



Victorian Equal Opportunity
& Human Rights Commission

Submission to the Parliamentary Inquiry into Anti-Vilification Protections 31 January 2020

Published by the Victorian Equal Opportunity and Human Rights Commission, Level 3, 204 Lygon Street, Carlton, Victoria 3053. January 2020.

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The Victorian Equal Opportunity and Human Rights Commission acknowledges and celebrates the Traditional Owners of the lands throughout Victoria and we pay our respects to their Elders, past and present.

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1. Executive summary

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to contribute to the Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections in Victoria (the Inquiry). The Commission has overseen the *Racial and Religious Tolerance Act 2001* (Vic) (the RRTA) for the nearly two decades the Act has been in operation. We consider this Inquiry timely as we confront the fact that the RRTA has not been as effective as was envisaged in 2001.

For the most part, Victorians respect and celebrate our diverse and vibrant society. However, in recent years, racist media coverage, reports of rising anti-Semitism, and the spread of right-wing extremism online have refocused our attention on the prevalence, nature and impact on hate within the Victorian community.

There have been only two successful cases of vilification in the Victorian Civil and Administrative Tribunal (VCAT) and one successful prosecution of serious vilification, calling into question the effectiveness of Victoria's anti-vilification protections.

We know strong laws, when accessible and effective, are an important way of promoting diversity and social cohesion. As explained by the Victorian County Court:

[R]acial and religious vilification speech - especially of an extreme kind 'is antithetical to the fundamental principles of equality, democratic pluralism and respect for individual dignity which lie at the heart of the protection of human rights'. Such legislation positively promotes people of different religions to participate in public life and discourse, free from vilification.¹

The Victorian Parliament's Inquiry into Victoria's anti-vilification protections is a valuable opportunity to create a more robust and expansive framework for protecting Victorians from hate and addressing modern challenges, such as the nature and magnitude of online hate.

Hate in the Victorian community (Part 3)

All Victorians should be able to live free from hate in our community. However, hate conduct is real, persistent and is taking new forms in the digital age. Hate impacts people's dignity, sense of self-worth and belonging to a community. It also diminishes an individual's ability to fully participate and contribute to society. When left unchecked, it can also lead to violence, such as the horrific mass murder of 51 Muslim worshipers in New Zealand in March 2019.

Despite protections under the RRTA, hate aimed at multicultural and multifaith communities as well as Aboriginal people, appears to be on the rise in Victoria (and across Australia). Numerous reports² and recent events such as the Hammered Music Festival advertised by a white supremacist hate group,³ serious incidents of anti-Semitic and Islamophobic abuse of school children,⁴ the flying of a Nazi flag over a house in regional Victoria⁵ and the ongoing racial abuse of African Victorians,⁶ suggest the law is not working as it should.

We know that there are many other groups who are victims of hate – in particular LGBTIQ people, women and people with disability. These groups are not currently protected under vilification laws in Victoria, despite extensive evidence of harm.

The limitations of law and enforcement (Part 4)

The RRTA is an important tool in countering hate and setting standards for acceptable behaviour. However, the current law has been under-utilised and under-enforced in Victoria.

There are significant barriers to using the RRTA, including that the law is not accessible to the communities it is designed to protect. The legal tests for vilification are too high and too complex. The tests require proof that hate conduct incited extreme negative emotions in an often-unidentifiable audience and fail to consider the harm caused to individuals, target communities and broader society.

Despite individuals subject to hate having very real fears of victimisation, the RRTA does not allow representative complaints without identifying individual complainants.

The current Act is also difficult for the regulator, the Commission, to enforce. The Commission is not empowered to identify unknown respondents, undermining our ability to combat online hate and hold perpetrators to account.

When it comes to policing vilification, one of the challenges is its complexity and visibility as a crime (not currently located in the *Crimes Act 1958 (Vic)* (the Crimes Act), and the weight of the available penalties. Police are more likely to rely on alternative 'tried and tested' offences, but these do not recognise the specific context and impact of hate-motivated crime.

The Commission is also concerned that the current provisions under the RRTA place a significant burden on individual complainants who have experienced vilification. The Commission does not currently have power to address underlying causes and drive system change. Instead, we must rely on individuals to make complaints. This individualises the harm of hate conduct, rather than recognising and addressing the harm to the broader community.

Strengthening law and enforcement (Part 5)

To more effectively combat hate in the Victorian community, the Commission recommends reform to increase the accessibility and effectiveness of the law, protect a broader group of people from hate conduct, and strengthen enforcement, including by reducing the burden of enforcement on individuals by equipping the Commission with power to address systemic issues of hate.

We also recommend that Victoria's vilification laws be incorporated in the *Equal Opportunity Act 2010 (Vic)* (the EOA) as part of a holistic suite of laws to promote equality in Victoria. Further, as Victorians already have a good understanding of the EOA, expanding it to include hate laws would also make these protections more accessible to a broader audience.

Expanding the scope of our anti-vilification protections to include other attributes including sexual orientation, gender identity, sex characteristics, gender, disability and personal association would ensure consistency with best-practice jurisdictions, acknowledge the profound harm resulting from hate and provide more effective redress for people who experience high rates of compounding intersectional forms of hate, such as Muslim and African women.

The law should be strengthened

One of the factors that has limited the number of successful cases under the RRTA is the high threshold it sets to show that vilification has occurred and the lack of recognition of the different forms of public hate. Victorians should be protected from a spectrum of hate – including hate that causes serious harm to individuals and

communities, incites or is capable of inciting others or which society deems objectively harmful such as the display of Nazi symbols.

Amending the threshold from conduct that incites to conduct that expresses or is reasonably likely to incite would simplify the test and ensure the protections are accessible and capable of providing effective redress for individual and systemic harms.

A new complementary harm-based civil provision should be introduced to enable more objective assessment of harm experienced from the perspective of the target group. The test should focus on the harm caused by hate conduct rather than incitement of a third party.

The criminal law should also be simplified and strengthened to increase prosecutions of the most serious kind of hate. We recommend a single more accessible serious vilification test be located in the Crimes Act. To promote their use by Victoria Police, there should be commensurate penalties in line with comparable offences in Victoria and other Australian jurisdictions. The criminal offences should prohibit people from 'intentionally or recklessly' engaging in hate conduct and should prohibit threats or incitement, rather than requiring both.

An emerging theme in the hate conduct we've observed is the public display or distribution of extremely offensive symbols, images and materials. Incorporating this conduct as complementary offences would allow Victoria's anti-vilification protections to provide redress for those impacted by the display of offensive material such as Nazi flags.

Dispute resolution should be strengthened

Dispute resolution, administered by the Commission, provides an opportunity for complainants to tell their stories, have harm acknowledged and access remedies. Strengthening our powers would allow us to more effectively regulate Victoria's anti-vilification protections and provide a more robust and effective complaints service. The law should allow representative complaints on behalf of an anonymous complainant to encourage reporting and reduce the fear of victimisation. The Commission should also be empowered to identify unknown respondents, whether they be administrators of a white supremacist social media page, or commuters on public transport who taunted a Jewish child on the way to school.

The burden of enforcement should be shifted

In reimagining our anti-vilification protections, there is a valuable opportunity to shift the burden from individuals and extend the Commission's powers to address underlying causes and drive system change. The Commission should be empowered to investigate systemic hate and have the necessary powers to effectively regulate the law. Consideration should also be given to introducing a positive duty for organisations to take reasonable and proportional steps to prevent vilification, making employers and other duty holders accountable for hate conduct at work and elsewhere.

Strengthening the policy response to hate (part 6)

The law alone is not enough to drive social change. A strong policy response to hate in the Victorian community must complement law reform, by empowering communities with knowledge about their rights, addressing under-reporting, promoting the celebration of diversity and countering prejudice, improving the response to hate by the law enforcers, and strengthening research, data, monitoring

and reporting. We must look to best practice in Australia and overseas, and work in partnership with community organisations.

This submission has been drafted on the land of the traditional owners of the Kulin Nation. The Commission acknowledges the particular impact that hate conduct has had on Aboriginal Victorians throughout the history of colonisation and continuing through to today. The Commission pays respect to the ongoing resilience and strong culture and identity of Victorian Aboriginal communities.

Summary of recommendations

Strengthening access to the law

Recommendation 1.

The Victorian Government should incorporate Victoria's vilification laws in the *Equal Opportunity Act 2010* (Vic).

