalence of discrimination in society, the areas in which it is most common, and the sorts of claims and outcomes that can be expected by parties. This would significantly enhance the administration of justice in accordance with the rule of law.[132]

Allen and Blackham recommended that equality agencies publish further de-identified data about claims and conciliation, and in particular, demographic data about the claimant (such as age or sex) and the respondent (such as individual or business), whether the parties were represented, and the settlement terms (such as any compensation or other outcomes).[133] The Committee is aware that the analysis and publication of these types of information would likely require additional funding for VEOHRC to implement.

The Committee considers that more work is needed to ensure that there is transparency around vilification that occurs in the community and the ways that incidents are resolved. The Victorian Government has a key role in ensuring that relevant data is collected, consolidated, analysed and, where possible, made available to the public. This includes data collected by all agencies with responsibilities related to the RRTA, including VEOHRC, Victoria Police and VCAT.

The Committee considers that improved data collection practices will also assist research into the drivers of vilification conduct and prejudice, and effective strategies to prevent this conduct, as recommended in Chapter 4. The availability of this data will also be useful to the five-year review of the new legislative framework as recommended in Chapter 6.

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130 Australian Discrimination Law Experts Group, *Submission 44*, p. 5.

131 Professor Beth Gaze, *Transcript of evidence*, p. 22.

132 Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom', *Melbourne University Law Review*, vol. 43, no. 2, 2019, p. 34.

133 Ibid., p. 35.

In addition, the Committee is aware that there are currently a lack of outcome measures and indicators for responding to hate conduct and vilification more broadly. The final report of the New Zealand (NZ) Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain, *Ko tō tātou kāinga tēnei*, included various recommendations towards improving social cohesion. This included that the NZ Government develop an evaluation framework, with performance indicators, that examines the impact and effectiveness of government policies and programmes on the wellbeing of ethnic communities and on social cohesion.[134] The introduction of these types of outcome measures and indicators could similarly assist Victorian agencies to measure the effectiveness of an amended legislative framework stemming from this inquiry.

RECOMMENDATION 34: That the Victorian Government work with agencies—including the Victorian Equal Opportunity and Human Rights Commission, Victoria Police, Victorian Crime Statistics Agency and the Victorian Civil and Administrative Tribunal—to develop a strategy to collect, monitor and regularly report government data on vilification conduct and prejudice-motivated crime. Data should refer to outcome measures and indicators to monitor the effectiveness of legislation, programs and services in reducing vilification.

134 Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019*, 26 November 2020, Volume 1, p. 31.

9 Online vilification

Online vilification is prohibited under the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), with vilifying conduct identified as 'use of the internet or e-mail to publish or transmit statements or other material'.[1] Despite this, it is a significant and growing problem for Victorians. According to the Office of the eSafety Commissioner, internet and digital technologies have evolved rapidly since the RRTA was enacted, which has given rise to new online harms and risks:

> When the Racial and Religious Tolerance Act 2001 (Vic) (Racial and Religious Tolerance Act) was introduced in [2001], Facebook was still three years away from being founded and the first iPhone was still six years away from being released.
>
> Since that time, internet and digital technologies have revolutionised the lives of Australians. While this undeniably brings enormous benefits and opportunities, it also presents risks and harms, including cyber abuse and online vilification.[2]

Online vilification coexists with real-world or face-to-face vilification, although it is unique because of the scope and pace with which it can spread. There is a tendency also for people to communicate and behave differently in online environments, especially those who choose to be anonymous or use a fake identity. There is growing recognition of these and other specific challenges in preventing online vilification and other online harms. This is accompanied by growing pressure on governments, technology and social media companies to address these issues and work together to develop a multifaceted and effective approach to regulate this space.

The purpose of this chapter is to explore the evolution of digital media, and some of the accompanying risks and harms. The chapter also considers the efficacy of the regulation of the online environment by both governments and the tech industry. The Committee believes that strengthening Victoria's anti-vilification legislative framework will contribute somewhat to addressing online vilification. However, it is also aware that state and territory governments are somewhat limited in their powers in this area due to the Commonwealth Government having primary responsibility for the regulation of corporations and telecommunications in Australia.

9.1 The digitisation of life

Since the RRTA was enacted, the proliferation of the internet and smartphones has resulted in the digitisation of human life.[3] Personal computer ownership and access

1 *Racial and Religious Tolerance Act 2001* (Vic) ss 7,8,24,5.

2 Office of the eSafety Commissioner, *Submission 16*, received 19 December 2019, p. 3.

3 There are 33 million mobile phone connections in Australia, which is equivalent to 130 per cent of total population. See: Datareportal, *Digital 2020: Australia*, 2020, <https://datareportal.com/reports/digital-2020-australia> accessed 14 December 2020.

to the internet has grown exponentially, alongside use of smart mobile phones. In 2000, only four million Australian households had access to a computer and 37% of households had access to the internet.[4] Today, experts estimate that approximately 90% of Australians are internet users.[5] This Australian experience reflects the spread of information technology around the world. The confluence of people's real-world and digital lives is ever-increasing, and most people now inhabit 'online' and 'offline' environments. Access to the internet is now considered by some key international actors to be critical to the realisation of human rights, and a number of countries have recognised access to the internet as a right in itself.[6]

The launch of social media platforms (SMPs) has arguably been the most significant change to the digital and internet landscape in the last two decades. Facebook was established in 2005, Twitter began tweeting in 2006 and Instagram was launched only a decade ago in 2010. SMPs have created an entirely new online social system where people interact with one-another instantaneously, at any time, across the globe.

In that time, SMPs have undergone their own transformation. Facebook began as a social networking site that allowed users to chronicle their daily lives by sharing personal updates, photos, videos and other media. Today, it is a publicly listed top 50 global company worth more than $500 billion.[7] It integrates news, public information, commerce, advertising and social connections, all delivered to users' 'newsfeeds' via artificial intelligence algorithms.

With this transformation, Facebook has come under increasing scrutiny for its business practices and role in social, political and economic affairs. It has been accused of censoring information,[8] exploiting and misusing user data and personal information,[9] alleged interreference in foreign elections,[10] being a conduit for political suppression[11] and enabling incitement of violence and hate speech.[12] Yet on the other hand,

4 Australian Bureau of Statistics, *8147.0 - Use of the Internet by Householders, Australia, Nov 2000*, <https://www.abs.gov.au/ausstats/abs@.nsf/productsbytopic/AE8E67619446DB22CA2568A9001393F8> accessed 14 December 2020.

5 Datareportal, *Digital 2020: Australia*.

6 Australian Human Rights Commission, *8 A right to access the Internet*, 2020, <https://humanrights.gov.au/our-work/8-right-access-internet> accessed 17 December 2020.

7 Forbes, *Global 2000: The world's largest public companies*, 2020, <https://www.forbes.com/global2000/#3db04980335d> accessed 14 December 2020.

8 Ryan Mac and Zahra Hirji, 'Facebook said politicians can lie in ads. It's taking down ads from Warren, Biden, and Trump for other reasons', *Buzzfeed News*, 15 October 2019, <https://www.buzzfeednews.com/article/ryanmac/facebook-warren-biden-trump-ads-take-down-profanity> accessed 18 January 2020.

9 Alex Hern, ''Antiquated process': data regulator on obtaining Cambridge Analytica warrant', *The Guardian*, 24 November 2020, <https://www.theguardian.com/technology/2020/nov/24/antiquated-process-data-regulator-obtaining-cambridge-analytica-warrant> accessed 25 November 2020.

10 Julia Carrie Wong, 'Facebook discloses operations by Russia and Iran to meddle in 2020 election', *The Guardian*, 22 October 2019, <https://www.theguardian.com/technology/2019/oct/21/facebook-us-2020-elections-foreign-interference-russia> accessed 25 November 2020.

11 Amnesty International, *Viet Nam: Tech giants complicit in industrial scale repression*, 2020, <https://www.amnesty.org.nz/viet-nam-tech-giants-complicit-industrial-scale-repression> accessed 2 December 2020.

12 Alexandra Stevenson, 'Facebook admits it was used to incite violence in Myanmar', *The New York Times*, 6 November 2018, <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> accessed 25 November 2020.

Facebook, and its founder, Mark Zuckerberg, continually argue that the platform supports and promotes freedom of expression and exists to connect people.[13]

Twitter is another SMP that redefined the internet by providing a platform for people to 'tweet' 140-character updates to other Twitter users and the public.[14] In November 2017, Twitter extended the length of tweets to 280 characters to allow users to properly express themselves.[15] According to Twitter's official data partner, sproutsocial, there are currently 330 million active monthly Twitter users.[16]

Twitter was the first SMP to adopt the revolutionary use of hashtags as a 'group organising framework'.[17] Hashtags have become its own form of expression, used in both online and offline settings, including for social and political activism. For example, in 2017 a viral tweet by actress Alyssa Milano used the hashtag #metoo—based on the 'me too' movement founded by Tarana Burke in 2006—which set-off a global movement to unmask sexual violence perpetrated by men against women.[18]

Twitter, like Facebook, has come under increasing scrutiny for the harmful online conduct and content that spreads across its platform, and the adequacy of its responses. Twitter is also a strong proponent of the right to freedom of speech, although in recent times, it has taken more steps to balance this freedom with other human rights. For example, in January 2021, former President of the United States of America, Donald Trump, was banned from Twitter for inciting violence following violent riots by his supporters in Washington DC in the same week.[19] Following this, Twitter updated its harmful activity policy to state that it will take strong enforcement action against individuals that use the SMP in a way that can potentially lead to offline harm.[20]

Further discussion regarding self-regulation by SMPs in response to harmful online conduct and content is in section 9.3.1.

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13 Facebook, *Mark Zuckerberg stands for voice and free expression*, 2019, <https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression> accessed 14 December 2020.

14 Twitter Inc., *Permanent suspension of @realDonaldTrump*, 2021, <https://blog.twitter.com/en_us/topics/company/2020/suspension.html> accessed 18 January 2021.

15 Twitter Inc., *Giving you more characters to express yourself* 2017, <https://blog.twitter.com/official/en_us/topics/product/2017/Giving-you-more-characters-to-express-yourself.html> accessed 21 January 2021.

16 Jenn Chen, 'Social media demographics to inform your brand's strategy in 2020', *Sprout Social*, 4 August 2020, <https://sproutsocial.com/insights/new-social-media-demographics/#TW-demos> accessed 21 January 2021.

17 Erin Black, 'Meet the man who 'invented' the #hashtag', *CNBC*, 30 April 2018, <https://www.cnbc.com/2018/04/30/chris-messina-hashtag-inventor.html> accessed 21 January 2020.

18 Sophie Gilbert, 'The movement of #MeToo', *The Atlantic*, 16 October 2017, <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979> accessed 19 January 2020.

19 Twitter Inc., *Permanent suspension of @realDonaldTrump*.

20 Twitter Inc., *An update following the riots in Washington, DC*, 2021, <https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--.html> accessed 18 January 2021.

9.2 Harmful online conduct and content

Chapter 3 acknowledges that in order to understand the full context of the issues surrounding vilification, a broader range of experiences and behaviours than those currently deemed to be vilification under the RRTA should be discussed. This chapter makes the same qualification and accordingly discusses a broad range of 'harmful online conduct and content' connected to online vilification. Such conduct and content is identified as cyberbullying, abusive commentary or 'trolling', the non-consensual sharing of intimate images, grooming for the purpose of child sexual abuse, cyber-flashing, doxing and cyberstalking.[21] From an anti-vilification perspective, harmful online conduct and content refers to online vilification, online incitement and online hate speech.

When discussing these harms, it is useful to acknowledge that online vilification is not a term commonly used by internet users or SMPs. Rather, various terms are used interchangeably, which means conduct considered trolling by one person may in fact amount to online vilification. SMPs including Facebook, Twitter, Reddit and YouTube have 'hate speech' policies. Further, the use of online language and terms can change rapidly, especially in the context of trending hashtags and keywords on SMPs.

It is also important to note at the outset that there is limited data, analysis or breakdown of complaints of online vilification through the RRTA or online racial hatred through the *Racial Discrimination Act 1975* (Cth) (RDA). For example, Victorian Equal Opportunity and Human Rights Commission (VEOHRC) does not include in its annual report a breakdown of these complaints and enquiries as a specific data subset.[22] Rather, the experiences and stories of stakeholders heard throughout the inquiry, alongside primary research, provided the Committee with a mainly qualitative overview of the prevalence of harmful online conduct and content.

9.2.1 Risks and harms

In 2020, the Office of the eSafety Commissioner published a report into hate speech online, bringing together primary research from Australia and New Zealand (NZ), as well as findings from Europe and the United Kingdom (UK).[23] The Australian component comprised a survey of 3,737 adults aged between 18 and 65 who were asked about their attitudes, awareness and responses to online hate speech. The report defined hate speech as:

> any technology-mediated speech or digital communication that offends, discriminates, denigrates, abuses and/or disparages a person(s) on the basis of a group-defining

21 Department of Communications and the Arts, *Online safety legislative reform: Discussion paper*, Australian Government, 2019, p. 12.

22 Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2018–19*, VEOHRC, Carlton, October 2019, pp. 114–7, Appendix 1: Complaints and enquiries data.

23 eSafety Commissioner, Netsafe and UK Safer Internet Centre, *Online hate speech: Findings from Australia, New Zealand and Europe*, 2020.

characteristic such as race, ethnicity, gender, nationality, sexual orientation, religion, age, disability, and others.[24]

The report revealed that in Australia almost 70% of respondents either agreed or strongly agreed that hate speech was on the rise in Australia and around the world and that social media is the primary place where they encounter it.[25] Further, approximately 15% of adult respondents reported being the target of online hate speech, with people citing the reason relating to their political views, religion, gender, race, ethnicity and nationality. People who identified as lesbian, gay, bisexual, trans and gender diverse and queer (LGBTIQ+) overwhelmingly reported that their sexuality was the reason for being targeted online. Overall, people who identified as LGBTIQ+ or as Aboriginal or Torres Strait Islander experienced online hate speech at more than double the national average.[26]

The study also demonstrated that most people were unable to attribute their experience of online hate speech to an identifiable person, with 47% attributing it to a stranger.[27] Facebook was reported by 58% of respondents as the platform where the hate speech occurred.[28] Many respondents indicated that that they reported the incident to a social media company or website, although 30% of respondents reported that the issue was not resolved to their satisfaction, either because it was ongoing or they had chosen to ignore it.[29] Further, nearly 80% of respondents agreed or strongly agreed that social media platforms should do more to address the problem of hate speech online. There was also support for the introduction of new laws to stop online hate.[30]

The survey also explored the effect of online hate on victims, with the results reflected in Table 9.1. Overall, 58% of respondents experienced a negative impact, with 37% reporting experiencing mental or emotional stress.