If vilification continues to be regulated in a standalone Act, the Victorian Government should replace the title of the *Racial and Religious Tolerance Act 2001* (Vic) with a title that is inclusive of any additional protected attributes and which removes the word 'tolerance' to promote respect for diversity.

Strengthening protections

Recommendation 2.

The Victorian Government should extend the protections under Victoria's reformed vilification laws to the following attributes:

- race
- religious belief or activity
- sexual orientation
- gender identity
- sex characteristics
- gender
- disability
- personal association.

The law should also acknowledge the intersectional nature of vilification and the cumulative impact of vilification when it occurs because of multiple intersecting attributes.

All of these attributes should be protected under the reformed civil incitement provision (recommendations 5 and 6), the proposed complementary civil harm-based provision (recommendation 7) and the reformed criminal offences (recommendations 9 and 10).

Recommendation 3.

For consistency with the reforms in recommendation 2, the Victorian Government should reform the attributes of 'sexual orientation' and 'gender identity' and introduce a new attribute of 'sex characteristics' under the *Equal Opportunity Act 2010* (Vic) for the purposes of discrimination law.

Recommendation 4.

The Victorian Government should finalise the names and definitions of the attributes relating to 'sexual orientation', 'gender identity', 'sex characteristics' and 'gender' in consultation with affected community stakeholders, particularly from the LGBTIQ community, including intersex organisations.

Strengthening the law

Recommendation 5.

The Victorian Government should simplify the vilification provisions under sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic) by introducing a single incitement provision that prohibits vilification on the ground of the proposed attributes set out in recommendation 2.

Recommendation 6.

The Victorian Government should reform the vilification provision by replacing the word 'incites' with the words 'expresses or is reasonably likely in the circumstances to incite'. In the event that this does not occur, the word 'incites' should be replaced with the words 'is likely to incite'.

Recommendation 7.

The Victorian Government should introduce a complementary civil harm-based provision that:

1. assesses harm objectively from the perspective of the target group
2. protects the same attributes proposed for the incitement test
3. exempts private conduct
4. includes the same public conduct exception as the civil incitement provision to balance freedom of expression.

Importantly, the Victorian Government should safeguard against any actual or perceived 'watering down' of existing harm-based laws in a Victorian context.

Recommendation 8.

The Victorian Government should narrow the public conduct exception under section 11 of the *Racial and Religious Tolerance Act 2001* (Vic) by:

- replacing the definition of 'religious purpose' with a definition that reflects the limited ability for a person to manifest a religious belief under human rights law in 'worship, observance, practice and teaching'
- including the word 'genuine' before the word 'purpose' in section 11(1)(b)(ii).

The reformed public conduct exception should apply to the reformed civil incitement test (recommendations 5 and 6) and the proposed complementary harm-based test (recommendation 7).

Recommendation 9.

The Victorian Government should introduce a single criminal offence for serious vilification that is modelled on the offences for serious vilification under section 24 and 25 of the *Racial and Religious Tolerance Act 2001* (Vic) with the following modifications:

- the fault element should be amended to 'intentionally *or* recklessly'
- the subjective test of conduct that 'the offender knows is likely to incite' should be replaced with an objective test of conduct that 'is likely to incite'
- the offence should prohibit threats *or* incitement (rather than threats *and* incitement in the existing criminal offences).

The offence should protect the same attributes set out in recommendation 2.

The offence should include an exception for 'private conduct' modelled on section 12 of the *Racial and Religious Tolerance Act 2001* (Vic).

Recommendation 10.

The Victorian Government should consider introducing complementary offences to criminalise:

- the possession, distribution or display of hateful material; and
- hate conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property.

Recommendation 11.

The Victorian Government should adopt the definition of ‘public act’ under section 93Z(5) of the *Crimes Act 1900* (NSW) for the purposes of all of the civil provisions and criminal offences in Victoria’s reformed vilification laws to clarify the broad scope of conduct covered by the Act.

Strengthening dispute resolution

Recommendation 12.

The Victorian Government should empower the Victorian Equal Opportunity and Human Rights Commission to:

- direct a person (including natural and non-natural persons) to provide information or produce a document that is relevant to a complaint
- enforce a direction by filing it with the Victorian Civil and Administrative Tribunal (which would then be enforceable as if it were an order of the Tribunal).

Recommendation 13.

The Victorian Government should amend section 20 of the *Racial and Religious Tolerance Act 2001* (Vic) to enable a representative complaint to be made without the need to name an individual complainant or for individual consent.

For consistency, amendments to section 114 of the *Equal Opportunity Act 2010* (Vic) should be made to enable a representative complaint to be made without the need to name an individual complainant or for individual consent for the purposes of discrimination law.

Strengthening criminal enforcement

Recommendation 14.

The Victorian Government should move the serious vilification offences from the *Racial and Religious Tolerance Act 2001* (Vic) to the *Crimes Act 1958* (Vic).

The *Equal Opportunity Act 2010* (Vic) should include a reference to:

- the offences in the *Crimes Act 1958* (Vic)
- the ability for the Commission and Victoria Police to cross-refer matters.

Alternatively, if Victoria’s vilification laws remain in a standalone Act, the relevant Act should refer to the same matters listed above.

Recommendation 15.

The Victorian Government should increase the penalties for serious vilification in line with comparable offences in Victoria and other Australian jurisdictions.

Shifting the burden of enforcement

Recommendation 16.

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to extend the full range of the Victorian Equal Opportunity and Human Rights Commission's functions and powers to the regulation of vilification, including to issue practice guidelines, undertake research, conduct legal interventions, undertake compliance reviews, prepare action plans and conduct investigations.

Recommendation 17.

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 dispute resolution or the 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.

These reinstated functions and powers should also apply to the regulation of vilification under the *Equal Opportunity Act 2010* (Vic) (see recommendation 1).

Recommendation 18.

The Victorian Government should consider extending the positive duty under section 15 of the *Equal Opportunity Act 2010* (Vic) to vilification, accompanied by strengthened functions and powers for the Victorian Equal Opportunity and Human Rights Commission to effectively regulate vilification (see recommendation 17).

Strengthening the policy response to hate

Recommendation 19.

The Victorian Government should fund the Victorian Equal Opportunity and Human Rights Commission and other relevant organisations to:

- provide education and support to relevant community organisations to equip them to better support their communities to understand and exercise their rights
- develop targeted educational resources (in partnership with relevant community organisations) on what the law says, who it applies to and options for redress for communities who will be protected by Victoria's reformed vilification laws.

Recommendation 20.

The Victorian Government should fund a public awareness campaign to promote diversity and social cohesion in Victoria, and to increase understanding and respect for communities who are disproportionately targeted by hate conduct and crime in the community.

Recommendation 21.

The Victorian Government should fund tailored education and training for:

- police and prosecutors on:

- Victoria’s reformed vilification laws
 - section 5(2)(daaa) of the *Sentencing Act 1991* (Vic)
 - identifying, recording and responding to hate crime
 - the nature and impact of hate crime
- judicial officers on Victoria’s reformed vilification laws, section 5(2)(daaa) of the *Sentencing Act 1991* (Vic) and the nature and impact of hate crime.

Recommendation 22.

The Victorian Government should fund ongoing research on hate conduct and crime in Victoria, including emerging issues such as online hate.

Recommendation 23.

The Victorian Government should work in partnership with relevant government agencies in Victoria – including the Victorian Equal Opportunity and Human Rights Commission, Victoria Police, the Crimes Statistics Agency and the Victorian Civil and Administrative Tribunal – to develop a comprehensive strategy for collecting, monitoring and reporting government data on hate conduct and crime in Victoria.

2. Background

Summary

Part 2 of our submission provides background information about:

- the Commission (part 2.1)
- this submission (part 2.2)
- the RRTA (part 2.3)
- enforcement of the RRTA (part 2.4)
- the regulation of online hate (part 2.5).

2.1 About the Commission

2.1.1 Our roles and functions

The Victorian Equal Opportunity and Human Rights Commission (the Commission) is an independent statutory body with responsibilities under three Victorian laws:

- the *Equal Opportunity Act 2010* (the EOA)
- the *Charter of Human Rights and Responsibilities Act 2006* (the Charter)
- the *Racial and Religious Tolerance Act 2001* (the RRTA).

Our functions include to:

Resolve complaints	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free confidential dispute resolution service.
Research	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
Educate	We provide information to help people understand and assert their rights, conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations and provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
Advocate	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
Monitor	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
Enforce	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

2.1.2 Our work to combat hate

The Commission's work to combat hate in the Victorian community - including education, dispute resolution and engagement - supports our strategic priorities to:

- embed a human rights culture in Victoria
- reduce racism.