24 Ibid., p. 4.
25 Ibid., p. 7.
26 Ibid., p. 9.
27 Ibid., p. 10.
28 Ibid., p. 11.
29 Ibid., p. 13.
30 Ibid., pp. 7, 17.

Table 9.1 Top five negative effects of online hate speech

	None (%)	Mental or emotional stress (%)	Relationship problems[a] (%)	Reputational damage (%)	Work problems (%)	Financial loss (%)	Sample size
Total	**42**	**37**	**14**	**10**	**7**	**7**	**578**
Gender							
Male	42	34	13	11	10	9	288
Female	42	39	15	9	5	4	285
Age							
18–24	41	29	15	10	7	9	104
25–29	36	36	23	13	13	13	99
30–40	44	34	13	8	8	5	179
41–50	38	43	15	15	5	4	88
51–65	47	41	7	6	4	6	108
Cohort							
LGBTQI	33	50	18	12	6	6	80
Indigenous	22	43	22	17	17	17	69
CALD	38	31	19	14	11	10	190
Disability	32	45	22	14	13	9	131

a. Includes relationships with family, friends and romantic relationships.

Source: eSafety Commissioner, NetSafe NZ and the UK Safer Internet Centre, *Online Hate Speech: Findings from Australia, New Zealand and Europe*, 2020, p. 14.

The Commonwealth Department of Communication and Art's *Online Safety Legislative Reform Discussion Paper* released in December 2019 also identified that harmful online conduct and content presents a variety of risks to Australians, including social exclusion and psychological harm.[31] It found that cyberbullying 'is associated with significantly higher rates of self-harm or attempted suicide than for non-victims and non-perpetrators'.[32] Further, according to the Australia Institute, the economic costs and productivity losses associated with harmful online conduct and content are significant:

> Under the most conservative estimate, online harassment and cyber-hate were estimated to have resulted in $62 million in medical costs and $267 million in lost income for Australians. The Australia Institute projected the economic costs across the population to be between $330 million and $3.7 billion to date. More research would be needed to develop a longitudinal estimate of the economic impacts each year.[33]

31 Department of Communications and the Arts, *Online safety legislative reform: Discussion paper*, p. 13.

32 A John, et al., 'Self-harm, suicidal behaviours and cyberbullying in children and young people: systematic review', *J Med Internet Res*, vol. 20, no. 4:e129, 2018.

33 The Australia Institute, *Trolls and polls - the economic costs of online harassment and cyberhate*, 2019. in Department of Communications and the Arts, *Online safety legislative reform: Discussion paper*, p. 14.

The Committee is also aware that when harmful online conduct and content go unchecked, it can result in devastating consequences and crimes, as reflected in Box 9.1. Swinburne University of Technology recently conducted research that mapped Victorian-based online anti-feminist and far-right groups on SMPs like Facebook and Twitter and examined how this contributes to spreading hatred. The report noted the following in regard to violent extremism in online environments:

> Since the Reclaim Australia rallies in 2015, the far-right has grown predominantly online, using social media platforms like Facebook to form communities and spread messages to a large number of people; for example, the Nationalist Uprising page, which posted anti-Islam content and was run by a noted Australian far-right figure, had more than 100,000 followers (Wroe & Koslowski 2019). The livestreaming of the Christchurch attack of March 2019 by an Australian white supremacist who killed 51 people after posting his manifesto on social media platforms such as 8chan and Twitter has brought the connection between extremist ideology and violence to the fore (Nguyen 2019; Purtill 2019; Miller 2020). Cunneen and Russell (2020, 96) argue that social media platforms provide a real-time way of connecting over a "vision of moral unity", and therefore can amplify and manufacture misogynist, racist and other extremist discourse.[34]

The Committee also notes a recent incident involving a far-right extremist men's group that met in regional Victoria in late January 2021. Media reported that the group was shouting Nazis slogans and claimed to be the Ku Klux Klan.[35] Experts commented that events like these are stunts and used to gain attention, recruit new members and spread messages of hate.[36] The internet and SMPs are also used by this and other far-right groups to galvanise extreme views. A member of the group claims he tried to recruit the Australian man, Brenton Tarrant, who committed the Christchurch terror attack, through an online community.[37] The group is reportedly being monitored by Victoria Police and the Australian Security Intelligence Organisation (ASIO).

In 2020, ASIO advised the Inquiry of the Australian Parliamentary Joint Committee on Intelligence and Security that right-wing extremists now represent 30 to 40% of its priority anti-terrorism caseload.[38] It also explained that these far-right groups had seized on the Coronavirus Pandemic (COVID-19) to 'amplify their messages of hate

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34 Christine Agius, et al., *Mapping right-wing extremism in Victoria: Applying a gender lens to develop prevention and deradicalisation approaches*, Victorian Government, Department of Justice and Community Safety: Countering Violent Extremism Unit and Swinburne University of Technology, Melbourne, 2020, p. 6.

35 Nick McKenzie and Joel Tozer, 'Neo-Nazis go bush: Grampians gathering highlights rise of Australia's far right', *Sydney Morning Herald*, 27 January 2021, <https://www.smh.com.au/politics/federal/neo-nazis-go-bush-grampians-gathering-highlights-rise-of-australia-s-far-right-20210127-p56xbf.html> accessed 28 January 2021.

36 Christopher Knaus, 'Daniel Andrews warns of rising antisemitism after neo-Nazi gathering in Victorian national park', *The Guardian*, 28 January 2021, <https://www.theguardian.com/australia-news/2021/jan/28/daniel-andrews-warns-of-rising-antisemitism-after-neo-nazi-gathering-in-victorian-national-park> accessed 28 January 2021.

37 Patrick Begley, 'Australian white nationalist group tried to recruit Christchurch terror attack accused', *Stuff*, 2 May 2019, <https://www.stuff.co.nz/national/christchurch-shooting/112400675/australian-white-nationalist-group-tried-to-recruit-christchurch-terror-attack-accused> accessed 25 November 2020.

38 Australian Security Intelligence Organisation, *Opening statement - PJCIS review - ASIO Amendment Bill*, 2020, <https://www.asio.gov.au/publications/speeches-and-statements/opening-statement-pjcis-review-asio-amendment-bill.html> accessed 28 January 2021.

on-line', and as a result Australians as young as 14 years old are being radicalised.[39] As discussed in Chapter 3, a 2020 report by the anti-racism not-for-profit organisation, All Together Now, identified recent increases in the number of young people being recruited by right-wing extremist groups online during the COVID-19 pandemic. The report stated that groups manipulated feelings of isolation, loneliness and depression in order to offer a sense of belonging through their online community.[40]

BOX 9.1: Christchurch terror attacks

On 15 March 2019, an Australian man, Brenton Tarrant, murdered 51 people and attempted to murder a further 40 people at the Christchurch masjidain and the Linwood Islamic Centre. Brenton Tarrant had adopted a white supremacist ideology that culminated in extreme Islamophobia and the desire to kill Muslims.

Brenton Tarrant was a prolific internet and social media user, although he actively minimised his internet footprint. He was active on Facebook, 4chan and 8chan, and it has been confirmed that he visited extreme right-wing internet forums, subscribed to right-wing channels on YouTube, read widely on the internet about extreme right-wing politics and posted right-wing and threatening comments. His terrorist manifesto demonstrated a fluency in the language customarily used on right-wing extremist websites. The New Zealand *Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* concluded that it was plausible that his exposure to this content contributed to his terrorist actions, although there was no evidence of personal encouragement.

Brenton Tarrant also used social media and the internet on the day of the attack to communicate his intentions. He livestreamed the attack on Facebook for 16 minutes. One of the challenges was virality of the content and its cross-pollination to other platforms. As soon as it was taken down, it was replaced in its original or an edited form, which made it impossible to detect quickly. Some internet users reported unintentionally seeing the video on their SMP accounts.

Prime Minister of New Zealand, Jacinda Ardern, initiated the 'Christchurch Call to Action' to encourage governments, SMPs and technology firms to work to eliminate terrorist and violent extremist content online. Australia is one of 51 countries that support the Christchurch Call. Ten technology firms and SMPs, including Facebook, Twitter and Google also support it.

Sources: All Together Now, Right-Wing Extremism and COVID-19 in Australia, 2020; Mr Mike Burgess, Opening Statement, Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020, 2020, <https://www.asio.gov.au/publications/speeches-and-statements/opening-statement-pjcis-review-asio-amendment-bill.html> accessed 20 December 2020; The Christchurch Call Advisory Network, *The Christchurch Call to Action*, 2019, <https://www.christchurchcall.com/call.html> accessed 20 December 2020; Ko tō tātou kāinga tēnei, Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, Vol 1–2.

39 Ibid.

40 All Together Now, *Right-Wing Extremism and COVID-19 in Australia*, 2020.

9.2.2 Experiences of harmful online conduct and content

Throughout the inquiry, numerous stakeholders presented the Committee with examples of harmful online conduct and content. This section provides an overview of this evidence and demonstrates that such conduct and content is directed at a broad range of racial and religious groups, Aboriginal and Torres Strait Islander communities, LGBTIQ+ communities, women and people with disability. This builds on the experiences discussed in Chapters 3 and 4.

The Islamic Council of Victoria (ICV) referred in its evidence to the *Islamophobia in Australia* report, which collates self-reported incidents of Islamophobia across Australia and analyses them within the broader context of anti-Muslim broadcasting, reporting and political rhetoric.[41] A key finding of the report is that the majority of online Islamophobia involves threats or threats of violence:

> the analysis of online Islamophobia in Section II reveals that 51.4% of the online harassments were found to be of a violent nature – expressing, encouraging and facilitating violence. These findings indicate that far right groups of various persuasions as well as their spread of hatred through social media need to be taken more seriously.[42]

A second volume of the *Islamophobia in Australia* report was recently released for 2016–2019, which demonstrated that Facebook is the most common online platform for Islamophobia. The report also indicated that victims are mostly young adults and a quarter of online cases called for the killing or harming of Muslim people.[43]

In its submission, the Executive Council of Australian Jewry (ECAJ) referred to its *Report on Antisemitism in Australia 2019.* The report details the 'many types of groups and organisations operating within Australia which openly espouse and promote an antisemitic ideology, sometimes intermixed with white supremacist and other racist themes'.[44] The report also featured commentary on the notion of a white genocide ideology based on the conspiracy theory that Jewish people are coordinating and orchestrating a 'white replacement' or 'white genocide'.[45] The online comments of users who subscribe and propagate this conspiracy theory have usernames like 'Adolf Göbbels' and interlace German language with remarks such as:

> the world needs to Rid the Yid. Final Solution 2.0. Holocaust™ was a Lie and kikes use it to make money off of us Goy to use it to flood the western world with Islamic rats and African niggers.![46]

41 Dr Derya Iner, *Islamophobia in Australia 2014–2016*, Charles Sturt University and ISRA, Sydney, 2017, p. IV.

42 Ibid., p. 65.

43 Dr Derya Iner, *Islamophobia in Australia - II (2016–2017)*, Charles Sturt University, Sydney, 2019, p. 11.

44 Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2019: 1 October 2018 – 30 September 2019*, ECAJ, 2019, p. 94.

45 Ibid., p. 99.

46 Ibid., pp. 102–30.

In its submission, the Online Hate Prevention Institute (OHPI) referred to a 2019 report tracking over 2000 pieces of antisemitic online content over a 10 month period. Almost half the content was 'traditional antisemitism...and covered content such as conspiracy theories, racial slurs, and accusations such as the blood libel'.[47] The report discussed the SMPs and online sources of the conduct and content:

> The report also outlines where each type of antisemitism occurs, with content promoting violence against Jews far more likely to be found on Twitter (63% on Twitter, 23% on YouTube and 14% on Facebook), while content promoting Holocaust denial was more likely to be found on YouTube (44% YouTube, 38% Twitter, 18% Facebook).[48]

The Australian Jewish Association (AJA) provided a supplementary submission to the Committee to demonstrate COVID-19 related antisemitism that emerged throughout 2020. It included twenty screenshots from sites that blame Jewish people and Israel for the rise and spread of COVID-19.[49]

Nicole Shackleton, PhD Candidate, Dr Laura Griffin, Lecturer, and Danielle Walt, Project Manager and Policy Consultant, all from La Trobe University, discussed the issue of online gendered hate speech as part of their submission. They stated that women, and especially young women, are disproportionately the targets of such hate speech online.[50] They cited research that demonstrates that online attacks on women are more likely to be sustained, sexualised and violent.[51]

Further, the La Trobe academics discussed how 'female journalists, activists and politicians are particularly vulnerable to being targeted with [gendered hate speech] GHS online'.[52] Citing academic research, they stated that in a comparative study of online hate directed at sportsmen and sportswomen, the women attracted more than three times the number of negative comments than men.[53] They also referred to an Amnesty International study that showed that female journalists are prime targets for violence and abuse because of the public nature of journalism and reliance on social media to distribute news opinions.[54]

In a public hearing, Diana Sayed, the Chief Executive Officer of the Australian Muslim Women's Centre for Human Rights (AMWCHR) similarly discussed the report by Amnesty International:

> Amnesty International conducted an extensive research report over two years looking at a platform like Twitter, for example—one example, and obviously a large multinational

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47 Online Hate Prevention Institute, *Measuring the hate: The state of antisemitism in social media*, 2016, <https://ohpi.org.au/measuring-antisemitism> accessed 21 January 2020.

48 Ibid.

49 Australian Jewish Association, *Inquiry into anti-vilification protections: Supplemental Submission*, supplementary evidence received 18 May 2020.

50 Nicole Shackleton, Dr Laura Griffin and Danielle Walt, La Trobe University, *Submission 19*, received 20 December 2019, p. 12.

51 Ibid.

52 Ibid.

53 Ibid., p. 13.

54 Amnesty International, *Toxic Twitter: Triggers of violence and abuse against women on Twitter*, 2018, Chapter 2, in Nicole Shackleton, Dr Laura Griffin and Danielle Walt, *Submission 19*, p. 13.

> corporate—and looked at the experiences of women on that social media platform of hate speech, vilification and the different attributes that were being targeted specifically.[55]

Diana Sayed stated that the statistics were alarming, and showed that women, and particularly women of colour, were subject to death threats and doxing; which involves breaches of their personal information and privacy.[56] She further explained that black women were most likely to be the targets of online hate speech:

> It showed how pervasive that hate speech and abuse was directed towards people with certain attributes, and the highest rate of hate speech on the platform was directed at black women, for example. They were the most targeted.[57]

Diana Sayed also told the Committee that this type of online conduct has concrete impacts on the free participation of women on SMPs and in society, with research demonstrating that it has a silencing effect on women. They remove themselves from the platform, delete their accounts and stop engaging in the public narrative. Ultimately, the voices of these women become lost.[58]

Felix Walsh, the Policy and Law Reform Officer at the Disability Legal Service, referred in his evidence to research that demonstrated 40% of people with a disability face or experience direct hatred online.[59] He explained that the nature of disability means that certain characteristics are more targeted than others. For example, research found that '75 per cent of people with cognitive disabilities—autism, as an example—had received either online or offline hate speech'.[60]

The Centre for Multicultural Youth (CMY) brought a unique perspective to the inquiry, explaining that young Australians are often the targets of hatred online. Carmel Guerra, Director and Chief Executive Officer of the CMY, discussed research from the eSafety Commissioner on the experiences of youth in online environments:

> We know that young people also, in experiencing racism online, are often the group who face the greatest barriers to safe digital participation and engagement because of low digital literacy skills. So we think that that requires an important education and awareness program that really talks to the vulnerability of this group and moving forward on some strategies.[61]

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55 Diana Sayed, Chief Executive Officer, Australian Muslim Women's Centre for Human Rights, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 4–5.

56 Ibid.

57 Ibid.

58 Ibid.

59 Felix Walsh, Policy and Law Reform Officer, Disability Discrimination Legal Service, Public hearing, Melbourne, 25 June 2020, *Transcript of evidence*, p. 22.

60 Ibid.

61 Carmel Guerra, Director and Chief Executive Officer, Centre for Multicultural Youth, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 38.

9.2.3 Unique features of the online environment

The Committee heard throughout the inquiry that harmful online conduct and content is exacerbated by the unique features of online communication and expression, namely the volume of content, the virality of content, and the dehumanising aspects of online interaction such as anonymity and the use of pseudonyms.

Modern-day internet users are aware that content can quickly gain an almost limitless number of likes, mentions, comments and shares. Further, content on one SMP is easily and routinely shared on other SMPs. This is almost inevitable with Facebook, which encourages simultaneous multi-platform posting and sharing across its integrated platforms, including Instagram.

Because of these unique features, experts from the Allens Hub for Technology, Law and Innovation, at the University of New South Wales (Allens Hub), told the Committee that there is a difference between how in person and online vilification takes place and its overall impact. Siddharth Narrain Arcot Ananth, PhD candidate and Scientia scholar with Allens Hub, indicated that online vilification should be understood as its own phenomenon:

> I notice that a number of submissions so far say that online hate speech is just another version of hate speech and should be looked at that way, but I think online hate speech has certain specifics which make it particularly challenging to address.[62]

> Two of these characteristics are the sheer volume of vilification that you deal with, and secondly, what we call acceleration of virality—the fact that almost instantaneously such content can be shared and goes through different mediums.[63]

Siddharth Narrain also discussed that online vilification is uniquely primed to spread quickly and multiply across a variety of platforms. This creates further challenges in terms of investigation and enforcement:

> The other point is that online hate speech also moves very easily between platforms. So something that I post on Facebook can end up on Instagram and can easily make its way onto WhatsApp and circulate. So all these things make it particularly challenging to trace and prosecute online vilification.[64]

Another recurring theme in the evidence was the anonymity of users on the internet and SMPs. Jamie Gardiner, a Member of the Government Regulation and Equality Committee at Liberty Victoria, told the Committee:

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62 Siddharth Narain, PhD Candidate and Scientia Scholar at UNSW Law, The Allens Hub for Technology, Law and Innovation, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, pp. 10–1.

63 Ibid., p. 11.

64 Ibid.

> The problem with online is that you do not know who the person is, because they could be called XYZ123 and you have no idea who that is or they could be called by a well-known name falsely.[65]

According to a position paper by the Office of the eSafety Commissioner on *Anonymity and identity shielding*, anonymous communication is argued by some to be the cornerstone of promoting freedom of speech, expression and privacy on the internet. However, the position paper also noted that there is clear evidence of it being used to abuse or control people.[66]

Many stakeholders told the Committee that anonymity and the dehumanising effect of technology clearly influences some people's conduct online, reducing their inhibitions and emboldening them to behave in ways they would not offline.[67] In its submission, the Springvale Monash Legal Service discussed research into the online disinhibition effect:

> The Online Disinhibition Effect suggests that people exercise less restraint when communicating online due to factors such as anonymity, empathy deficit (the victim is reduced to a name on a computer screen), and lack of verbal cues, and the ability distance yourself from your online persona. The lack of restraint can lead people to make extreme and hateful comments that they would not otherwise have made, including those that incite violence…[68]

In a public hearing, Mark Zirnsak, Senior Social Justice Advocate at the Uniting Church, Synod of Victoria and Tasmania, similarly discussed how anonymity allows people to behave atypically online:

> there is a whole body of cyberpsychology that basically shows that giving people anonymity, creating a sense that they have a cloak of invisibility, encourages them in being able to be disinhibited, so they will engage in behaviours that they would not normally engage with.[69]

The position paper by the Office of the eSafety Commissioner identified that interacting with anonymous accounts can be distressing for people who are victims of online abuse, particularly when they fear that the perpetrator can use different anonymous or fake accounts to continue to target them, even if one account is blocked or removed. Anonymity is also a barrier to reporting the abuse as the accounts are not easily identifiable, which also creates challenges for law enforcement agencies and regulators:

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65 Jamie Gardiner, Member, Government Regulation and Equality Committee, Liberty Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 6.

66 eSafety Commissioner, *Anonymity and identity shielding*, <https://www.esafety.gov.au/about-us/tech-trends-and-challenges/anonymity> accessed 26 January 2021.

67 Greater Dandenong City Council, *Submission 29*, received 20 December 2019, p. 5; Penny Badwal, Community Engagement and Liason Officer, Catholic Archdiocese of Melbourne, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 35; Ethnic Communities' Council of Victoria, *Submission 15*, received 19 December 2019, p. 4; Casey Multi Faith Network, *Submission 24*, received 20 December 2019; Victorian Council of Social Service, *Submission 30*, received 20 December 2020, p. 3.

68 Springvale Monash Legal Service, *Submission 43*, received 24 January 2020, p. 7.

69 Mark Zirnsak, Senior Social Justice Advocate, Synod of Victoria and Tasmania, Uniting Church in Australia, public hearing, Melbourne, 25 February 2020, *Transcript of evidence*, p. 27.

It is very difficult for regulators and law enforcement to identify and prosecute individuals and crime syndicates using fake accounts. It also makes it almost impossible for social media services and other users to deal with abusers breaching the terms of service, through strategies such as blocking and suspension, as well as preventing, detecting and removing multiple accounts operated by one user.[70]

Mark Zirnsak from Uniting Church indicated that resolving online issues will continue to be challenging as long as that anonymity exists.[71] The Committee understands that many SMPs and services have introduced a number of verification processes to authenticate account users, including requiring them to provide personal identifying information or asking for an email address or phone number. While there are calls for SMPs to verify all social media accounts and introduce more transparent identity-related policies, the Office of the eSafety Commissioner recognises the importance of ensuring solutions are evidence-based and subject to independent scrutiny, as well as that the rights of users are considered.[72]

Further discussion regarding how Victoria's anti-vilification legislative framework could respond to complaints of online vilification involving anonymous complaints is in section 9.4.2.

9.3 Responses to harmful online conduct and content

A common theme in the inquiry evidence is that the rise of SMPs is unprecedented, and at the time of the RRTA's enactment, there was no appreciation or anticipation of their future power, global reach and cultural impact. Despite the positive opportunities for cooperation and communication facilitated by SMPs, there remain considerable risks and harms associated with their use. There is increasing recognition that further measures are required, whether through regulation or self-imposed accountability measures, to ensure SMPs and social media companies operate responsibly and in accordance with relevant human rights laws.

In 2019, the UK Government released a *Joint White Paper on Online Harms*. This paper identified the fundamental challenge that SMPs, like Facebook and Twitter, pose for users and citizens due to them becoming pseudo public spaces, akin to the 'village square'. The paper states that this provokes questions about whether such platforms perform a role as a public service and what standards, norms and laws they should conform to:

> Increasing public concern about online harms has prompted calls for further action from governments and tech companies. In particular, as the power and influence of large companies has grown, and privately-run platforms have become akin to public spaces,

70 eSafety Commissioner, *Anonymity and identity shielding*.

71 Mark Zirnsak, *Transcript of evidence*, p. 27.

72 eSafety Commissioner, *Anonymity and identity shielding*.

> some of these companies now acknowledge their responsibility to be guided by norms and rules developed by democratic societies.[73]

David Kaye, the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, has argued that it is not appropriate for SMPs to decide what should be freely expressed online or taken down:

> Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic.[74]

While the Committee sympathises with this view, it acknowledges that a multi-pronged approach that involves regulation alongside self-imposed accountability measures is likely to be the most effective way to combat harmful online conduct and content in Australia. This section provides an overview of such an approach, including measures by SMPs, existing laws at national, state and territory levels, and some examples of international responses.

9.3.1 Self-regulation

Since their establishment, SMPs have largely set their own rules of operation and online standards and have sought to minimise government regulation or intervention. Technology firms and SMPs have frequently promoted themselves as bastions of free speech and community connectors.[75] However, it is evident that they are driven by markets forces, namely shareholders, profits and the expectations of their users. For example, Twitter's stock value fell 10% after the permanent suspension of Donald Trump.[76]

SMPs acknowledge that their platforms can be used to spread harmful online conduct and content, including online hate speech. Accordingly, they have attempted to address this problem, with all major SMPs implementing harmful and illegal content policies and complaints procedures.

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73 HM Government, *Online Harms White Paper*, CP 57, 2019, p. 5.

74 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/38/35, 2018, p. 7.

75 Twitter Inc., *Twitter for Good: Using the positive power of Twitter to strengthen our communities*, <https://about.twitter.com/en/who-we-are/twitter-for-good> accessed 25 January 2020.

76 Theron Mohamed, 'Twitter stock tumbles 10% after Trump is permanently banned from the platform', *Business Insider Australia*, 11 January 2021, <https://www.businessinsider.com.au/twitter-stock-price-president-donald-trump-permanently-banned-tweeting-2021-1> accessed 25 January 2021.

Table 9.2 Hate speech policies of major social media platforms

Platform	Harmful content covered	Attributes protected from hate	Hate speech definition
Facebook *Community Standards*	• Violence and incitement • Bullying and harassment • Hate speech • Cruel and insensitive content	Race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, age[a] and serious disease or disability.	A direct attack on a person based on a protected characteristic. Three tiers of attacks: • Tier 1—violent or dehumanising speech. • Tier 2—Harmful stereotypes and statements of inferiority. • Tier 3—Calls for exclusion or segregation.
Twitter *The Twitter Rules*	• Violence policy • Abusive behaviour • Hateful conduct	Race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.	People may not promote violence against or directly attack or threaten other people on the basis of a protected attribute. Accounts whose primary purpose is inciting harm towards others are not allowed. Hateful images or symbols may not be used in people's profile image or profile header.
YouTube *Community Guidelines*	• Hate speech • Harassment and cyberbullying	Age, caste, disability, ethnicity, gender identity and expression, nationality, race, immigration status, religion, sex/gender, sexual orientation, victims of a major violent event and their kin and veteran status.	Content promoting violence or hatred against individuals or groups based on a protected attribute.
Reddit *Content Policy*	• Cyberbullying • Harassment • Threats of violence • Inciting violence or promoting hate	Race, colour, religion, national origin, ethnicity, immigration status, gender, gender identity, sexual orientation, pregnancy, or disability.	Everyone has a right to use Reddit free of harassment, bullying, and threats of violence. Communities and people that incite violence or that promote hate based on identity or vulnerability will be banned.

a. Facebook protects age when it is paired with another protected attribute.

Source: Legislative Assembly Legal and Social Issues Committee. Adapted from <https://www.facebook.com/communitystandards/hate_speech; <www.reuters.com/article/us-twitter-content-hate-idUKKBN28D03U>; <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>; <https://support.google.com/youtube/answer/2801939>; <https://www.reddithelp.com/hc/en-us/articles/360045715951> accessed 25 January 2021.

As reflected in Table 9.2, online hate speech or conduct are the most commonly used terms by SMPs to cover abusive behaviour and harmful conduct that could potentially amount to vilification. Facebook's characterisation of hate speech covers a broad range of protected attributes, and it divides conduct into three tiers. [77] Facebook also provide

77 Facebook, *Measuring our progress combating hate speech*, 2020, <https://about.fb.com/news/2020/11/measuring-progress-combating-hate-speech> accessed 25 November 2020.

some examples for users as to what is unacceptable, stating that it has banned Holocaust denial, introduced new rules to address incitement of violence against migrants and is attempting to combat white nationalism.[78]

SMPs employ moderators to respond to and resolve reports of harmful and illegal material. The Committee notes that commentary surrounding moderators often raises issues of poor working conditions and traumatic effects arising from the work, especially those employed at Facebook.[79]

SMPs have also implemented a variety of enforcement mechanisms to address matters or complaints regarding harmful conduct or content. Users can block or hide other users or pages and request to have content removed—these are known as takedown measures. SMPs can also suspend or permanently ban users from their platforms.[80] Facebook explains how it deals with low level and serious violations:

> The consequences for violating our Community Standards vary depending on the severity of the violation and the person's history on the platform. For instance, we may warn someone for a first violation, but if they continue to violate our policies, we may restrict their ability to post on Facebook or disable their profile. We may also notify law enforcement when we believe that there is a genuine risk of physical harm or a direct threat to public safety.[81]

In a bid to increase transparency, Facebook released its first Community Standards Enforcement Report in November 2020.[82] It detailed how it addressed harmful content on Facebook and Instagram, such as bullying and harassment, child nudity and sexual exploitation of children, and hate speech. Regarding hate speech, Facebook reported that in the third quarter of 2020, 0.10% of views showed violating content, meaning that for every 10,000 content views, approximately 10 contained hate speech.[83] Reframing that into raw data, hate speech was evident in 22 million content views.[84] The Committee acknowledges that Facebook has commercial interests it must protect, although these need to be balanced against its private and public responsibilities—and transparently.

Twitter has increasingly been in the spotlight regarding its response to the presence of harmful content on the platform. The election of Donald Trump as the US President prompted Twitter to employ new self-regulation measures to cope with the content

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78 Ibid.

79 Casey Newton, 'The trauma floor: the secret lives of Facebook moderators in America', *The Verge*, 25 February 2019, <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> accessed 25 November 2020.

80 See: Twitter Inc., *About suspended accounts*, <https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts> accessed 25 November 2020.

81 Facebook, *Community standards*, <https://m.facebook.com/communitystandards/introduction> accessed 2 December 2020.

82 Facebook, *Community Standards Enforcement Report, Q3 2020*, 2020, <https://about.fb.com/wp-content/uploads/2020/11/CSER-Q3-2020-Transcript-11.19.20.pdf> accessed 2 December 2020.

83 Facebook, *Community Standards Enforcement Report: Hate speech*, <https://transparency.facebook.com/community-standards-enforcement#hate-speech> accessed 25 November 2020.