Our work also supports the implementation of our *Multicultural and Multifaith Engagement Action Plan 2018-22* (MMEAP).

Reducing Racism

As part of the MMEAP, the Commission developed and implemented *Reducing Racism*, a project designed to tackle hate experienced by African and Muslim communities. The Commission worked closely with these communities to support them to exercise their rights by:

- delivering co-designed education programs and resources to ensure that people could both understand and exercise their rights
- establishing an African Ambassadors program
- creating an information campaign based on storytelling
- developing a digital Community Reporting Tool to provide new entry points for people to report discrimination or vilification incidents to the Commission.

Community Reporting Tool

The Commission developed a Community Reporting Tool using Human Centred Design Principles, enabling community members to confidentially report experiences of discrimination and vilification to the Commission. The tool aims to increase accessibility to the Commission, particularly for African and Muslim communities. To date, 37 reports have been submitted through the Community Reporting Tool via the Commission's website and 15 local council websites.

Our education services

In the six years between 1 January 2013 and 31 December 2019, the Commission provided 61 education and information sessions, attended by 1872 participants in total, on racial and religious vilification under the RRTA.

A key objective of the MMEAP is to continue to empower multicultural and multifaith individuals, who have experienced racism or who belong to vulnerable communities, to understand and exercise their rights through events and education sessions.

Our dispute resolution service

As part of the Commission's dispute resolution service, we help people resolve complaints of vilification under the RRTA (part 2.4.1).

One of our goals under the MMEAP is to encourage reporting of racism and vilification, by increasing awareness of and access to our dispute resolution service through co-created digital strategies and campaigns.

Our community work and leadership

The Commission participates in a range of consultative committees aimed to promote human rights and reduce hate in the community. This includes the Anti-Racism Action Plan Working Group (Department of Premier and Cabinet) and the LGBTI Justice Working Group (Department of Justice and Community Safety).

2.2 About this submission

2.2.1 Scope

The Commission's submission responds to the following terms of reference (TOR):

Terms of reference	Part
TOR 1: The effectiveness of the operation of the Racial and Religious Tolerance Act 2001 (the Act) in delivering upon its purposes	4.1
TOR 2: The success or otherwise of enforcement of the Act, and the appropriateness of sanctions in delivering upon the Act's purposes	4.2, 4.3
TOR 3: Interaction between the Act and other state and Commonwealth legislation	2.3.7
TOR 4: Comparisons in the operation of the Victorian Act with legislation in other jurisdictions	4
TOR 5: The role of state legislation in addressing online vilification	2.5
TOR 6: The effectiveness of current approaches to law enforcement in addressing online offending	3.3, 4.2
TOR 7: Any evidence of increasing vilification and hate conduct in Victoria	3.4, 3.5
TOR 8: Possible extension of protections or expansion of protection to classes of people not currently protected under the existing Act	3.5, 5.2

In addition to responding to the terms of reference, the Commission's submission:

- provides an overview of hate in the Victorian community (part 3)
- recommends a complementary policy response to combating hate (part 6).

2.2.2 Methodology

To inform the development of the Commission's submission to the Inquiry, the Commission undertook research, analysed a range of data sources and ran a consultation process, including focus groups, interviews and an online survey (see **Appendix A** for a list of organisational stakeholders we consulted with).

Data sources	<p>The Commission:</p> <ul style="list-style-type: none"> • analysed its dispute resolution data, including enquiries and complaints about vilification under the RRTA • requested data from the Crime Statistics Agency on criminal enforcement of the RRTA • requested data from VCAT on applications under the RRTA.
Research	The Commission considered key academic literature on vilification, hate conduct and crime.

Consultation	<p>The Commission facilitated focus groups with:</p> <ul style="list-style-type: none"> • multicultural and multifaith stakeholders (26 November 2019) • disability sector stakeholders (2 December 2019) • LGBTIQ stakeholders (3 December 2019) • legal and academic stakeholders (5 December 2019).⁷ <p>The Commission also:</p> <ul style="list-style-type: none"> • undertook interviews with targeted stakeholders • ran an online survey inviting Victorians to share their experiences of hate (open from 25 November 2019 to 10 January 2020) with a total of 90 survey participants.
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2.2.3 Terminology

There is a range of different terminology, including legal and non-legal terminology, to describe hate in the community. For the purposes of this submission:

- **vilification** means prohibited conduct under ss 7 and 8 of the RRTA
- **serious vilification** means criminal conduct under ss 24 and 25 of the RRTA
- **hate speech** means any prejudice-motivated speech (which may not necessarily amount to vilification under the RRTA)
- **hate conduct** means any prejudice-motivated conduct (including hate speech, hate conduct and hate crime)
- **hate crime** means any prejudice-motivated crime (including serious vilification under the RRTA and any other crime that is motivated by hate or prejudice).

2.3 About the RRTA

2.3.1 Overview

The RRTA commenced on 1 January 2002. The Act:

- prohibits racial vilification (s 7) and religious vilification (s 8)
- includes exceptions for certain public conduct (s 11) and private conduct (s 12)
- prohibits victimisation (s 13)
- prohibits authorising or assisting vilification or victimisation (s 15)
- makes an employer or principal vicariously liable for the conduct of an employee or agent who breaches the RRTA (subject to an exception that the employer or principal took 'reasonable precautions' to prevent the breach) (ss 17 and 18)
- provides for dispute resolution by the Commission (part 3)
- provides for civil remedies for a breach of the RRTA (s 23C)
- criminalises serious racial vilification (s 24) and serious religious vilification (s 25).

The Commission's Victorian Discrimination Law Resource (2nd edition, 2019) includes a detailed overview of the RRTA and relevant case law.⁸

What does vilification include under the RRTA?

Vilification under the RRTA is any public conduct that incites hatred of a person or group of people because of their race or religion. This could include verbal abuse, online abuse, publications, statements at a public meeting or rally, graffiti, flags, flyers, posters or stickers, mocking, property damage, threats or violence.

Conduct that may amount to vilification under the RRTA can also be known by names such as racism, Islamophobia, anti-Semitism, harassment and trolling.

Unlike discrimination laws, the RRTA is not limited to conduct in specific areas of public life, such as at work, at school, or in the provision of goods and services.

2.3.2 The purpose of the RRTA

The RRTA promotes the importance of social cohesion and harmony in Victoria by setting the standards of behaviour expected in our culturally diverse community. The RRTA recognises that vilification is contrary to democratic values because it diminishes people's dignity, self-worth and sense of belonging to the community. It also reduces the ability for people to participate fully and equally in the community.

The purposes and objectives of the RRTA

The purposes of the RRTA (s 1) are to:

- promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground or race or religious belief or activity
- provide a means of redress for the victims or racial religious vilification.

The objectives of the RRTA (s 4) are 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
- maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons
- promote dispute resolution and resolve tensions between persons who (as a result of their ignorance of the attributes of others and the effect that their conduct may have on others) vilify others on the ground of race or religious belief or activity and those who are vilified.

2.3.3 Racial and religious vilification

The RRTA prohibits conduct that incites hatred, serious contempt for, revulsion or severe ridicule of a person or group of people because of their race or religion.

Racial and religious vilification under the RRTA

Section 7 of the RRTA (racial vilification) states that:

1. A person must not, on the ground of the race or 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:

- may be constituted by a single occasion or by a number of occasions over a period of time
- may occur in or outside Victoria.

Note: 'Engage in conduct' includes use of the internet or email to publish or transmit statements or other material.

Section 8 of the RRTA (religious vilification) is drafted in the same terms as section 7, except that s 8(1) refers to 'religious belief or activity' instead of 'race'.

International law

Legal protections against racial and religious vilification are founded in Australia's obligations under international law, including the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In particular:

- Article 20(2) of the ICCPR provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.
- Article 4(a) of the ICERD requires State parties to 'declare an offence punishable by law all 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'.

The UN Committee on the Elimination of Racial Discrimination has commented that article 4(a) of the ICERD requires States to take actions to prohibit:

- dissemination of ideas based upon racial superiority or hatred
- incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin
- threats or incitement to violence against persons or groups
- expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination, when it clearly amounts to incitement to hatred or discrimination
- participation in organisations and activities which promote and incite racial discrimination.⁹

Significantly, Australia has made a reservation to Article 20(2) of the ICCPR and Article 4(a) of the ICERD to the effect that existing state and federal legislation is regarded as adequate, and that Australia reserves the right not to introduce further laws against hate conduct.

Comparative civil laws

Civil laws to regulate hate conduct in Australia include laws that prohibit:

1. the incitement of serious negative emotions in a third party (incitement laws)
2. conduct that offends, insults, humiliates or intimidates (harm-based laws)
3. racial harassment in specified areas of public life (harassment laws).

Incitement laws	VIC	<i>Racial and Religious Tolerance Act 2001</i> (Vic), ss 7 and 8
	NSW	<i>Anti-Discrimination Act 1977</i> (NSW) ss 20C, 38S, 49ZT and 49ZXB
	QLD	<i>Anti-Discrimination Act 1991</i> (Qld) s 124A(1)
	ACT	<i>Discrimination Act 1991</i> (ACT) s 67A(1)
	TAS	<i>Anti-Discrimination Act 1998</i> (Tas) s 19
	SA	<i>Civil liability Act 1936</i> (SA) s 73(2) (civil tort)
Harm-based laws	CTH	<i>Racial Discrimination Act 1975</i> (Cth) s 18C
	TAS	<i>Anti-Discrimination Act 1998</i> (Tas) s 17(1)
Harassment laws	WA	<i>Equal Opportunity Act 1984</i> (WA) ss 49A-49C

2.3.4 Exceptions

As outlined in the Explanatory Memorandum, the RRTA includes broad ranging exceptions that are designed to strike a balance between freedom of expression and freedom from racial and religious vilification.¹⁰ The exceptions apply to certain public conduct engaged in 'reasonably and in good faith' and to private conduct.

The onus is on the person who claims an exception to prove the exception applies.

Public conduct exception

Section 11 of the RRTA states that:

1. A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith:
 - a. in the performance, exhibition or distribution of an artistic work; or
 - b. in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for:

any genuine academic, artistic, religious or scientific purpose; or

any purpose that is in the public interest; or

in making or publishing a fair and accurate report of any event or matter of public interest.

For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.

Private conduct exception

Section 12 of the RRTA states that:

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.

The right to freedom of expression

The right to freedom of expression is protected by international law and in Victoria, by the *Charter of Human Rights and Responsibilities 2006 (Vic)* (Charter).

International law

Article 19(2) of the ICCPR provides that:

‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

Significantly, article 19(3) confirms that the right to freedom of expression carries with it ‘special duties and responsibilities’ and may be subject to restrictions that are provided by law and are necessary to respect the rights or reputation of others or to protect national security or public order, or public health or morals.

The UN Committee on the Elimination of Racial Discrimination has commented that:

‘the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even where such ideas are controversial’.¹¹

Victorian law

In Victoria, the right to freedom of expression is protected by section 15(2) of the Charter, which is modelled on article 19 of the ICCPR.¹²

Freedom of expression under the Charter

Section 15 of the Charter states that:

1. Every person has the right to hold an opinion without interference.
2. Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether –
 - a. orally
 - b. in writing
 - c. in print
 - d. by way of art, or
 - e. in another medium chosen by him or her.
3. Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –
 - to respect the rights and reputation of other persons, or
 - for the protection of national security, public order, public health or public morality.

In *Cottrell v Smith* [2019] VCC 2142, the Victorian County Court found that:

“In my view, ‘expression’ that constitutes religious vilification – especially serious or extreme religious vilification – is excluded from the concept of ‘expression’ protected by s 15 of the Charter.

‘The concept of ‘expression’ protected by s 15(2) of the Charter is not unqualified and absolute”¹³

2.3.5 Criminal offences

Serious racial and religious vilification

The RRTA criminalises serious racial and religious vilification. The Explanatory Memorandum for the Racial and Religious Tolerance Bill 2001 explains that:

‘These offences refer to the extreme forms of conduct which promote and urge the strongest forms of dislike towards a person or group because of 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’.¹⁴

A prosecution for the offence of serious racial or religious vilification cannot be started without the written consent of the Director of Public Prosecutions (DPP).¹⁵

Serious racial and religious vilification under the RRTA

Section 24 of the RRTA states 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.

Note: ‘Engage in conduct’ includes use of the internet or e-mail to publish or transmit statements or other material.

- 3) For the purposes of subsections (1) and (2), conduct:
 - a) may be constituted by a single occasion or by a number of occasions over a period of time
 - b) may occur in or outside Victoria.

Section 25 of the RRTA is drafted in the same terms except that section 25(1) refers to ‘religious belief or activity’ instead of ‘race’.

In determining whether a person has committed serious racial or religious vilification, it is irrelevant whether the person made an incorrect assumption about the race or religious belief or activity of another person or group at the time of the offence.¹⁶

There has only been one successful prosecution of serious vilification under the RRTA, *Cottrell v Smith* [2019] VCC 2142. In this case, on 19 December 2019, the County Court of Victoria sent a clear message about the seriousness of the vilification stating it is ‘antithetical to the fundamental principles of equality,

democratic pluralism, respect and dignity which lie at the heart of the protection of human rights.¹⁷

Victoria's first successful prosecution of serious vilification – *Cottrell v Smith* [2019] VCC 2142

What was the case about?

Mr Cottrell is a member of the far-right extremist group United Patriots Front (UPF). He participated in making a short video of a mock beheading of a mannequin in front of Bendigo Council offices. The video was uploaded to the UPF Facebook page and used to promote a rally or protest to be held a week later against a proposal of the Council for a Mosque to be built in Bendigo.

In September 2017, the Magistrates Court of Victoria convicted Mr Cottrell of serious religious vilification under s 25(2) of the RRTA, fining him \$2000. He was convicted for knowingly engaging in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of Muslim people on the ground of their religious belief of activity. Mr Cottrell appealed the decision to the County Court.

What were the arguments?

Mr Cottrell argued unsuccessfully that:

- It hadn't been proved, beyond reasonable doubt, that he had the necessary 'intention' required for the offence of serious religious vilification.
- His conduct was akin to a mere insult and fell into the category of political discourse. He argued that s 25(2) should be read down or narrowed to exclude political discourse, having regard to the Charter rights of freedom of expression, freedom of thought, conscience, religion and belief and taking part in public life.
- The offence of serious religious vilification is unconstitutional because it infringes the implied freedom of political communication.

What did the court find?

His Honour Chief Judge Kidd upheld the conviction, finding that:

- Mr Cottrell knowingly engaged in conduct with the intention of inciting people who viewed the UPF Facebook page to experience serious contempt for, or revulsion, or severe ridicule of Muslims. The video was purposeful and calculated – intended to incite visceral, impactful and lasting emotions and 'whip up extreme negative feelings' including 'fear, loathing, disgust and alarm'.¹⁸
- s 25(2) of the RRTA does not engage the Charter rights of freedom of thought, conscience, religion and belief, freedom of expression and taking part in public life. However, if there are some restrictions on Charter rights, the limits are at the very margins and are reasonable and justified in law.
- s 25(2) does not burden the implied constitutional right of political communication. Even if it did, it is reasonably appropriate and adapted to a legitimate purpose.

Comparative hate crimes

Comparative Australian jurisdictions have prejudice-motivated criminal offences for:

1. intentional or reckless incitement and/or threats (incitement offences)
2. possession of material for dissemination or display (possession offences)

3. conduct that is intended to or likely to harass (harassment offences).

Incitement offences	CTH	<i>Criminal Code Act 1995</i> (Cth) ss 80.2A and 80.2B
	NSW	<i>Crimes Act 1900</i> (NSW) s 93Z
	SA	<i>Racial Vilification Act 1996</i> (SA) s 4
	QLD	<i>Anti-Discrimination Act</i> (Qld) s 131A(1)
	WA	<i>Criminal Code Act Compilation Act 1913</i> (WA) ss 77 and 78
Possession offences	WA	<i>Criminal Code Act Compilation Act 1913</i> (WA) ss 79, 80, 80C and 80D
Harassment offences	WA	<i>Criminal Code Act Compilation Act 1913</i> (WA) ss 80A and 80B

2.3.6 Criminal sanctions

Penalties for serious vilification

The maximum penalty for an offence under sections 24 or 25 of the RRTA is:

- 300 penalty units (\$49,566 at 1 July 2019) for a body corporate
- 60 penalty units (\$9,913.20 at 1 July 2019) for an individual and/or 6 months' imprisonment.

The offence is a summary offence heard in the Magistrates' Court and usually prosecuted by Victoria Police.