84 Facebook, *Community Standards Enforcement Report, November 2020*, 2020, <https://about.fb.com/news/2020/11/community-standards-enforcement-report-nov-2020> accessed 20 November 2020.

of his tweets.[85] During his presidency, he was the world's most-well known tweeter, using Twitter as his primary medium to publicly express his opinions and inform his supporters and others of his decisions and policies.[86]

In 2020, Twitter took self-regulation to a new and unprecedented level by including warning labels on Donald Trump's tweets about alleged election fraud. The warning labels included links to other verified sources of information that described his claims of election fraud as unsubstantiated.[87] Twitter stated that the warning labels helped provide context to Donald Trump's tweets,[88] while some journalists and news outlets described the labels as a regulatory measure to 'fact-check' the tweets.[89]

In January 2021, Twitter permanently suspended Donald Trump for inciting violence following the violent riots in Washington DC, stating that he violated Twitter's rules.[90] Twitter Chief Executive Officer Jack Dorsey stated that the ban reflected a 'failure' to create a service that could sustain civil discourse and healthy conversations.[91]

The Trump phenomenon and the rise of the alt-right online has drawn rising attention to SMPs' capacity and willingness to effectively regulate their respective online environments and to operate responsibly. In a recent article, Professor Katharine Gelber from the University of Queensland, stated that SMPs and technology firms have largely resisted self-regulation, although they are now beginning to respond to external pressures:

> The big tech companies have staunchly resisted being asked to regulate speech, especially political speech, on their platforms. They have enjoyed the profits of their business model, while specific types of users – typically the marginalised – have borne the costs.[92]

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85 Twitter Inc., *Additional steps we're taking ahead of the 2020 US Election*, 2020, <https://blog.twitter.com/en_us/topics/company/2020/2020-election-changes.html> accessed 14 December 2020; Todd Spangler, 'Twitter, Facebook slap warning labels on Trump's tweet charging Democrats with trying to 'steal' election', *Variety*, 3 November 2020, <https://variety.com/2020/digital/news/twitter-facebook-trump-warning-label-steal-election-1234822899> accessed 14 November 2020.

86 Mr Trump's Twitter account is no longer accessible to him or the public, but there are various screenshots of his tweets collected by new agencies and journalists worldwide.

87 BBC News, 'Twitter tags Trump tweet with fact-checking warning', 27 May 2020, <https://www.bbc.com/news/technology-52815552> accessed 25 January 2021.

88 Sherisse Pham, 'Twitter says it labels tweets to provide 'context, not fact-checking'', *CNN Business*, 3 June 2020, <https://edition.cnn.com/2020/06/03/tech/twitter-enforcement-policy/index.html> accessed 25 November 2020.

89 Elizabeth Culliford and Katie Paul, 'With fact-checks, Twitter takes on a new kind of task', *Reuters*, 31 May 2020, <https://www.reuters.com/article/us-twitter-factcheck/with-fact-checks-twitter-takes-on-a-new-kind-of-task-idUSKBN2360U0> accessed 25 November 2020.

90 Elizabeth Dwoskin, 'Twitter CEO Jack Dorsey said the Trump ban reflected 'a failure' to police online discourse', *The Washington Post*, 14 January 2021, <https://www.washingtonpost.com/technology/2021/01/13/twitter-trump-ban> accessed 25 January 2021.

91 Ibid.

92 Katharine Gelber, 'No, Twitter is not censoring Donald Trump. Free speech is not guaranteed if it harms others', *The Conversation*, 12 January 2021, <https://theconversation.com/no-twitter-is-not-censoring-donald-trump-free-speech-is-not-guaranteed-if-it-harms-others-153092> accessed 21 January 2021.

Given that SMPs have started to respond to growing public pressure to address these problems, the Committee believes it is time for governments to strengthen regulation in this area to protect users from harmful online conduct and content and provide redress to victims.

Stakeholder views on the effectiveness of self-regulation

There was widespread scepticism among inquiry stakeholders regarding the ability and willingness of SMPs to self-regulate, with many providing examples of SMPs failing to respond to complaints of online harmful conduct, including hate speech. In its joint submission, Victorian Legal Aid (VLA) and the Victorian Aboriginal Legal Service referred to Tyson, a young Aboriginal man who, in an online chat room, attempted to report users because of their racist remarks and to have content removed. Tyson stated:

> I have tried reporting people when they say something racist, but they only get a 15-minute ban. When I have told people off because they have been racist I have got a two day ban. I think they are protecting people being racist on the site. It's very hard to get someone permanently banned, it is very difficult to contact the company directly as it is based overseas. I don't do it anymore. It's hard to bring a racial vilification complaint because I don't know the identity of the people who abuse me and the company is based overseas.[93]

In its submission, the ICV stated that Facebook was the principal SMP for Islamophobia online. However, attempts to have content removed have proven difficult:

> Facebook is the leading platform for anti-Muslim abuse according to Australian and international studies. Where members of the [Islamic Council of Victoria] have engaged with Facebook to report excessive and vile anti-Muslim online abuse and request its removal, there has been little or no recourse to action.[94]

Similarly, the OHPI concluded from its research that not enough is being done to combat antisemitism on SMPs, finding that only 20% of content was removed following complaints.[95]

While recognising the complexity of regulating corporations in these circumstances, Rowan McRae, the Executive Director of Civil Justice, Access and Equity at VLA stated that 'social media platforms need to play a bigger role as intermediaries in monitoring and responding to online hate speech, including trolling'.[96] She explained:

> We appreciate again that you have got to have a 'reasonable' component to what is expected of companies and corporations, but it is reasonable, we think, to expect that corporations should also bear some responsibility for ensuring that individuals and the Victorian community at large are protected from vilification.[97]

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93 Victoria Legal Aid and Victorian Aboriginal Legal Service, *Submission 50*, received 31 January 2020, p. 19.

94 Islamic Council of Victoria, *Submission 45*, received 31 January 2020, p. 19.

95 Online Hate Prevention Institute, *Measuring the hate*.

96 Rowan McRae, Executive Director, Civil Justice, Access and Equity, Victoria Legal Aid, public hearing, Melbourne, 28 May 2020, *Transcript of evidence*, p. 27.

97 Ibid.

The Committee acknowledges the challenge of volume and virality of content as discussed in section 9.2.3, although according to Professor Beth Gaze from the Australian Discrimination Law Experts Group (ADLEG), that moderation could be achieved by automated systems. Ultimately, she questioned SMPs' willingness to establish such systems and practices:

> While it is a big job to moderate, they are actually able to set up, you know, automatic artificial intelligence to identify a whole lot of things on those platforms. I do myself think that it is partly a matter of what incentive they have to actually set up a proper artificial intelligence to check all postings, because there are some words that they will be able to identify quite clearly as problematic or potentially problematic. So I do not think it is impossible to have a computer do this. I do not think it has to be all done by humans.[98]

Dr Bruce Baer-Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School at the University of Canberra, made similar arguments about the willingness and capacity of SMPs to self-regulate. He said that SMPs have previously side-stepped responsibility for dealing with harmful content on their platforms, including based on freedom of expression arguments:

> The response of the platforms in relation to COVID is absolutely fascinating. If we look globally over the last 15 years, the major platforms have argued, 'Well, really, we're just a pipeline. We should be immunised from responsibility. All we do is provide a pipe. Any concerns should be addressed to someone who's expressing hate, someone who's engaging in a scam—something like that. We will not intervene, and indeed any intervention would be contrary to our rights under the US free-speech regime'.[99]

However, Dr Baer-Arnold explained to the Committee that during COVID-19, SMPs behaved differently and demonstrated their willingness to remove harmful content:

> What we have seen in relation to COVID is—unexpectedly—suddenly they are taking responsibility and they are saying, 'Well, okay, there is a public harm here. There is a serious harm. We will actually start to do filtering. We will unilaterally remove particular expressions'. So this is significant in terms of vilification because it suggests that actually they acknowledge they do have the scope to remove repugnant, misleading, hateful and harmful expression. They do have the technical power and they do have resources.[100]

Dr Baer-Arnold also pointed out these are incredibly wealthy corporations with the capacity and resources to do more in this area:

> They make large amounts of money, and they pay very little tax. They have the financial resources to put in either software or humans to reduce this. It is definitely within their capability. They should be encouraged, if not required, to do so.[101]

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98 Professor Beth Gaze, Professor, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 20.

99 Dr Bruce Baer Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School, University of Canberra, Public hearing, Melbourne, 24 June 2020, *Transcript of evidence*, p. 4.

100 Ibid.

101 Ibid.

Ashleigh Newnham, the Manager of Strategic and Community Development at the Springvale-Monash Legal Service, stated in her evidence that SMPs should be required to conform to the community's expectations and not the other way around:

> We often bow down to these big corporations and think, 'Oh, you know,' but they should have to fit in with our society and the expectations we have of what kind of a Victoria we want to have.[102]

9.3.2 Australian measures and laws

Office of the eSafety Commissioner

In response to growing concerns about harmful online conduct and content, the Office of the eSafety Commissioner and the eSafety Commissioner were established under the *Enhancing Online Safety Act 2015* (Cth) (EOSA) to promote and enhance online safety, especially for Australian children. The eSafety Commissioner does not deal specifically with online vilification, rather its primary focus is cyberbullying of children, the non-consensual sharing of adult images and removal of abhorrent violent material.[103] The Office states that it is the only government agency solely committed to keeping citizens safer online.[104]

The eSafety Commissioner has a number of legislative functions and powers to foster online safety, including those relating to:

- Cyberbullying—investigate and act on complaints about serious cyberbullying material targeted at children.
- Image-based abuse—to assist with removing intimate images or videos from online platforms, and in some cases take action against the person responsible for the abuse. eSafety can also give enforceable removal notices to social media services, websites, hosting providers and perpetrators, requiring the removal of intimate material.
- Illegal and harmful online content—including powers to issue an abhorrent violent material notice under the *Criminal Code Act 1995* (Cth) (CCA) to a website or its hosting service if they are providing access to such material.[105]

The Commissioner has powers under a number of Acts, including the *Broadcasting Services Act 1992* (Cth), under which it can investigate complaints about online content, and take action on material found to be prohibited or potentially prohibited. This could include content with detailed instruction or promotion of crime or violence.[106]

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102 Ashleigh Newnham, Manager, Strategic and Community Development, Springvale Monash Legal Service, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, pp. 36–7.

103 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Letter to Her Excellency, Ms. Marise Payne, Minister for Foreign Affairs, 2019, REFERENCE: OL AUS 5/2019.1–2., version, 2019.

104 eSafety Commissioner, *What we do*, <https://www.esafety.gov.au/about-us/what-we-do> accessed 25 November 2020.

105 eSafety Commissioner, *Our legislative functions*, <https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions> accessed 25 November 2020.

106 Gail Mason and Natalie Czapski, 'Regulating Cyber-racism', *Melbourne University Law Review*, vol. 41, no. 1, 2017, pp. 308–11.

Online Safety Bill 2020 (Cth)

In December 2020, the draft exposure Online Safety Bill 2020 (Cth) was released that proposes establishing a new cyber-abuse regime for Australian adults, which would provide for the removal of serious online abuse and harassment. The Commonwealth Government had previously not been willing to extend the child cyberbullying provisions to adults due to the availability of other laws to deal with online harassment, including criminal laws.[107] However, if passed, the eSafety Commissioner will have 'world first' powers to order the removal of seriously harmful online abuse towards adults when the website or SMP does not respond. In a fact sheet regarding the Bill, the Department of Infrastructure, Transport, Regional Development and Communications states:

> Online service providers will be required to take action in a reduced time frame when they receive a notice from the eSafety Commissioner. Take down notices for image-based abuse, cyber-abuse, cyber-bullying, and seriously harmful online content will need to be actioned within 24 hours, rather than the current 48 hours.[108]

Section 7 of the draft Bill characterises cyber-abuse as material that intends to have the effect of causing serious harm to an adult and which an ordinary Australian adult would regard as being menacing, harassing or offensive.[109] It is clear from this characterisation that cyber-abuse is conduct that occurs on a continuum that also includes online hate speech and online vilification. The Committee welcomes the new cyber-abuse regime, however, it is important that further consultation clarifies how it will harmonise with existing vilification laws throughout Australia and the Commonwealth's RDA.

The Committee notes that the overlap in the legal characterisation of cyber-abuse and vilification could have legal and policy consequences regarding which authority provides redress, handles complaints or enforces the relevant law. For example, in Victoria VEOHRC has a specific legislative mandate to deal with vilification, whereas the Australian Human Rights Commission (AHRC) is responsible for dealing with racial hatred federally. The eSafety Commissioner has a raft of powers and obligations to Australian internet users, both younger and older, who experience harmful online conduct and content. Additionally, the state and federal police have a role to play, especially regarding offences of serious vilification or racial hatred. Without definitional clarity, authorities will be left to decipher who is responsible for providing redress. It also risks confusing users as to which authority they should report harmful online conduct and content to in response to individual incidents.

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107 Parliament of Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Report into the Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, 2018, p. 4 at 1.16.

108 Australian Government, Department of Infrastructure, Transport, Regional Development and Communications, *Consultation on a Bill for a new Online Safety Act*, (n.d.), <https://www.communications.gov.au/have-your-say/consultation-bill-new-online-safety-act> accessed 28 January 2021.

109 Exposure Draft, Online Safety Bill 2020 (Cth) cl 7.

The Committee acknowledges that seeking such harmonisation was recommended by the Office of the eSafety Commissioner in its submission to this inquiry:

> Recognise and promote eSafety's services and programs as part of a multi-faceted and holistic approach to addressing online harm, including online vilification.[110]

The Committee welcomes this recommendation. While submissions will have closed for the draft exposure Online Safety Bill 2020 (Cth) by the time this report is published, the Committee urges the Victorian Government to contribute to the consultation process where possible to discuss how Victoria's anti-vilification laws will harmonise with the Bill.

Australian Council of Attorneys-General

In November 2019, the Australian Council of Attorneys-General (CAG) agreed to add the regulation of online harmful content as a standing agenda item at future CAG meetings. The purpose of this was to enable CAG to contribute to this policy area in an oversight role and to inform cooperative work across jurisdictions to ensure Australians are protected from harmful online content.[111]

Since the announcement, there have been no further updates about the work it intends to undertake in this area. Furthermore, although its Communique from the November 2019 meeting states that Australians should be protected from 'the full range of harmful online content',[112] it is not yet evident whether this includes vilification.

Commonwealth and state legal regimes

There are a number of laws at both Commonwealth and state and territory levels that regulate harmful online conduct and content. In addition to the EOSA, the *Broadcasting Services Act 1992* (Cth) is the other main Commonwealth law. This Act provides, among other matters, for the Commissioner to refer prohibited content to law enforcement agencies and to the service provider for response, and for individuals to make complaints to the Commissioner about certain prohibited content.[113]

Although the RDA does not include a direct reference to the lawfulness of racial hatred online, the provisions have been interpreted to include online content. This has been demonstrated in cases such as *Jones v Toben*:

> I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, has engaged in conduct rendered unlawful by section C of this Act in the publication of material racially vilificatory of Jewish people, on the Adelaide Institute's Internet site. This conduct is rendered unlawful by Part IIA of the Act.[114]

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110 Office of the eSafety Commissioner, *Submission 16*, received 19 December 2019, p. 2.