Sentencing hate crime

In 2009, the *Sentencing Act 1991* (Vic) was amended to require a sentencing court to consider if a crime was motivated by hatred or prejudice in sentencing an offender. If so, the hatred or prejudice-motivation is an aggravating factor, which increases the gravity of the offence and the moral culpability of the offender.¹⁹

Section 5(2)(daaa) of the Sentencing Act

In sentencing an offender, a court must have regard to 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.

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'.²⁰

2.3.7 Interaction with other laws

Victorian laws

The RRTA is a part of a framework of equality and human rights laws in Victoria, including:

- the EOA which prohibits discrimination, sexual harassment and victimisation
- the Charter which places a legal obligation on public authorities to act compatibly with human rights and to consider human rights when making decisions.

Under the RRTA and the EOA, a person can make a complaint to the Commission for dispute resolution or an application to VCAT. Complaints about breaches of human rights under the Charter can be made to the Victorian Ombudsman, the Independent Broad-Based Anti-Corruption Commission (about police misconduct) or other complaint-handling bodies such as the Disability Services Commissioner.

In practice, there may be circumstances where the same conduct potentially breaches the RRTA, the EOA and/or the Charter. Separate complaints would need to be lodged under the RRTA and the EOA, but can be heard together in the same conciliation conducted by the Commission. There is currently no direct resolution mechanism under the Charter.

Federal laws

Racial discrimination

The RRTA also operates alongside the federal *Racial Discrimination Act 1975* (Cth) (RDA), which prohibits racial hatred.²¹ There may be circumstances where the same conduct potentially breaches the RRTA and the RDA. In such circumstances, a person must select one jurisdiction to pursue the matter. Complaints under the RDA can be made to the Australian Human Rights Commission. If the complaint cannot be resolved, the person can make an application to a Federal Court.

Religious discrimination

There is currently no federal law prohibiting religious discrimination. However, the Australian Government has recently released the second exposure draft of the Religious Discrimination Bill 2019 (RDB).²² In our submission to the first exposure draft of the RDB, we expressed support for the introduction of enforceable protections against religious discrimination for all people in Australia. However, we also expressed concern that the Bill would provide protection to religious belief or activity at the expense of other rights. We noted particular concern for provisions that seek to override state and territory anti-discrimination laws.²³ We restated this point in our submission to the second exposure draft of the RDB, submitted on 31 January 2020.

In particular, clause 42 of the second exposure draft provides that ‘statements of belief’ do not constitute discrimination for the purposes of anti-discrimination law or contravene Tasmania’s harm-based vilification provision.²⁴ This means that individuals will be prevented from making complaints about certain statements of religious belief (for example, offensive, humiliating or insulting comments targeted at LGBTIQ people) which would otherwise be unlawful in some state and territory jurisdictions.

This provision will have the effect of preventing federal and state and territory anti-discrimination laws from operating concurrently, as is the conventional approach. The RDB does not explicitly override the RRTA and does not protect statements that would or are likely to ‘harass, threaten, seriously intimidate or vilify another person or group’ (with ‘vilify’ defined to mean incitement of hatred or violence).²⁵ However, the Commission is significantly concerned about the potential for the RDB, if passed, to undermine any efforts to reform hate laws in Victoria – including the potential to incorporate hate laws in the EOA (rather than a standalone Act) (part 5.1).

2.4 Enforcement of the RRTA

If a person believes that they have experienced vilification under the RRTA, they can:

1. make a complaint to the Commission
2. apply to the Victorian Civil and Administrative Tribunal
3. report the matter to Victoria Police.

2.4.1 Making a complaint to the Commission

A person may make a complaint to the Commission under the RRTA for dispute resolution.²⁶ A representative body can also bring a dispute to the Commission.²⁷

A complaint can be made against individuals of any age, corporations and unincorporated associations.²⁸

Snapshot of the Commission'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 the Commission 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, the Commission received 615 enquiries from people seeking information about the RRTA.

Many complaints under the RRTA are resolved at conciliation with a range of outcomes such as an apology, financial compensation or a donation to a charity.

Outcomes of conciliated complaints at the Commission

Over the last six years, 64 per cent of conciliations under the RRTA at the Commission have been resolved. Examples of conciliated outcomes 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.

2.4.2 Making an application to VCAT

A person can also apply directly to VCAT alleging a breach of the RRTA without making a complaint to the Commission.²⁹ A complaint that has been made to the Commission but has not been resolved through dispute resolution can also be brought to VCAT. If VCAT finds a person has breached the RRTA, it can make an order that the person:

- refrain from committing any further breaches of the Act
- pay compensation for loss, damage or injury suffered
- do anything specified to redress the loss, damage or injury suffered.³⁰

The use of the RRTA in VCAT

In the seven years between 2012-13 and 2018-19:

- there have been six matters resolved by compulsory conference and seven matters resolved by conciliation at VCAT
- 25 matters were finalised by VCAT, including nine that were withdrawn, 11 that were struck out and five that were dismissed.³¹

In total, there have been two successful cases of vilification before VCAT:³²

- 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'.³³
- 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.³⁴

Since 2007, there have been no successful vilification cases at VCAT.

2.4.3 Reporting serious vilification to Victoria Police

A person can report serious racial or religious vilification to Victoria Police.³⁵

Matters can be referred between the Commission and Victoria Police under a Memorandum of Understanding (discussed in part 5.5.1). Available data on reports of vilification to Victoria Police are discussed in part 4.1.1.

2.5 The regulation of online hate

In Victoria, online hate is regulated by:

- the RRTA
- the RDA³⁶
- the *Enhancing Online Safety Act 2015* (Cth)
- other laws.

2.5.1 The RRTA

The RRTA regulates online vilification by defining prohibited conduct to include ‘the use of the internet or email to publish or transmit statements or other material’.³⁷

Both an individual and an organisation (such as a social media platform) can be liable under the RRTA for:

- racial and religious vilification (ss 7 and 8)
- serious racial and religious vilification (ss 24 and 25)
- victimisation (ss 13)
- authorising or assisting vilification or victimisation (ss 15).

A person who believes that they have been vilified online may bring a complaint to the Commission or VCAT, for example against a social media platform who does not promptly remove hate content, for assisting or authorising vilification (part 2.4.1).³⁸

2.5.2 The RDA

Section 18C(1) of the RDA makes it unlawful for a person (including a corporation) to do an act, otherwise than in private, if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Like the RRTA, section 18C applies to online conduct (that is racially-motivated).

Example of online hate prosecuted under the RDA

In *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389, the applicant was the mother of three Aboriginal boys aged 15, 11 and 10 who were killed in a motor vehicle accident. One of the boys’ cousins aged 17 was also killed in the accident. A fifth teenage boy survived the accident.

The respondent newspaper published six articles on its website in relation to the accident along with comments from readers. The comments were moderated by the respondent before publication. Barker J found that four comments by readers that were published contravened s 18C of the RDA, including that the families of the boys who were killed had a ‘criminal history’, that the boys were ‘criminal trash’ and ‘scum’ and should be used ‘as land fill’ in disused mineshafts near Kalgoorlie, and that the applicant was ‘hopeless at mothering’ and should not ‘breed’. Barker J awarded Ms Clarke \$12,000 to compensate her for the offence, insult and humiliation she suffered as a result of the publication of these comments.

Case study: Australian Human Rights Commission³⁹

2.5.3 The Enhancing Online Safety Act

The eSafety Commissioner (eSafety) is the national independent regulator for online safety. eSafety was established under the *Enhancing Online Safety Act 2015* (Cth) (EOSA) in 2015 with functions primarily related to enhancing online safety for Australian children. In 2017, the EOSA was amended to expand eSafety's remit to enhance online safety for all Australians.

eSafety has statutory functions to regulate:

- cyberbullying targeted at an Australian child
- image-based abuse
- prohibited online content (discussed below).

Although eSafety does not have a statutory remit to consider prejudice-motivated cyber abuse, eSafety has developed advice, resources and support for groups including Aboriginal and Torres Strait Islander people, LGBTIQ people and women.⁴⁰

eSafety's online safety regime complements the regulation of vilification under the RRTA. While the Commission focuses on a rights-based approach to conciliating disputes about racial and religious vilification under the RRTA, eSafety has a broader focus on promoting online safety and quickly removing unlawful content – regardless of whether the content is hate-motivated.