111 Council of Attorneys-General, *Communique, 29 November 2019, Adelaide*, 2019.

112 Ibid.

113 *Broadcasting Services Act 1992* (Cth)., schs 5, 7.

114 *Jones v Toben* [2002] FCA 1150.

The CCA makes it an offence to use a carriage service (the internet) to menace, harass and cause offence.[115] An Australian citizen can be prosecuted even if the conduct occurred outside Australia, and the offence provision can apply to vilifying conduct on the basis of race or religion.[116] There have been 308 successful prosecutions under this offence between 2005 and 2014. One example is a 2014 case where a person in Western Australia was charged and pleaded guilty to sending abusive tweets directed at an AFL player of Fijian heritage.[117]

Different jurisdictions across Australia include or exclude a direct reference to online vilification. The Queensland *Anti-Discrimination Act 1991* defines a public act as including communication by electronic means.[118] Similar to the note in the RRTA, the Australian Capital Territory *Discrimination Act 1991* gives examples of conduct done otherwise than in private, including 'writing a publicly viewable post on social media'.[119] In Chapter 5, the Committee recommended that the Victorian Government adopt the definition of a 'public act' from s93Z(5) of the NSW *Crimes Act 1900* which defines it as including 'broadcasting and communicating through social media and other electronic methods'.[120]

In Victoria, aside from the RRTA, state-based harassment and stalking offences—for example, section 21A of the *Crimes Act 1958* (Vic)—are also relevant. These offences for serious bullying in Victoria (commonly referred to as Brodie's Law) also apply to online conduct. In addition, there are provisions under the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) that make it an offence to publish or transmit objectionable material using computer systems, including material that promotes or instructs on crime or violence.[121]

9.3.3 International responses to harmful online conduct and content

The German Netzwerkdurchsetzungsgesetz/Network Enforcement Act 2016 (NEA) is the most well-known regulatory regime for SMPs and hate speech globally. It was developed after escalating discrimination online toward Syrian Refugees arriving in Germany.[122] It was designed to protect SMP users against hate speech and misinformation by obliging SMPs to respond to complaints and take down offending content within 24 hours, otherwise risking significant economic sanctions, including fines of up to 50 million euros.[123]

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115 *Criminal Code Act 1995* (Cth) s 474.17.

116 Mason and Natalie Czapski, 'Regulating Cyber-racism', p. 303.

117 Ibid.

118 *Anti-Discrimination Act 1991* (Qld) s 4A Meaning of public act.

119 *Discrimination Act 1991* (ACT) s 67A Unlawful vilification.

120 *Crimes Act 1900* (NSW) s 93Z.

121 Mason and Natalie Czapski, 'Regulating Cyber-racism', pp. 306–7.

122 Amelie Heldt, 'Reading between the lines and the numbers: an analysis of the first NetzDG reports', *Internet Policy Review*, vol. 8, no. 2, 2019, p. 3.

123 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Letter, REFERENCE: OL DEU 1/2017, version, 2017.

The German NEA has been criticised consistently since its inception, including being labelled as unconstitutional.[124] David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, criticised it as bad regulation of SMPs that risks limiting freedom of expression.[125] However, the Commonwealth Department of Communication and Arts stated in its discussion paper on the online safety legislative reform that the German NEA has had a positive impact on SMPs enforcing the law, recognising that they must meet their obligations:

> Implemented in 2018, this legislation has reportedly led to Facebook increasing the German based staff resources dedicated to moderating German content.[126]

Another example of an international response was the development of the European Commission Code of Conduct on Countering Illegal Hate Speech Online. Its purpose was to prevent the viral spread of online hate speech on SMPs. Facebook, Twitter, YouTube and Microsoft committed to work to stop the spread of racist and xenophobic content and hate speech.[127] As of 2020, there have been five monitoring exercises on its implementation, which according to the European Commission have had a positive impact:

> The fifth evaluation on the Code of Conduct on Countering Illegal Hate Speech Online shows that the Code continues to deliver positive results. On average 90% of the notifications are reviewed within 24 hours and 71% of the content is removed.[128]

Further, as previously discussed, the UK Government released its *Joint White Paper on Online Harms* in 2019, which recommended, among other things, that social media platforms be legally obliged to prevent and prohibit harmful online content through a new statutory 'duty of care'.[129] To enforce this duty of care, the paper recommended the establishment of an independent regulator.[130] While the UK Information Commissioner's Office (ICO) was open to further regulation of online harms, it argued for a more strategic coordinated approach to regulation of the digital economy, as opposed to a 'single or super digital regulator'.[131] The ICO proposed as an alternative for other rules and mechanisms to demonstrate visible and immediate action with effective sanctions.[132]

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124 Heldt, 'Reading between the lines and the numbers: an analysis of the first NetzDG reports', p. 2.

125 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Letter, REFERENCE: OL DEU 1/2017.

126 Department of Communications and the Arts, *Online safety legislative reform: Discussion paper*, p. 15.

127 European Union, *Code of conduct on countering illegal hate speech online*, 2016, p. 1.

128 European Commission, *5th evaluation of the Code of Conduct: Factsheet June 2020*, 2020.

129 HM Government, *UK to introduce world first online safety laws*, 2019, <https://www.gov.uk/government/news/uk-to-introduce-world-first-online-safety-laws> accessed 28 January 2021.

130 Ibid.

131 United Kingdom Information Commissioner's Office, *Response to the Department for Digital, Culture, Media & Sport consultation on the Online Harms White Paper*, 2019, p. 11.

132 Ibid., p. 12.

9.4 Addressing online vilification in Victoria

There are clear limitations as to what the Victorian Government can achieve regarding the regulation of corporations and telecommunications, including SMPs, with telecommunications primarily falling under Commonwealth jurisdiction.[133] The Committee believes that the Victorian Government should prioritise strengthening its anti-vilification protections to effectively respond to vilification both offline and online. The Committee has proposed numerous recommendations to achieve this.

In Chapter 5, the Committee recommended strengthening the civil provisions of the RRTA, such as through changes to the incitement test and the introduction of a harm-based provision. The Committee believes that these are fundamental improvements that will facilitate more complaints of vilification offline and online. Bill Swannie, Lecturer at the Victoria University Law School and Member of the Law Institute of Victoria's Human Rights Committee, advised in a public hearing:

> it is true that there is one specific improvement which could be made—and we have argued for it in our submission—about improving the effectiveness of the Racial and Religious Tolerance Act, and that is by adjusting the test which it sets. Our submission argues that it is a very difficult test to satisfy, whether it is online material or whether it is material published in another format.[134]

The harm-based provision is vital for dealing with vilification online. In online settings, people directly interact with one another—for example, through comments sections or private messaging services on SMPs. It is through these exchanges where there is significant potential for online vilification and online hate speech to occur. Chapter 5 discussed at length that proving incitement was a major barrier to utilisation and enforcement of the RRTA. On the other hand, a harm-based provision arguably provides a more appropriate legal tool to address online vilification because it involves the direct derogation or abuse of people. The example of Tyson's experience, discussed earlier in this chapter and in Chapter 4, demonstrates how a harm-based provision could have assisted him to facilitate a complaint under Victoria's anti-vilification laws.

Further, the recommendation to expand the protected attributes to include women, LGBTIQ+ people and people with a disability will have significant positive consequences for online vilification. As noted by Dandenong City Council in its submission, these groups are regular victims of online vilification:

> The prevalence of online vilification has taken these social tensions to centre stage, where we see women, the LGBTIQ+ community and people with disabilities disproportionately being abused and vilified. Yet, currently, these groups are not afforded the same protections from harmful abuse as those granted for race and religion.[135]

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133 In accordance with s 51(v) of the Constitution of Australia.

134 Bill Swannie, Member, Human Rights Committee, Law Institute of Victoria, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, p. 40.

135 Greater Dandenong City Council, *Submission 29*, p. 4.

The recommendation to adopt the *Crimes Act 1900* (NSW) definition of a public act will also help to address online vilification. As highlighted by the UK *Online Harms White Paper*, as well as Penny Badwal, the Community Engagement and Liaison Officer at the Catholic Archdiocese of Melbourne, there is real potential for confusion about what is public and what is private conduct in the online environment:

> I think with the nature of what online communication is, it can encourage people to believe that what they are expressing is done in a private capacity as opposed to realising that the nature of social media is very much public.[136]

The clarification about public conduct will also apply to the online environment and provide VEOHRC, the Victorian Civil Administrative Tribunal and the courts the opportunity to determine what conduct is private or public in online settings.

9.4.1 Positive duty for online vilification

In Chapter 6, the Committee recommended establishing a positive duty to more effectively prevent vilification. The purpose of this is to promote a culture in which vilification is unacceptable and to address vilification systemically. The Committee heard throughout the inquiry that a positive duty is directly relevant to online vilification because there is currently uncertainty about the obligations of SMPs and tech firms under Australian laws to proactively prevent online vilification, beyond self-regulation.

The Committee is of the view that a positive duty will contribute to reducing harmful online conduct and content. Liam Elphick from ADLEG told the Committee that in an online context, a positive duty would be an effective means to seek SMPs' compliance with anti-vilification laws:

> So our proposed positive duty on online platforms to take all reasonable steps to ensure that communications comply with anti-vilification laws would be one major step in ensuring that it is prevented. And we have seen recent defamation cases effectively impose duties on social media companies to moderate the comments on their posts, particularly news organisations. And we think that a duty on online platforms in that regard could take somewhat of a similar form and cut it off before it occurs.[137]

Professor Gaze, also from ADLEG, explained that the existing positive duty in discrimination and harassment laws sets a precedent and a model for anti-vilification laws. She also argued that a positive duty is not simply about avoiding liability, but requires publication of data and policies by duty holders to demonstrate how they are preventing vilification:

> I think that positive duty—actually asking those companies that are online publishers to provide policies and show what they are doing to address these various issues—would be a step forward. It actually has a parallel under current anti-discrimination laws with

136 Penny Badwal, *Transcript of evidence*, p. 35.

137 Liam Elphick, Adjunct Research Fellow, Australian Discrimination Law Experts Group, public hearing, Melbourne, 11 March 2020, *Transcript of evidence*, pp. 18–19.

> the obligations on employers to show that they have taken reasonable steps to prevent their employees from being sexually harassed in order to avoid vicarious liability, so there is that sort of formulation in a way. We are suggesting that it should be a more explicit positive duty, not just to avoid liability.[138]

The OHPI similarly advocated for a positive duty to address systemic hatred from repeat offenders in online settings:

> We believe state legislation should put platforms under an obligation to report to state authorities any user who repeatedly engaged in vilification and is not responsive to the platforms efforts to prevent such behaviour. Practically this means adding reporting to state authorities as a step in the escalation of penalties the platform can apply. Such reporting should not be a decision, but a requirement when a certain threshold of incidents of abusive behaviour is reached. At this point state authorities should investigate and press charges if appropriate.
>
> Legislation would be needed to require at least major platforms to notify authorities when the threshold is reached and requiring them to provide current and historical data on the behaviour that led up to the mandatory referral.[139]

Jonathan Meddings, a Senior Policy Analyst at Thorne Harbour Health, also supported the inclusion of a positive duty in online settings. However, he warned that clear boundaries are necessary to prevent potential over-policing of speech by SMPs:

> I am mindful that policing what people say online has authoritarian connotations and that social media companies will probably err on the side of censorship if a positive duty, as described, is imposed on them, so here again I think it is essential to emphasise that although there is a need for the law to clearly apply to public conduct online as it does public conduct in general, laws governing what behaviour or speech constitutes hate] conduct must set a high bar, whether that conduct is or is not on a virtual forum.[140]

The Committee is aware that SMPs have begun to implement a range of self-imposed measures to address harmful online content. The Committee believes that these measures should be complemented with a regulatory environment that sets fundamental standards. A positive duty is a vital fundamental standard that will assist to drive systemic change and encourage SMPs to establish more effective ways to prevent online hate speech and vilification on their platforms.

9.4.2 The power to compel

In Chapter 6, the Committee recommended that VEOHRC be granted the power to compel information to resolve a complaint of vilification. This was discussed in the context of online and offline vilification, although it was identified as particularly useful

138 Professor Beth Gaze, *Transcript of evidence*, p. 20.

139 Online Hate Prevention Institute, *Submission 38*, received 17 January 2020, p. 8.

140 Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 10.

for online incidents where anonymity is an issue. This was supported by various inquiry stakeholders, including Nicole Shackleton from La Trobe University, who told the Committee:

> So in terms of anti-vilification laws there do need to be powers available to compel social media companies to do what they can to identify the perpetrator when the police have done everything they can or when the VEOHRC has done everything they can to identify the perpetrator. [141]

Kristen Hilton, the Victorian Equal Opportunity and Human Rights Commissioner, advised that if she had the power to compel documents and identify perpetrators, this would help overcome the barrier of anonymity.[142] She provided an example of a Facebook page where VEOHRC could not identify the perpetrators:

> For example, we received a complaint about a Facebook page that was vilifying Chinese people. However, the owner of the Facebook page could not be identified so we could not accept the complaint. Where we had those powers, we would be able to seek that information from Facebook and make that respondent a party to a dispute resolution process.[143]

Kristen Hilton further advised that this power would assist with dispute resolutions:

> That is not a prosecution from us, but we contact them and ask them to take down that offensive material and also try and engage them in a dispute resolution process. At the moment we are very hamstrung by the inability to be able to compel that sort of information which would identify a respondent. We know that so many people hide behind some sort of anonymity on Facebook or other forms of social media.[144]

The Committee believes addressing and enforcing online vilification will be easier if VEOHRC is granted this power. As discussed, the unique features of the online environment include the ability to be anonymous or use a pseudonym, and this emboldens people to abuse or denigrate others online. In these circumstances, VEOHRC could legitimately use its power to effectively unmask perpetrators who would otherwise escape the consequences of their actions.

In making this recommendation, the Committee is also aware of the implications, particularly regarding privacy, of enforcing this power in online settings. In its submission, the Allens Hub referred to research regarding law enforcement, privacy and open source data. It explained that in these ambiguous online 'public spaces' privacy law can apply even in situations where personal data being collected is publicly available or open source, for example on SMP newsfeeds.[145] The Allens Hub further

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141 Nicole Shackleton, PhD Candidate, La Trobe University, public hearing, Melbourne, 12 March 2020, *Transcript of evidence*, pp. 2–3.

142 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, public hearing, Melbourne, 27 May 2020, *Transcript of evidence*, p. 26.

143 Ibid.

144 Ibid., p. 29.

145 Law and Innovation Allens Hub for Technology, *Submission 10*, received 10 December 2019, p. 4.

explained that whether content is private or public is further complicated when it is sought to be used as evidence. This often relies on requesting information from a foreign SMP through a slow, mutual legal process.[146] The Allens Hub indicated that there may be benefits to clearly articulating a legal framework for law enforcement use of open source data, such as that on social media newsfeeds.

9.4.3 Online vilification strategy

In Chapter 4, the Committee recommended that the Victorian Government work with relevant organisations to develop community education campaigns on vilification and hate conduct. It recommended that the topics covered include creating awareness about vilification laws, hate conduct, responding to incidents, online vilification and strengthening social cohesion. Although that recommendation included online vilification, the Committee believes that the unique challenges of the online environment requires development of a specific online vilification strategy.

This strategy should be developed in consultation with VEOHRC, stakeholders from targeted groups, the Office of the eSafety Commissioner and the OHPI with a focus on legislative and non-legislative protections and responses to vilification to collectively reduce the problem. A key component should be building digital literacy and online safety skills among targeted communities to ensure victims of online vilification and abuse are aware of their rights and how to enforce them. Better data collection across key agencies regarding incidents, complaints and resolutions is also required and should be addressed in the strategy.

RECOMMENDATION 35: That the Victorian Government work with relevant agencies, community organisations and stakeholders (such as the Victorian Equal Opportunity and Human Rights Commission, Office of the eSafety Commissioner, the Online Hate Prevention Institute and others) to develop a strategy to reduce and prevent vilification online. The strategy should include steps to build digital literacy and online safety skills, data collection and publication and raising awareness of the application of the anti-vilification laws to online settings.

9.5 Addressing online vilification across jurisdictions

As explained earlier, harmful online conduct and content has arisen from the digitisation of life and the unique features of the online environment. The Committee has recommended a suite of changes to ensure Victoria's anti-vilification laws more effectively address harmful online vilification, although it also understands it is a larger-scale problem that in many circumstances requires more involvement and regulation at the national level. In addition to the regulation of SMPs, a fundamental challenge considered by the Committee was how Victoria's anti-vilification laws provide

146 Ibid., p. 10.

redress to victims of online vilification where the vilifying conduct or content originates in another state, territory or country.

Many stakeholders explained in their evidence that even if Victoria made its anti-vilification laws as effective as possible, in terms of harmful online content originating outside of the state, it will continue to have limited enforcement powers.

In discussing jurisdictional challenges within Australia, ADLEG raised with the Committee the impact of a recent High Court of Australia judgment, *Burns v Corbett [2018] HCA 15*. The case involved Gary Burns, an anti-discrimination activist residing in NSW, who complained that the published statements of a Victorian woman in a Victorian publication were discriminatory. The respondents argued that the NSW Civil and Administrative Tribunal did not have jurisdiction to determine the dispute.[147] The case was decided in the respondent's favour.

In a public hearing, Liam Elphick from ADLEG, explained that this case had implications for online vilification when harmful content originates in another state:

> This might be a concern for social media more than other types of vilification where it originates in other states. So a person online in New South Wales vilifies a person in Victoria and questions arise as to whether, for instance, if that case was to go to VCAT, they would actually be able to hear that question as to which laws should apply. I do not think we have a clear answer to this problem yet.[148]

In the article *Regulating Cyber-Racism,* published in the Melbourne University Law Review, authors Gail Mason and Natalie Czapski, demonstrated the complexities in this space on a global scale. They use the example of an online racist publication in another country, which may target a person in Australia, on a social media platform hosted by a third country that is incorporated in a fourth jurisdiction. The authors stated that to effectively address this 'may require coordination between law enforcement and government agencies from multiple countries as well as intermediaries such as online host platforms and connectivity providers, bringing to light legal inconsistences between jurisdictions'.[149] The Committee understands that this is not an issue that can be effectively resolved at the state or national level, although greater collaboration is required to determine how Australia can better respond.

Another core jurisdictional issue is how to effectively deal with global SMPs, like Facebook and Twitter. When the inquiry was first referred to the Committee, the then Attorney-General Jill Hennessey MP, discussed 'the realities about the regulatory limitations of regulating the internet and social media platforms':

> Whilst our powers as a commonwealth and potentially as a state are far sharpened where we are dealing with companies that are domiciled in Australia, those that are domiciled internationally often run businesses in Australia and therefore there may be

147 Azaara Perakath, 'Burns v Corbett (2018) 353 ALR 386 Tribunals and Tribulations: Examining the Constitutional Limits on the Jurisdiction of State Tribunals', *Adelaide Law Review*, vol. 40, no. 2, 2019, p. 588.

148 Liam Elphick, *Transcript of evidence*, p. 18.

149 Mason and Natalie Czapski, 'Regulating Cyber-racism', p. 296.

> other platforms that we can potentially regulate. So this is a challenge that manifests itself in a whole variety of areas of both civil and criminal law. It is one for which I believe this Parliament would be well guided by having a parliamentary committee to consider and reflect upon what are effective mechanisms to regulate in that space.[150]

During the inquiry, there was a sense from some stakeholders that the problem of regulating and enforcing laws for SMPs was too challenging. Ashleigh Newnham from the Springvale-Monash Legal Service told the Committee:

> Well, I guess the idea of regulating these giant world all-consuming organisations is somewhat overwhelming, and I think that there is a reluctance—I mean, it is just too mind-numbingly huge to even possibly start thinking about. [151]

Similarly, Jamie Gardiner from Liberty Victoria indicated in his evidence:

> Now, I am not, and I do not think any of us are, in a position to understand how to deal with your Facebooks and Instagrams and all of the others where they involve international bodies and they involve federal law, but we need to somehow bring them within the purview of the law so as to deal with the harm that they cause or facilitate...[152]

The Committee was interested in a key recommendation from the OHPI (see Box 9.2) that requires SMPs to verify which jurisdictions its users reside in.[153] The OHPI argue that this requirement could make it easier for users and SMPs to report serious online vilification to the relevant authority.[154] The Committee also foresees other benefits, such as facilitating data collection about the prevalence of online vilification in Victoria and across Australia. It would also complement the positive duty for corporations to prevent and respond to vilification on their platforms. The Committee is aware that this type of verification tool does not itself solve jurisdictional challenges, although it should be further explored by the Commonwealth Government.

150 Victoria, Legislative Assembly, 12 September 2019, *Parliamentary debates*, p. 3333.

151 Ashleigh Newnham, *Transcript of evidence*, pp. 36–7.

152 Jamie Gardiner, *Transcript of evidence*, p. 6.

153 Online Hate Prevention Institute, *Submission 38*, p. 7.

154 Ibid.

BOX 9.2: Online Hate Prevention Institute

The OHPI is an innovative, independent organisation that combats online hate and harms. It developed software and related tools to 'identify, categorise and remove instances of online hate'. Beyond monitoring and reporting, it conducts evidence-based research, runs anti-online hate campaigns, provides public education and training, and contributes to the development of online hate policy and regulation.

The OHPI developed its own software to identify and remove harmful online conduct and content. Dr Andre Oboler, the Chief Executive Officer of the OHPI, told the Committee that its technology is developed in Victoria and is gaining international interest. The software connects directly to SMPs and websites to analyse public online content for hateful material, such as homophobic comments or racist memes. It uses both artificial intelligence and user-generated records to monitor and report online hate. The tool can be embedded on an individual website to allow direct reporting of hate on that website or platform.

The OHPI conducts monthly campaigns to combat online hate, including on cyberbullying, racism, antisemitism, Islamophobia, violent political extremism and hate directed at LGBTIQ+ people.

In March 2020, the OHPI's online campaign focused on racism against Aboriginal and Torres Strait Islander people on Instagram, which according to OHPI hosts accounts that facilitate the sharing of racist content. It also considered that this type of campaign contends with a uniquely Australian experience of online hate that global SMPs are not equipped to respond to. With the help of other internet users, the campaign systemically identified, reported and removed racist content from Instagram.

The OHPI became targets for online hate itself as a result of one of its campaigns. Dr Oboler told the Committee:

> Just in the last couple of days—we are drowning in vilification right now, because when we announced that our campaign next month is tackling Islamophobia, we received, I think, around 300 comments. Most of them are abusive, most of them are Islamophobic and some of them are violent and extreme, so we are dealing with those.

The Committee commends the OHPI as an entrepreneurial Victorian organisation developing globally innovative technology solutions to address online harms.

Source: Adapted from Online Hate Prevention Institute, Public Hearing, Melbourne, 12 March 2020, *Transcript of evidence*, pp. 14–15; and Online Hate Prevention Institute, *Submission 38*, received 17 January 2020.

As the Commonwealth Government is essential when considering how SMPs could be better regulated, the Committee believes the Victorian Government should advocate for greater collaboration across Australia, at both state and national levels, to explore different avenues. This could occur through CAG, as it may be best placed to examine the jurisdictional issues when responding to online vilification. In particular, Australia's Attorneys-General, and their equivalent enforcement agencies, can advance

cooperation across Australian jurisdictions and their respective legal regimes, and also seek cooperation internationally. As part of this, they could explore development of a legal framework for law enforcement agencies to handle online vilification issues.

In a public hearing, Dr Bruce Baer-Arnold from the University of Canberra identified the responsibility of the Commonwealth Government in this space but also indicated that Victoria has an opportunity to lead by example:

> The commonwealth is particularly important because the commonwealth, under the national constitution, has the power regarding telecommunications. It also has power regarding corporations. Victoria I think has a significant role, firstly in updating Victorian legislation, and secondly in sending a message both to Victorians and the rest of Australian society that vilification is not appropriate, and then following that up by working with the other governments so that we have a coherent regime across Australia.[155]

The Committee agrees with this point and is of the view that should the Victorian Government commit to implement the comprehensive suite of recommendations contained in this report, the Government will be in an excellent position to address online vilification at the state level and to advocate for greater collaboration across Australia.

RECOMMENDATION 36: That the Victorian Government explore options, in coordination with the Commonwealth and other states and territories, to address online vilification such as:

- reporting and referral tools between the Office of the eSafety Commissioner and anti-discrimination and human rights agencies throughout Australia
- encourage social media platforms to adopt jurisdiction verification tools
- collecting and publishing information and data on social media platforms and vilification, including policies and processes for reducing vilification
- a legal framework for law enforcement authorities to handle online vilification issues.

Adopted by the Legislative Assembly Legal and Social Issues Committee
Parliament of Victoria, East Melbourne
15 February 2021

155 Arnold, *Transcript of evidence*, p. 1.

Appendix A
About the Inquiry

A.1 Submissions

Submission no.	Name of individual or organisation
1	Craig King
2	Paul Rogers
3	Catherine Hughes
4	Lifeline Australia
5	Alexis Green
6	Umar Bin Amin
7	Australian Centre for Christianity and Culture
8	Geoff Lambourne
9	Commission for Children and Young People
10	Allens Hub for Technology, Law and Innovation
11	Bernie Bosma
12	Telecommunications Industry Ombudsman
13	Victorian Government
13A	Supplementary submission
14	Centre for Multicultural Youth
15	Ethnic Communities' Council of Victoria
16	Office of the eSafety Commissioner
17	Alastair Lawrie
18	Institute of Public Affairs
19	Nicole Shackleton, Dr Laura Griffin and Danielle Walt
20	Liam Bywater
21	Hindu Council of Australia
22	Bill Swannie
23	Office of the Public Advocate
24	Casey Multi-Faith Network
25	Melbourne Hare Krishna Movement
26	Jewish Community Council of Victoria
27	Victorian Gay and Lesbian Rights Lobby
27A	Supplementary submission
28	Dr Holly Lawford-Smith

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Submission no.	Name of individual or organisation
29	Greater Dandenong Council
30	Victorian Council of Social Service
31	Job Watch Incorporated
32	Nicholas Butler
32A	Supplementary submission
33	Catholic Archdiocese of Melbourne
34	Thorne Harbour Health
35	Australian Christian Lobby
36	Uniting Church
37	Zakariah Halabi
38	Online Hate Prevention Institute
38A	Supplementary submission
39	Liberty Victoria and LGBTIQ Legal Service
40	Michael Mazur
41	Dr Bruce Baer Arnold and Dr Wendy Bonython
41A	Supplementary submission
42	Spectrum Labor
43	Springvale Monash Legal Service
44	Australian Discrimination Law Experts Group
45	Islamic Council of Victoria
46	Law Institute of Victoria
46A	Supplementary submission
47	Human rights Law Centre, GetUp!, Victorian Trades Hall Council, Asylum Seeker Resource Centre and Anti-Defamation Commission
47A	Supplementary submission
48	Victorian Multicultural Commission
48A	Supplementary submission
49	Australian Muslim Women's Centre for Human Rights
50	Victorian Aboriginal Legal Service and Victoria Legal Aid
51	Victorian Equal Opportunity and Human Rights Commission
51A	Supplementary submission
52	Gender Equity Victoria
53	Equality Australia
54	Victorian Association of WW2 Veterans from the ex-Soviet Union
55	Australian Jewish Association
55A	Supplementary submission
56	National Better Balanced Futures

Submission no.	Name of individual or organisation
57	Union for Progressive Judaism
58	Aleph Melbourne
58A	Supplementary submission
59	Name withheld
60	Henry Erlich
61	Korean Society of Victoria
62	Victorian Disability Advisory Council

A.2 Public hearings and site visits

Tuesday, 25 February 2020

Meeting Room G1, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Vivienne Nguyen	Chair	Victorian Multicultural Commission
Maria Dimopoulos	Deputy Chair	
Eddie Micallef	Chair	Ethnic Communities' Council of Victoria
Chris Christoforou	Executive Officer	
Jennifer Huppert	President	Jewish Community Council of Victoria
Mark Zirnsak	Senior Social Justice Advocate	Synod of Victoria and Tasmania, Uniting Church in Australia
Dr Nigel Zimmerman	Principal Advisor to the Archbishop	Catholic Archdiocese of Melbourne
Penny Badwal	Community Engagement and Liaison Officer	
Adel Salman	Vice President	Islamic Council of Victoria

Wednesday, 11 March 2020

Meeting Room G1, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Gemma Carfarella	Chair	Liberty Victoria
Jamie Gardiner OAM	Member	
Sam Elkin	Coordinator	LGBTIQ Legal Service, St Kilda Legal Service
Morgan Begg	Research Fellow	Institute of Public Affairs
Dara Macdonald	Research Fellow	

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Name	Title	Organisation
Professor Beth Gaze	Professor	Australian Discrimination Law Experts Group
Liam Elphick	Adjunct Research Fellow	
Maxim Thomas	Co-convenor	Victorian Gay and Lesbian Rights Lobby
Sean Mulcahy	Committee Member	
Monique Hurley	Senior Lawyer	Human Rights Law Centre
Ruth Barson	Joint Executive Director	
Renaire Druery	Acting Human Rights Director	GetUp!
Abiola Ajetomobi	Director of Social Innovation	Asylum Seeker Resource Centre
Jacinta Lewin	Chair, Human Rights Commission	Law Institute of Victoria
Bill Swannie	Member, Human Rights Commission	
Dr Dvir Abramovich	Chairman	The Anti Defamation Commission