Cyberbullying

eSafety has the power to investigate and act on complaints about serious cyberbullying targeted at an Australian child. The cyberbullying scheme does not currently protect adults. However, the Australia's Government's Online Safety Legislative Reform Discussion Paper includes a proposal to introduce a new cyber abuse scheme for adults to facilitate the removal of serious online abuse and harassment and introduce a new end user take-down and civil penalty regime.⁴¹

Cyberbullying under the EOSA is online material that an ordinary reasonable person would conclude is likely to have a seriously threatening, seriously intimidating, seriously harassing or seriously humiliating effect on an Australian child.⁴²

eSafety also has the power to issue notices to individuals who post cyberbullying material and request that they take the material down, refrain from posting further cyberbullying material or apologise to the child.

Image-based abuse

The EOSA includes a civil penalties scheme that allows eSafety to help with the removal of intimate images or videos from online platforms, including by:

1. giving enforceable removal notices to social media services, websites, hosting providers and perpetrators, requiring the removal of online content
- 4) taking action against perpetrators including issuing a formal warning, giving a remedial direction, issuing an infringement notice, accepting an enforceable undertaking and seeking an injunction or civil penalty order in court.⁴³

Image-based abuse can include gender-motivated abuse.

Prohibited online content

eSafety also administers the Online Content Scheme and may investigate valid complaints about online content and take action on material found to be prohibited or potentially prohibited (including child sexual abuse material).

2.5.4 Other laws

A range of other Commonwealth and Victorian laws also provide complementary protection from online hate. For example:

- Under s 474.17 of the *Criminal Code Act 1995* (Cth), it is an offence to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The maximum penalty is three years imprisonment.
- Under s 21A of the *Crimes Act 1958* (Vic), stalking laws, amended by 'Brodie's Law', make bullying, including cyberbullying an offence. The maximum penalty is 10 years imprisonment.
- Under s 41DA of the *Summary Offences Act 1966* (Vic), it is an offence to intentionally distribute an intimate image of another person to a third person, where the image is contrary to community standards of acceptable conduct. This offence is often termed 'revenge porn'. The maximum penalty is two years imprisonment.
- The *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) regulates abhorrent violent material by requiring individuals, internet service providers and digital platforms to remove content within a reasonable time. Significant penalties apply for failure to notify law enforcement of abhorrent violent material and for failing to expeditiously remove content.
- Civil defamation laws can apply to an author of website content or social media posts, as well as to the hosts of social media pages.⁴⁴

Significantly, international jurisdictions are developing innovative new frameworks to deal with online hate, including New Zealand, Germany and the United Kingdom.⁴⁵

3. Hate in the Victorian community

Summary

Part 3 of our submission sets out the harmful nature, prevalence and impact of hate in the Victorian community including that:

- Hate takes many different forms in our community (part 3.1)
- Hate is often systemic and pervasive (part 3.2).
- The nature of hate is evolving in the digital age (part 3.3).
- Hate continues to be prevalent for multicultural and multifaith people (part 3.4).
- Hate is also prevalent for people who are not protected by the RRTA, including LGBTIQ people, women and people with a disability (part 3.5).
- Hate has profoundly negative impacts (part 3.6).

3.1 Hate takes many different forms in our community

Hate in our community manifests in many different ways. It can include verbal abuse, harassment in the street, on public transport or in shopping centres, publications, statements at a public meeting or rally, graffiti, displaying symbols, flyers, flags, posters or stickers, mocking, threats, property damage and physical violence. Increasingly, hate conduct occurs online (part 3.3). Hate can be targeted at an individual or group (such as verbal abuse in the street) or can be expressed more broadly (such as in a media publication or by the display of symbols).

A recent example is a Nazi flag being flown over a home in north-west Victoria, featuring a swastika and other Nazi symbols.⁴⁶ Symbols of hate, such as swastikas, cause real harm to Victoria's Jewish community, with Melbourne having one of the largest Holocaust survivor communities in the world. The swastika has been used as a symbol of hate – and importantly, as a symbol to *incite* hate, since the 1920s. As set out in part 3.4.3, the Executive Council of Australian Jewry recently reported a significant increase in anti-Semitic graffiti attacks, including swastikas.

At times, hate conduct can amount to vilification within the meaning of the RRTA – that is, inciting others to hate a person or group because of their race or religion (part 2.3). Other times conduct is targeted directly at a person or group of people because of their identity (rather than directed at a third party to incite others to hatred).

Hate can be known by different names such as racism, Islamophobia, anti-Semitism, misogyny, cyberbullying, trolling, homophobia, transphobia, harassment and bullying. Common to these concepts is a negative and harmful attitude towards a person or group because of their identity, belief or background.

What drives hate in our community?

The Scanlon Foundation's 2019 survey on 'Mapping Social Cohesion' identified that negative attitudes towards multicultural and multifaith people continue to persist in Australia. For example:

- The highest negative sentiment was towards immigrants from Ethiopia (16 per cent) and Middle Eastern countries including Iraq (22 to 24 per cent) and Lebanon (23 to 27 per cent).⁴⁷

- In relation to people of faith, the highest negative sentiment was towards Muslims, with the report noting that ‘the level of negative sentiment towards those of Muslim faith and by extension to immigrants from Muslim countries, remains a factor of significance in contemporary Australian society’.⁴⁸

Other drivers of hate identified in the Commission’s consultations included:

- cultural ignorance and assumptions based on stereotypes
- visible markers of 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.

3.2 Hate is often systemic and pervasive

Hate is often systemic and pervasive for groups of people including Aboriginal and Torres Strait Islander people, multicultural and multifaith communities, LGBTIQ people and women.

For example, it has been argued that ‘in Australia, gendered hate speech against women is so pervasive and insidious that it is a normalised feature of everyday public discourse’,⁴⁹ illustrated by recent reports.⁵⁰ In another example, the report preceding the introduction of the RRTA found that vilification of Aboriginal people in Victoria was systemic and pervasive (further discussed in part 3.4.1).⁵¹

As a part of community consultations that informed this submission, the Islamic Council of Victoria also explained to the Commission that hate is often an everyday experience for Muslim people, which is normalised in the community.⁵² In particular, the rise of online hate has further normalised Islamophobia.⁵³

Despite the often systemic and pervasive nature of hate in the Victorian Community, the Commission is not empowered to take proactive action to address systemic hate. Instead, for people who are currently protected by the RRTA, the burden of enforcement is on individual complainants to enforce the law (part 4.2.3).

Part 5.6 includes recommendations to shift the burden of enforcement.

3.3 The nature of hate is evolving in the digital age

Since the commencement of the RRTA over 17 years ago, there has been a dramatic expansion of the internet and digital platforms. More Australians are using digital technologies more often. For example, in the 6 months prior to May 2018, 89 per cent of Australian adults had accessed the internet (increasing to 100 per cent for people aged 18 to 44 years old).⁵⁴ While the digital age brings benefits and opportunities, it has also enabled the mass-scale expression of hate.

Like other forms of hate in our community, online hate takes different forms such as:

- commenting or posting harmful content online⁵⁵
- incitement or threats of violence (including rape), often targeted at women⁵⁶
- repeated harassment of someone because of their identity, with women disproportionately experiencing online harassment⁵⁷

- sharing intimate images without consent (often called image-based abuse or revenge porn), with 1 in 10 Australian adults experiencing image-based abuse⁵⁸
- ‘doxing’, which is intentionally publishing someone’s personal information on the internet with the intention to humiliate, threaten, intimidate or punish them⁵⁹
- incitement to suicide, where targeted individuals are encouraged or baited (by jeering and denigration) to suicide.⁶⁰

At its most extreme, online spaces can drive and promote violence and terrorism. For example, the recent shootings at two Christchurch mosques highlighted how social media services can enable the streaming of violent attacks in real-time to an enormous audience.⁶¹ The Commission has also heard about how far right groups use strategies to override language detection tools used by social media platforms such as adding the word ‘love’ to hate speech to avoid detection.⁶²

As explained by a participant at the Commission’s focus group with the LGBTIQ sector, there can also be a distinction between the different forms of online hate:

‘We need to make a distinction, on the one hand, between the kind of general hate experienced by our community, both online and offline, and on the other hand, serious trolling, which is a more concerted effort and feature of online platforms. Both need to be understood and addressed but treated differently’.⁶³

Another participant in the Commission’s focus group with multicultural and multifaith stakeholders told us that the main reporting mechanism for online hate is through social media platforms which can be manipulated by abusers who report victims.⁶⁴

There is emerging evidence that trolling is often conducted through more sophisticated strategies, such as the use of anonymous or fake accounts, and networked communication plans to amplify hate.⁶⁵ Professor Andrew Jakubowicz also told the Commission that the online world can function as ‘a rehearsal space’ before vilifying or taking action offline.⁶⁶

Significantly, while online hate is often targeted at individuals and communities, it is also viewed by other people. Research conducted by eSafety in 2016 found that 53 per cent of young people (aged 12-17) witnessed online hate targeted at cultural or religious groups and 56 per cent of children witnessed racist comments.⁶⁷

Responding to online hate

The Commission’s online survey found that participants responded to online hate by ignoring it, engaging with it, or reporting it. The majority of participants reported ignoring online hate by scrolling past it, signing out of the site, or blocking or unfollowing users that engage in hate speech. For example, one participant said:

“I usually ignore or block websites that induce hate. I feel if I were to stand up and write something back my voice would be too little to be heard!”