Thursday, 12 March 2020

Meeting Room G1, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Nicole Shackleton	PhD Candidate	La Trobe University
Dr Laura Griffin	Lecturer	
Danielle Walt	Project Manager and Policy Consultant	
Dr Andre Oboler	Chief Executive Officer and Managing Director	Online Hate Prevention Institute
Associate Professor David Wishart	Director	
Mark Civitella	Chairman	
Dr Nasya Bahfen	Director	
Dr Holly Lawford-Smith	Senior Lecturer	University of Melbourne
Tanja Kovac	Chief Executive Officer	Gender Equity Victoria
Jacinta Masters	Manager	
Jasmine Yuen	Acting Victorian Director	Australian Christian Lobby
Dan Flynn	Chief Political Officer	
Nicholas Butler	Individual	–

Wednesday, 27 May 2020

Meeting Room G6, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Anna Brown	Chief Executive Officer	Equality Australia
Ghassan Kassisieh	Legal Director	
Jonathan Meddings	Senior Policy Analyst	Thorne Harbour Health
Brigid Monagle	Deputy Secretary, Fairer Victoria	Department of Premier and Cabinet
John Batho	Executive Director, Multicultural Affairs and Social Cohesion, Equality	
Dr David Adler	President	Australian Jewish Association
Ted Lapkin	Executive Director	
Kristen Hilton	Commissioner	Victorian Equal Opportunity and Human Rights Commission
Emily Minter	Senior Legal Advisor	
Ashleigh Newnham	Manager, Strategic and Community Development	Springvale Monash Legal Service
Katia Lallo	Community Lawyer	

Thursday, 28 May 2020

Meeting Room G6, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Diana Sayed	Chief Executive Officer	Australian Muslim Women's Centre for Human Rights
M. Y.	Young Women's Program Coordinator	
Professor Lyria Bennett-Moses	Director	Allens Hub for Technology, Law and Innovation
Siddarth Narrain	PhD Candidate and Scientia Scholar at UNSW Law School	
Jessie Holmes	Chief Executive Officer	Yarriambiack Shire Council
Gavin Blinman	Director, Community Development and Wellbeing	
Rowan McRae	Executive Director, Civil Justice, Access and Equity	Victorian Legal Aid
Melanie Schleiger	Program Manager, Equity Law Program	
Rachel Gleeson	Solicitor, Civil and Human Rights Practice	Victorian Aboriginal Legal Service
Charmaine Clarke	Senior Practitioner	Aboriginal Family Violence Primary Prevention Innovation Project

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Name	Title	Organisation
Murray Norman	Director	National Better Balance Futures
Surinder Jain	Director	
Professor Suzanne Rutland	Member, Australian delegation to the International Holocaust Remembrance Alliance	
Maxine Piekarski	Parent	
Carmel Guerra	Director and Chief Executive Officer	Centre for Multicultural Youth
Akeer Garang	Youth Volunteer	
Shashwat Tripathi	Youth Volunteer	

Wednesday, 24 June 2020

Meeting Room G6, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Dr Bruce Baer Arnold	Assistant Professor	Canberra Law School
David Knoll AM	President	Union for Progressive Judaism
Brian Samuel OAM	Co-President	
Marsha Uppill	Co-founder and Director	Arranyinha
Professor Katharine Gelber	Head of School, School of Political Science and International Studies	University of Queensland
Professor Gail Mason	Co-Convenor	Australian Hate Crime Network
Julie Mason	Co-Convenor	

Thursday, 25 June 2020

Meeting Room G6, 55 St Andrews Place, East Melbourne

Name	Title	Organisation
Luke Cornelius	Assistant Commissioner	Victoria Police
Alastair Lawrie	Individual	–
Peter Wertheim	Co-Chief Executive Officer	Executive Council of Australian Jewry
Monique Meyer	Parent	
Felix Walsh	Policy and Law Reform Officer	Disability Discrimination Legal Service
Diana David	Chief Executive Officer	Reconciliation Victoria

Appendix B
Comparative vilification frameworks in Australian jurisdictions

B.1 Comparative vilification frameworks in Australian jurisdictions

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
Victoria	Civil—Anti-vilification	*Racial and Religious Tolerance Act 2001*	• Race • Religion	Based on a protected attribute, it is unlawful to engage in conduct that incites: • hatred • serious contempt • revulsion • severe ridicule.	Private conduct exceptions apply to genuinely private conduct.	• The alleged victim or a person/organisation on their behalf • A child or a person on their behalf • A person on behalf of two or more persons • Joint complaints • A representative body may, for a named person, bring a dispute to the Victorian Equal Opportunity & Human Rights Commission (VEOHRC) or make an application to the Victorian Civil and Administrative Tribunal (VCAT).	VEOHRC VCAT	• VEOHRC dispute resolution • Many complaints are resolved at dispute resolution with a range of outcomes such as an apology, financial compensation or a donation to a charity. Applications may be made to VCAT in respect of a dispute, resulting in the following outcomes: • refrain from behaviour • pay the applicant/ compensation • do anything to redress the loss of the applicant • issue an apology.
	Criminal—Serious vilification	*Racial and Religious Tolerance Act 2001*	• Race • Religion	Based on a protected attribute, it is an offence to intentionally engage in conduct that an offender knows is likely to incite hatred; and to threaten, or incite others to threaten, physical harm to person or property. Based on a protected attribute, it is an offence to intentionally engage in conduct that an offender knows is likely to incite: • serious contempt, • revulsion • severe ridicule.	n/a	Proceedings require consent of Director of Public Prosecutions (DPP)	Tribunal/court	Body Corporation: 300 Penalty Units (PU) ($49,566) Any other case: 60 PU ($9,913) and/or 6 months prison

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
Commonwealth	Civil— Racial hatred	*Racial Discrimination Act 1975*	• Race • Colour or national or ethnic origin	Based on a protected attribute, it is unlawful to do an act that is reasonably likely, in all the circumstances, to: • offend • insult • humiliate • intimidate.	Conduct is public if it can be observed/ heard by the public	• The alleged victim or a person/ organisation on their behalf. • A person on behalf of two or more persons. • Represented complainants can remain anonymous for conciliation.	Australian Human Rights Commission (AHRC)	Conciliation, including the following outcomes: • apology • employment reinstatement • compensation • other actions as appropriate. The AHRC may direct a person to take part in conciliation and enforce this direction. Unresolved complaints may be taken to the Federal Court. Only the Court can determine an act of unlawful discrimination.
	Criminal— Urging violence against groups	*Criminal Code Act 1995*	• Race • Religion • Nationality • National or ethnic origin • Political opinion	Based on a protected attribute, it is an offence to intentionally urge the use of force or violence against a group; and the use of the force or violence would threaten the peace, order and good government of the Commonwealth.	n/a	Proceedings require consent of Attorney-General (AG).	Tribunal/court	Imprisonment for 5 years
Australian Capital Territory	Civil— Other unlawful acts including vilification	*Discrimination Act 1991*	• Disability • Race • Gender identity • Religion • HIV/AIDS status • Sexuality • Intersex status	Based on a protected attribute, it is unlawful, other than in private, to incite: • hatred • revulsion • serious contempt • severe ridicule.	Conduct is public if it can be observed/ heard by the public, including: • public social media posts • wearing clothes, signs or flags • actions observable by the public • an interview intended for public broadcast	• The alleged victim or a person/ organisation on their behalf • Joint complaints • Complaints to the ACT Discrimination Commissioner by an agent must name the aggrieved person.	ACT Discrimination Commissioner	Conciliation, including the following outcomes: • apology • compensation • other actions as appropriate. The ACT Discrimination Commissioner may direct a person to take part in conciliation and enforce this direction. Maximum penalty: 50 PU

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
Australian Capital Territory (continued)	Criminal—Serious vilification	*Criminal Code 2002*	• Disability • Race • Gender identity • Religion • HIV/AIDS status • Sexuality • Intersex status	Based on a protected attribute, it is an offence to intentionally carry out a threatening act in a reckless manner that incites: • hatred • revulsion • serious contempt • severe ridicule.	It is an offence if the act occurs other than in private and if the offender is reckless about whether the act is private.	n/a	Tribunal/court	Maximum penalty: 50 PU
New South Wales	Civil—Vilification	*Anti-Discrimination Act 1977*	• Race • Transgender • Homosexual • HIV/AIDS status	Based on a protected attribute, it is unlawful to, based on a protected attribute, incite: • hatred • serious contempt • severe ridicule.	A public act includes: • any form of communication to the public • any form of conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia • the public distribution or dissemination of any matter.	• The alleged victim or a person/ organisation on their behalf • Joint complaints if each complainant has the protected attribute • A representative body may make a complaint for a named person.	Anti-Discrimination Board	Conciliation, including the following outcomes: • apology • compensation • other actions as appropriate. The Commissioner may direct a person to take part in conciliation and enforce this direction. Unresolved complaints may be taken to the NSW Civil and Administrative Tribunal

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
New South Wales (continued)	Criminal—Inciting violence	*Crimes Act 1900*	• Race • Religion • Sexual orientation • Gender identity • Intersex status • HIV/AIDS status	Based on a protected attribute, it is an offence to intentionally or recklessly threaten or incite violence based on a protected attribute.	A public act includes: • any form of public communication (including communicating through social media and other electronic methods) • any conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia • the distribution or dissemination of any matter to the public. For the avoidance of doubt, an act may be a public act even if it occurs on private land.	Proceedings require consent of DPP	Tribunal/court	Corporation: 500 PU ($55,000) Individual: 100 PU ($11,000) and/or 3 years imprisonment
Northern Territory	-	-	-	-	-	-	-	-

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
Queensland	Civil—Anti-vilification	*Anti-Discrimination Act 1991*	• Race • Religion • Sexuality • Gender identity	Based on a protected attribute, it is unlawful to incite: • hatred • serious contempt • severe ridicule.	A Public Act includes: • any form of communication to the public (including by electronic means) • any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.	• The alleged victim or a person/ organisation on their behalf. • Joint complaints. • If a complaint is referred to the QLD Civil and Administrative Tribunal (QLDCAT), the QLD Human Rights Commission (QLDHRC) may give a direction prohibiting the disclosure of the person's identity. • In relation to a representative complaint a complainant is a named person.	QLDHRC	Conciliation, including the following outcomes: • Apology • Compensation • Other actions as appropriate The Commissioner may direct a person to take part in conciliation and enforce this direction. Unresolved complaints may be taken to the QLDCAT
	Criminal—Serious vilification	*Anti-Discrimination Act 1991*	• Race • Religion • Sexuality • Gender identity	Based on a protected attribute, it is an offence to knowingly, or recklessly, incite hatred, serious contempt or severe ridicule in a way that includes threatening physical harm, or incites others to threaten physical harm.	As above	Proceedings require consent of AG or DPP	Tribunal/court	Corporation: 350 PU ($45,692). Individual: 70 PU ($9,138) or 6 months imprisonment
South Australia	Criminal—Racial vilification	*Racial Vilification Act 1996*	• Race	Based on a protected attribute, it is unlawful to incite: • hatred • serious contempt • severe ridicule.	Public Act means any form of communication with the public or conduct in a public place.	Proceedings require consent of the DPP	Tribunal/court	Body Corporation: $25,000. Natural person: $5,000 and/or 3 years imprisonment. Damages cannot exceed $40,000

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
South Australia (continued)	Tort—Racial victimisation	*Civil Liability Act 1936*	• Race	Based on a protected attribute, it is unlawful to incite: • hatred • serious contempt • severe ridicule An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.	Public Act means any form of communication with the public or conduct in a public place.	n/a	Tribunal/court	Damages not exceeding $40,000 may be awarded to compensate any form of detriment
Tasmania	Civil (only)—Prohibited conduct based on protected attributes	*Anti-Discrimination Act 1998*	• Age • Race • Disability • Sexual orientation or lawful sexual activity • Gender • Intersex • Gender identity • Pregnancy • Breastfeeding • Marital status • Relationship status • Family responsibilities • Parental status	Based on a protected attribute, it is unlawful in circumstances in which a reasonable person would expect the given outcome to: • offend • humiliate • intimidate • insult • ridicule.	Public Act includes: • any form of communication to the public • any conduct observable by the public • the distribution or dissemination of any matter to the public	• The alleged victim or a person, organisation or union on their behalf. • Joint complaints. • A child of significant maturity. • The Tasmanian Anti-Discrimination Commissioner (ADC) has the power to initiate a complaint. • A complaint must be filed within 12 months of the alleged incidence. • A complaint must identify the alleged aggrieved person.	Tasmanian ADC	Conciliation or any other method deemed appropriate by the Tasmanian ADC. The Tasmanian ADC may direct a person to take part in conciliation and enforce this direction. Maximum penalty: 10 PU. Conciliation can be referred to an inquiry in which the Tasmanian ADC can make certain orders: • respondent must not repeat or continue the conduct • redress any loss, injury or humiliation suffered by the complainant • appropriate compensation • Fine of 20 PU maximum • any other order that is appropriate.

Jurisdiction	Dispute/ Scheme	Legislation	Attribute(s)	Elements and threshold	Private and public acts/conduct	Who may make a complaint/bring a dispute	Arbitrator	Outcome/Offence
Tasmania (continued)	Civil (only)—Inciting hatred	*Anti-Discrimination Act 1998*	• Race • Religion • Disability • Sexual orientation or lawful sexual activity • Gender identity or intersex variations of sex characteristics	Based on a protected attribute, it is unlawful to incite: • hatred • serious contempt • severe ridicule	As above	As above	As above	As above
Western Australia	Criminal (only)—Racial hatred	*Criminal Code Act Compilation Act 1913*	• Race	There are four categories of racial hatred: • conduct intended or likely to incite racial animosity or racist harassment • possession of material for dissemination with intent or likely to incite racial animosity or racist harassment • conduct intended or likely to racially harass • possession of material for display with intent or likely to racially harass.	n/a	Proceedings require consent of the DPP	Tribunal/court	Penalties range from 1 to 14 years imprisonment and $12,000–$24,000 fines. A court may make an order for the forfeiture of unlawful material in respect of which offence was committed.

Source: Adapted from, *Racial and Religious Tolerance Act 2001* (Vic); *Australian Human Rights Commission Act 1986* (Cth); *Criminal Code Act 1995* (Cth); *Racial Discrimination Act 1975* (Cth); *Discrimination Act 1991* (ACT); *Criminal Code 2002* (ACT); *Anti-Discrimination Act 1977* (NSW); *Crimes Act 1900* (NSW); *Anti-Discrimination Act 1991* (Qld); *Racial Vilification Act 1996* (SA); *Civil Liability Act 1936* (SA); *Anti-Discrimination Act 1998* (Tas); and *Criminal Code Act Compilation Act 1913* (WA).