Other participants said they would report it to either the website or social media platform. However, one participant considered that:

“Facebook does nothing. But if it is a group, the group admins will often delete. I reported two hate posts this week. One about Africans who can’t drive. This was removed. The other was about Indians having bad body odour. To my dismay, that one hasn’t been taken

down yet. I don't want my Indian friends to see that post. It's disgusting and unnecessary".

Very few participants said they would engage with hate speech. For example:

"I correct the statement if it's false and advocate for my community members! I call it out for what it is, I don't allow it to travel freely on the net".

Despite the challenges of online hate, the RRTA is one important safeguard for people who are targeted online. Part 5.4 of this submission recommends changes to the RRTA which will enable more effective regulation of online hate, including empowering the Commission to identify unknown respondents to a complaint and allowing representative complaints without the need to identify complainants.

The Commission also considers that online hate should continue to be subject to complementary regulation with eSafety. Although the Commission recognises the critical need to more effectively regulate the growing problem of online hate in Australia, we have not made recommendations about the broader regulation of online hate in Australia, including the most effective national response to online hate.

3.4 Hate continues to be prevalent for multicultural and multifaith people

Despite the protections under the RRTA, multicultural and multifaith groups continue to be targeted by and experience the negative impacts of hate. For example, during consultations for our MMEAP,⁶⁸ community leaders highlighted the effect of hate on their daily lives including their commutes, efforts to get a job, rights to wear religious clothing, and relationships with law enforcement officials.

This submission sets out key research related to Aboriginal and Torres Strait Islander people, Muslim people, Jewish people and African communities. The Commission also recognises that a broader range of people experience hate based on their race and religion in Victoria.

Examples of racial and religious hatred

The majority of participants in our survey who reported experiencing racial hatred identified as black, and of these participants, the majority were women. The hate experienced was predominantly verbal abuse such as 'black bitch', 'nigger' and 'go back to where you came from'.

In one example, the participant, who was driving at the time of the incident, told us that her abusers:

"changed into the lane to the left of me and with all their windows down started to yell abuse. 'Go back to where you came from you stupid black bitch' 'Fucking black bitch fuck off' and so on. Then as we approached the intersection at Swanston Street they swerved suddenly and violently into my car. I slammed on the brakes, narrowly missing the car and my dog was thrown from the back seat into the dashboard. My son started crying. I was terrified."

The examples of racial hatred reported by survey participants predominantly occurred in public spaces (such as on public transport, on the road, in car parks and in shopping malls) and in the workplace. For example, participants told us that:

- “I work as a nurse and many times I’ve been called names by patients such as ‘nigga’, ‘black bitch’, ‘monkey’ etc. it’s almost normal and accepted that patients do this. [I] was told you are a fucking black bitch [by a patient].”
- “At the workplace colleagues have mocked my accent, called me names such ‘curry ass’ and criticised the way we eat with our hands referring to it as uncivilised.”
- “I was a refugee and I was told to go home to my country and get shot.”

3.4.1 Aboriginal and Torres Strait Islander Victorians

Recent research shows that Aboriginal and Torres Strait Islander people continue to experience systemic racism and vilification. For example, in Victoria, Aboriginal Victorians are four times more likely to experience racism than non-Aboriginal people and seven times more likely to experience racism than Anglo-Celtic Victorians.⁶⁹

Significantly, evidence indicates a high prevalence of overt racial hatred, with one survey of Aboriginal Victorians finding that:

- 97.3 per cent of respondents had experienced racism in the previous 12 months
- 92.3 per cent of respondents had been teased, called names and made the subject of comments on the basis of race
- 84.3 per cent of respondents were sworn at or verbally abused
- 67.4 per cent were spat at or had something thrown at them
- 66 per cent of respondents were told that they don’t belong in Australia.⁷⁰

National data from the Australian Bureau of Statistics in 2015 reveals that:

- the most commonly reported form of unfair treatment by Aboriginal and Torres Strait Islander people was hearing racial comments or jokes
- 25 per cent of Aboriginal and Torres Strait Islander people aged 15 years and over in non-remote areas and 15 per cent in remote areas said they had overheard racial comments in the previous 12 months
- one in seven (14 per cent) of Aboriginal and Torres Strait Islander people had been called names, teased or sworn at.⁷¹

In 2016, Gelber and McNamara found that racial abuse is frequent and prevalent for Aboriginal people.⁷² As explained by one Aboriginal participant in their research, “I think for me ... every day I get vilified”.⁷³

More recently, one in three Aboriginal people reported unfair treatment in the previous 12 months, including most commonly racial comments or jokes.⁷⁴

Consistent with this research, the Victorian Aboriginal Legal Service told the Commission it receives regular reports of racial abuse from its clients, including abuse from the general public, service providers (such as shops and pubs), employers, colleagues and police.⁷⁵

Disappointingly, the recent findings reflect the findings of the National Inquiry into Racist Violence (almost 30 years ago), which was one of the reports that triggered the introduction of s 18C of the RDA. That inquiry found that racist violence against Aboriginal Australians was severe, endemic and nationwide.⁷⁶

3.4.2 Muslim Victorians

Muslim Victorians continue to experience violence, abuse and intimidation because of their faith. In June 2019, during roundtables held by the Commission and the Australian Human Rights Commission,⁷⁷ religious leaders highlighted a range of serious harms including hate speech fuelled by an increasing atmosphere of hostility and discrimination towards Muslim communities. The Commission was told that child mental and emotional well-being is being impacted, with many children being labelled as terrorists or witnessing the racial abuse of carers or parents. For example, during the Melbourne consultation a teacher from a Muslim primary school recounted a public excursion where a man in the street verbally abused a group of students in uniform. Several participants spoke of mothers receiving verbal abuse in public places, like shopping centres, in front of their children and even security guards. We heard how such incidents cause Muslim women to retreat into the home, having implications for their ability to participate fully in society.

More broadly, we repeatedly heard how Muslim Victorians feel disconnected from, and isolated within, Australia. Another roundtable participant recounted that her daughter, a third-generation Australian, described feeling unwanted in Australia because of her religious identity.

The most recent Islamophobia in *Australia Report II (2016-17)* found Muslims, especially women and children, commonly experience abuse and physical harm.⁷⁸ The report found that:

‘While it is critical for mainstream society to understand the underlying dangers of religious-based vilification, positive action from the highest echelons of power is required to safeguard dignity, equality and safety of every citizen and minority group, including Muslim Australians’.⁷⁹

The report found nearly three quarters of victims were women and almost all were wearing a headscarf (hijab) at the time.⁸⁰ The report noted ‘the intricate intersections of sexism, racism and xenophobia with Islamophobia were in force’ with some women having ‘multiple vulnerabilities, such as being identifiably Muslim with their hijab, travelling unaccompanied, pregnant and accompanying younger children’.⁸¹

The report revealed there were 202 verified **offline cases** in which:

- 72 per cent of victims were women and 71 per cent of perpetrators were men⁸²
- of the 47 incidents where perpetrators were ethnically identified, 79 per cent were reported to be from Anglo-Celtic backgrounds⁸³
- of the 113 female victims, 96 per cent were wearing a headscarf and 57 per cent were alone (but only 6 per cent of male victims were alone)⁸⁴
- 67 per cent of reports were about insults based on religious appearance⁸⁵
- 50 per cent of incidents were categorised as hate speech and 25 per cent as physical attacks and vandalism⁸⁶
- 72 per cent of incidents were interpersonal and 28 per cent were generic (such as graffiti and stickers) but generic cases were still destructive and toxic since many of them were publicly threatening Muslims and inciting violence⁸⁷
- 60 per cent of incidents occurred in guarded areas (for example, where police, security guards or surveillance cameras were present).⁸⁸