Appendix C
Recommendations from Worklogic's independent inquiry into Brighton Secondary College[1]

In this report, the reviewer:

- Provides specific recommendations for Brighton Secondary College to address issues of antisemitism that have occurred at the school, prevent further occurrences and restore the confidence of the Jewish community and the wider school community.
- Provides recommendations for state-wide improvements regarding the management of antisemitic, attribute-based and other bullying.
- Outlines the progress of the recommended action items announced by the Deputy Premier on behalf of the Victorian Government on 19 November 2019 following a review into antisemitic bullying at Cheltenham Secondary College and Hawthorn West Primary School, specifically their application in relation to the issues arising at Brighton Secondary College.
- Provides recommendations for improvements for Brighton Secondary College and system-wide within the context of the existing action items.

Reporting and recording-keeping

1. It is recommended that reporting and record-keeping practices at BSC be enhanced as follows:

    a. That an online form be created to enable students to report antisemitic and other discriminatory or inappropriate behaviour that they are subjected to or have observed. This form should require students to login but give the option of making a report which is anonymous, except when viewed by the Wellbeing team for the purposes of protection students' safety.

    b. That a receipt be issued to the person making a report, whenever an allegation or an incident is received. This may be a student or parent. The receipt should allow students or parents to verify that a report was received, when it was received, a brief description of the incident, how it was flagged (e.g. as an antisemitic incident) in the student's Chronicle record, and that in addition to being investigated and properly handled immediately, it will also be counted

1 Worklogic, *Independent inquiry into Brighton Secondary College*, report for Brighton Secondary College, Worklogic, Melbourne, 2020.

towards the quarterly statistical report described below. A record of the receipt must be stored electronically in a form which can be audited and used to verify any receipt which is produced.

c. That all reports of antisemitic bullying received at BSC be entered into the individual Chronicle records of both the target and the alleged perpetrator and specifically identified as being antisemitic in nature. A similar approach should be applied to other forms of bullying which involve racial or religious vilification, and the scheme should be expanded to cover at a minimum all attributes which become protected by Victorian anti-vilification law. Consideration should be given to immediately including gender, sexual orientation, gender identity, sex characteristics and disability. It is further recommended that these incidents be given colour-coded, so that these incidents are easily identifiable and aggregated to identify emerging issues and trends (including the effectiveness of interventions to reduce incidences)."

d. That the Wellbeing Department and relevant year level co-ordinators receive a notification when a flagged entry (as discussed in the previous recommendation) is added to a Chronicle record so they are aware of patterns within the school and students who may need assistance.

e. That a quarterly statistical report be compiled detailing how many incidents of antisemitism have occurred, and similarly, how many incidents of each other type of flagged incident have occurred. The report should also detail the responses after investigation according to categories such as educational response (e.g. a student being spoken to, an address at an assembly), disciplinary response (e.g. a detention, suspension), maintenance (e.g. removal of graffiti, restoration or replacement of damaged property), dismissed or discontinued (e.g. report is made but then dropped, report is found to be inaccurate, or the report lacks details to take further), or other (e.g. referral to another authority or external program).

f. That senior leadership and the Wellbeing Department meet each quarter to discuss the report, the nature of the underlying complaints, investigations into them and actions that have resulted, and to plan any strategies to address patterns that emerge from the data and the discussion, for example further year level assembly speeches.

g. That BSC annually provide the compiled quarterly statistical reports to the Department of Education and Training, along with brief details of any additional actions taken as a result of the quarterly review.

h. That the school discuss this data with its regional Senior Education Improvement leader as part of annual school review processes.

i. That the parents of all students involved in bullying allegations (irrespective of whether their child was the target or perpetrator of the behaviour) be advised of the outcome of any investigations into such allegations, and that a record of this communication be included on their child's student record.

j. That in addition to the year level co-ordinators, a designated contact officer be nominated by the school to receive complaints of antisemitism or other bullying, and provide an alternative avenue for reporting. It is further recommended that the person who receives the complaint email a copy of the report to the other receiver of reports, i.e., that the year level co-ordinators emails the contact officer or vice versa. If the person who receives the report is not a co-ordinator or the contact person, they must send an email to those parties to advise of the nature of the report and the action taken.

k. That all students be given a specific and detailed briefing in term one of year 7, and then further annual briefings, about the content of the school's Bullying Prevention Policy and the reporting mechanisms and Wellbeing support available.

l. That students be actively encouraged to report any harassing or discriminatory conduct or graffiti they experience or observe, and advised they can do so on an anonymous basis.

Recommendation for state-wide application: That the Department consider how these practices could be adopted in all Victorian government schools, with local adaptation as required.

Student voice

2. It is recommended that the following measure be taken to ensure student voices and experiences are heard and understood:

   a. That the school leadership consult with the student Wellbeing committee about how to better address issues of antisemitism, racism, discrimination and bullying at the school.

   b. This consultation should include discussion about what barriers exist to reporting such incidents. That the school discuss this data with its regional Senior Education Improvement leader as part of annual school review processes.

   c. That an invitation be extended to the UJEB J-Lunch group that operates at the BSC, and broadly to all Jewish students at the school, to either participate in the J-Voice group established by the Department (see below), or otherwise, to share their experiences and ideas with the group about how antisemitism could be better addressed at the school.

Graffiti management

3. It is recommended that the following steps be taken in relation to the presence of graffiti at the school:

   a. That a comprehensive audit be done of all of BSC's facilities, including toilets, classrooms, hallways and locker bays to check for any form of antisemitic or other discriminatory or inappropriate graffiti and that all such graffiti be documented (for example, a photo taken) and removed as a matter of urgency.

b. That there be designated staff members who monitor the school's facilities on a regular basis and keep a record of any such graffiti they observe. The staff members should then complete a maintenance request asking the school's cleaners or maintenance staff to remove the offending material.

c. That school cleaners and maintenance staff document all graffiti before cleaning it and provide photos to the designated contact officer to enable them to identify and respond to any antisemitic, racist, sexist, homophobic or otherwise offensive graffiti.

Recommendation of state-wide application: That the Department consider how this practice of managing offensive and inappropriate graffiti could be adopted across all Victorian schools.

Policy change

4. It is recommended that:

   a. BSC update its Student Wellbeing Policy (which incorporates the school's Bullying Prevention Policy) to incorporate the new definition of bullying adopted by the Department and detailed in Part 3 of this report.

   b. BSC amend its Student Wellbeing Policy (which incorporates the school's Bullying Prevention Policy) as a matter of priority, to extend the definition of racial harassment to incorporate religious discrimination and vilification. It is also recommended that appropriate examples of this form of conduct are included in the policy.

   c. BSC update its Uniform Policy to reflect the practice at the school of allowing religious symbols to be worn on a necklace if they are tucked in.

Recommendation of state-wide application: That the Department advise all Victorian schools to incorporate these definitions into their updated policies as a matter of priority.

Courage to Care

5. It is recommended that Brighton Secondary College invite Courage to Care to attend the school as soon as practicable to deliver its upstander program across each year level initially, and then to year 7s on an annual basis.

Restorative justice

6. It is recommended that:

   a. As a first step, the school undertake further investigations into how it can use restorative justice processes in the way it responds to instances of antisemitism, discrimination and bullying.

   b. BSC consult with the Jewish Community Council of Victoria (as the peak representative body of the Jewish Community in Victoria) for guidance about how to best use these processes when responding to incidents of antisemitism.

c. Wellbeing staff and, if appropriate, year level co-ordinators be provided with specialised training in how to apply these practices.

Recommendation of state-wide application: That the Department support all Victorian schools to develop competence in these practices.

Mediation/restorative process

7. It is recommended that:

   a. The students and families who participated in this inquiry, the Principal, the members of the school leadership and representatives of the Education Department be offered the opportunity to meet in a confidential, non-legal forum, managed by the Independent Office for School Dispute Resolution to discuss the executive summary of this report. The students should be given an opportunity to share their experiences of antisemitism in the school in this forum if they wish. All participants should be invited to comment and discuss the report's recommendations, the degree to which this brings resolution to the experiences, and the degree to which this will protect Jewish students from antisemitic incidents and ensure timely and appropriate responses in the future.

   b. That the school acknowledge the students' perspectives and apologise for the students having had these experiences while at the school and also, provide reassurance that further steps to address antisemitism will be implemented.

Teacher education

8. It is recommended:

   a. The Department, in consultation with the Jewish Community Council of Victorian, develop a plan to make available to all Victorian teachers and schools training that will help them develop a better understanding of the specific nature of antisemitism, its common manifestations, its impacts and how it can best be addressed.

   b. This training material be made available to BSC by the Department as a matter of priority.

Email signature footer

9. It is recommended that in addition to the school's current "I support Pride" staff email signature footer, that BSC develop another email footer that makes a statement about tolerance and/or the rejection of any discrimination or racism for all staff emails with words to the effect: "I stand for equality", "I stand against antisemitism and racism", "I stand for tolerance". The SSA imagery developed by BSC students may be a fitting image to accompany this (see part 13).

Recommendation for state-wide application: That the Department consider how these practices could be adopted in all Victorian government schools.

Study of *Maus* text

10. It is recommended that:

    a. Students be instructed at the commencement of the unit of study of this text that any incidents of antisemitism will not be tolerated and will be dealt with seriously, in accordance with the school's disciplinary policies.

    b. All students be advised that the study of this text may be traumatic for them and that they should seek assistance from the class teacher or the Wellbeing Department if they require any additional support.

Exit interviews

11. It is recommended that the opportunity to participate in exit interviews be offered to all students who are leaving the school prior to the end of year 12, as well as their parents, so that any issues that the school may not have been made aware of (which could include unreported bullying or antisemitism or discriminatory treatment).

Recommendation for state-wide application: That the Department consider developing policy guidance for all Victorian schools regarding the conduct of exit interviews for students leaving a school before the end of year 12.

Surveys

12. It is recommended that students complete a short anonymous survey each year about experiences of bullying and harassment and that this survey be configured so that data on reports of antisemitic incidents can be specifically counted and traced to schools for comparison against the each school's reported statistics of recorded incidents they were aware of. The same should apply to other forms of hate which are flagged in their Chronicle records. Students should also be asked if they are aware of pathways for reporting such incidents, and asked whether have reported the incidents and about any barriers to reporting.

Recommendation for state-wide application: That the Department consider developing a survey instrument to identify whether they have been subjected to antisemitism, discrimination or bullying, and whether they understand the reporting pathways for this.

Student support

13. It is recommended that:

    a. As a matter of course, students who are reporting incidents of antisemitism, bullying or any other form of discrimination are referred to the Wellbeing Department for support, irrespective of whether they have identified the perpetrator.

    b. Consideration be given to the emerging field of intersectional studies and the experience of microaggressions and macroaggressions, and how the intersections of social categorizations such as race, gender, religion and

disability (including learning disabilities and autism spectrum disorders) affect those displaying bullying behaviours as well as the perceptions and experiences of those experiencing bullying behaviours.

Recommendation for state-wide application: That the Department consider developing policy guidance to school ensuring that all students reporting incidents of antisemitism, bullying or any other form of discrimination are referred for appropriate wellbeing support from the school.

Support for BSC staff

14. It is recommended that the Department offer support to staff who have been shocked and distressed about the revelations about antisemitism in the school and the distress experienced by some of the Jewish students at the school.

UJEB involvement

15. It is recommended that that the following practices be adopted in accordance with the recommendations made by five current and former UJEB facilitators/ co-ordinators at Brighton Secondary College:

    a. That the UJEB Madrichim/facilitators (or similar) be provided with the details of the designated contact person at BSC so that they can directly raise any concerns concerning bullying, antisemitism and/or unlawful discrimination (including discrimination based on Israeli nationality) raised by students to the leader(s).

    b. That where a UJEB facilitator reports an incident while still at the school that the contact person or other appropriate membership of the school leadership, acknowledges receipt of the report in written or electronic form.

    c. That the UJEB facilitator(s) be provided with a login so that they may alternatively lodge an online report and receive a receipt, if they are not able to meet with the relevant staff member at the time that they are onsite at the school.

    d. That UJEB deliver training, in conjunction with the school, on best practice responses to bullying, antisemitism and/or unlawful discrimination (including discrimination based on Israeli nationality).

    e. That the quarterly statistical reports of any reported antisemitic incidents be provided to UJEB and they be given the opportunity to provide written comments to be considered along with the statistical report at the quarterly review between senior leadership and Wellbeing staff.

16. It is recommended that the Department provide support for schools to assist in identifying the perpetrator when cyber-related bullying incidents occur.

17. It is recommended that the Department and individual schools adopt the IHRA Working Definition of Antisemitism as a tool to be used in evaluating incidents reported as antisemitism.

November 2019 action items

18. It is recommended that that the action items detailed in part 2.6 be enhanced as follows:

    a. In relation to item 1:

    - A copy of an executive summary of this report be provided to the J-Voice group and their views actively sought as to what strategies may assist to overcome the cultural issues that appear to be present at the school.

    b. In relation to item 3:

    - Any schools which receive reports of antisemitism or racism or religious discrimination/vilification be encouraged to invite Courage to Care in to provide a workshop at the earliest possible opportunity.
    - Funding to and collaboration with Courage to Care be reviewed so as to enable them to further develop digital resources for the delivery of programs to extend their reach into more Victorian schools and additional regional areas.

    c. In relation to item 4:

    - Rather than asking parents (even on a voluntary basis) to disclose details of their religious, cultural or racial background, that consideration be given to asking all families at enrolment if there is any personal information about the child, their family circumstances or background that would assist the school to best support the child's education and accommodate their needs. This is likely to have a broader benefit of increasing school's understanding of individual families' circumstances, which may assist them to provide more holistic support to students.

    d. In relation to item 5:

    - Brighton Secondary College's Wellbeing handbook and those of all schools be updated to provide the website link to access information about the contact desk and how to report race and religious discrimination.
    - The school's website is modified to ensure if someone searches "report racism" using the main search function at the top of the page, this information is easily found. At the moment, this page does not appear when searching using this search tool and it is necessary to scroll to the bottom of the page and search under the "for parents" tab to find this information.

    e. In relation to item 6:

    - There be periodic consultation with UJEB to ensure that the existence of these programs is appropriately communicated by schools.

    f. In relation to item 8:

    - All schools receive periodic reminders about the existence and activities of Click Against Hate and Courage to Care.

g. In relation to item 9:

- The Department's advice about out of hours conduct be augmented to make it clear that schools are not able to conduct an investigation into conduct that is subject to police charges, without seeking Department legal advice, although they continue to have a responsibility to ensure the safety and welfare of all students.
- As part of the review into the suspensions policy, that consideration be given to expanding its reach to include out of hours conduct found to have been engaged in by one student of a school against another which impacts on their safety and wellbeing. This clearly would extend to incidents of cyber-bullying.