The report also revealed there were 147 verified **online cases** in which:

- 61 per cent of victims were women and 72 per cent of perpetrators were men⁸⁹
- 82 per cent of incidents were reported by online witnesses⁹⁰
- Facebook was the most common online platform for Islamophobia (63 per cent of incidents)⁹¹
- 82 per cent of online incidents were to the Islamophobia Register Australia's Facebook page⁹²
- 48 per cent spread Islamophobic rhetoric⁹³

The Online Hate Prevention Institute's earlier 2015 'Spotlight on Anti-Muslim Internet Hate Campaign' revealed 1,100 cases of online hate over a 2-month period.⁹⁴

3.4.3 Jewish Victorians

The 2019 Report on Antisemitism in Australia revealed that in the 12-month period between October 2018 to September 2019, there were 368 anti-Semitic incidents logged across Australia, including 225 attacks and 143 threats.⁹⁵

Of the 105 reported incidents in Victoria, the most common incidents were:

- physical assault (2)
- abuse, harassment and intimidation (31)
- graffiti (38)
- email or online threat (12)
- telephone, text or fax threat (9)
- leaflets, posters, stickers or other threat (13).⁹⁶

While the increase in incidents was small from the previous 12 months, there was a marked increase in the more serious categories, including more than double the number of anti-Semitic graffiti attacks.⁹⁷ Graffiti often called for the murder of Jews, including 'Kill the Jews' and 'Gas the Kikes' or included symbols, such as swastikas.⁹⁸

The report also revealed an increase in online hate, noting that 'the rise in anti-Semitic and Nazi sentiment is seen even more clearly online especially on sites used by far-right, white supremacist, Nazis and other racists'.⁹⁹ This digital anti-Semitism appears to disproportionately affect young Jewish Australians. Recent research found that 80 per cent of young research participants witnessed anti-Semitism as opposed to 51 per cent for all Jewish participants.¹⁰⁰

This creates a climate of fear within communities. During our religious roundtable in Melbourne, a Jewish representative spoke about communities feeling unsafe to congregate and feeling compelled to enact intense security processes, such as checking the underside of cars for bombs.

Examples of anti-Semitic hate

The 2019 Report on Antisemitism in Australia includes hundreds of examples of anti-Semitism in the 12-month reported period.¹⁰¹ For example:

- A 12-year-old Jewish boy at a public school was assaulted in the corridor requiring hospital treatment for his injuries. During the assault, the attacker shouted that he was 'a cooked up Jewish cunt'.

- A 75-year-old Jewish man was verbally abused in a carpark next to a synagogue, being told 'Move your car, you fucking Jew bastard. I hate Jews'.
- Two teenage boys harassed a Jewish teenager on a bus, saying 'It's a shame that Hitler didn't kill all the Jews ... we would go back and make sure he wipes them all out'. The boys followed her for two blocks when she got off the bus.
- A bus stop was graffitied with swastikas and 'Kill all Arabs Kill all Jews'.
- An antisemitic poster contained an image of a female with the words 'She's a bitch Jewish bitch please share'.
- One participant in the Commission's online survey told us that she had experienced 'anti-Semitic slurs on multiple occasions and had eggs thrown at me from a car while standing outside a synagogue'.

3.4.4 African communities

African Victorian communities have highlighted sustained experiences of hate and vilification, partly driven by political and media attention on 'African gangs' in recent years fuelling negatively perceptions of the community and racial abuse. The Centre for Multicultural Youth's 2016 report on growing up South Sudanese in Victoria found that as a consequence of racialised media coverage of the 2016 Moomba 'riot', young South Sudanese Australians have been subject to increased racial abuse in public settings.¹⁰² Examples included hate crimes against individuals and their siblings on public transport and in public spaces.¹⁰³

Consultations with African leaders raised concerns about intensified racial abuse in their communities. For example, the Ballarat African Association told the Commission that the African community regularly experiences vilification at school, at work and in the broader community (e.g. shopping centres) such as 'go back to where you came from!'.¹⁰⁴ During consultations to inform the Commission's MMEAP, one participant told us:

'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.'

A recurring theme during our focus groups on the RRTA, was the targeting of Muslim Africans, in particular women, whose experience of vilification is intersectional (based on the overlap and her race, religion and gender), significantly compounding the impact of the conduct. As a participant highlighted, African women experience multiple forms of oppression, as well as multiple barriers to reporting and addressing that oppression.¹⁰⁵

An interview with a young African community leader highlighted the impact that hate may be having on young lives. They told us:

on the one hand, it may cause individuals retreat and become silent. On the other hand, young people may be driven away from their community and lose faith in institutions and have few avenues to communicate their anger. They may make decisions that attract the law, which can create further problems for them.¹⁰⁶

Reporting Racism: What you say matters

In 2013 the Commission published a report on racism in Victoria, Reporting racism: What you say matters.¹⁰⁷ By conducting interviews, online surveys and examining online content, we found:

123 people reported incidents of racism that happened to them personally, 102 people witnessed racism and 40 people saw or received racist materials.¹⁰⁸

People told us that racism was most likely at work (32.4 per cent) and in the streets (30.7 per cent), with verbal abuse being the most common form of racism (57 percent of respondents reported).

Over half of respondents who experienced racism did not report it, with the most common reason for not reporting being a view that no action would be taken from their reports.

3.5 Hate is also prevalent for people who are not protected by the RRTA

Although the RRTA only currently protects people from vilification because of their race or religion, other groups of Victorians are disproportionately targeted by hate. This includes LGBTIQ Victorians, women and people with disability.

People who have a personal association with a person who has a protected attribute can also experience hate – such as parents, carers and advocates.

Existing protections from vilification in comparative civil jurisdictions

Sexual orientation is protected in NSW, the ACT, QLD and Tasmania.¹⁰⁹

Gender identity is protected in NSW, the ACT, QLD and Tasmania.¹¹⁰

Sexual characteristics is protected in the ACT ('intersex status') and Tasmania.¹¹¹

Gender is protected in Tasmania for the purposes of the harm-based law.¹¹²

Disability is protected in the ACT and Tasmania.¹¹³

HIV/AIDS status is protected in NSW and the ACT.¹¹⁴

Lawful sexual activity, age, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities are protected in Tasmania.¹¹⁵

Race is protected in the Commonwealth, NSW, ACT, Qld, TAS and WA.¹¹⁶

Religion is protected in the ACT, Qld and TAS.¹¹⁷

3.5.1 LGBTIQ Victorians

LGBTIQ people continue to experience high rates of hate conduct and crime on the basis of their sexual orientation, gender identity and intersex status. Relevantly, the Human Rights Law Centre's report 'End the Hate: Responding to hate speech and violence against the LGBTI community' documented the experiences of hate, particularly in response to the marriage equality postal survey which provided a political and media platform for the vilification of LGBTIQ people across Australia.¹¹⁸

Other research confirm the high prevent of hate against LGBTIQ people. For example:

- A 2018 survey found that just under 95 per cent of LGBTI young people had experienced heterosexist abuse.¹¹⁹
- A 2016 study found that 50.4 per cent of LGBTIQ participants experienced public harassment on a weekly or monthly basis, including staring (65.1 per cent), verbal comments (63 per cent), horn honking (63.3 per cent), wolf whistling (41.4 per cent) and unwanted conversation (42.5 per cent). 31.5 of experiences targeted gender identity and 29.1 per cent targeted sexual orientation.¹²⁰
- A 2015 survey found that over 71 per cent of LGBTI people had experienced violence, harassment or bullying on the basis of their sexual orientation, gender identity or intersex status.¹²¹
- A 2014 survey found that over 64 per cent of LGBTI young people had been subject to verbal abuse based on their sexual orientation, gender identity or intersex status.¹²²
- In 2014, the Australian Human Rights Commission reported that 3 in 5 LGBTI people experienced verbal homophobic abuse, 1 in 5 experienced physical homophobic abuse, and 1 in 10 experienced other types of homophobia.¹²³

Examples of LGBTIQ hatred

Participants in the Commission's online survey who reported experiencing hate because of their gender identity told us stories including that "[I have been] physically attacked due to expression and gender identity" and "I have been twice beaten by random men on the street due to their phobia of transgender people".

The Commission also heard about people's experiences of hate because of their sexual orientation including examples where the perpetrators were identified as a group of males:

- "Random strangers [chased] me in a car because I was carrying a rainbow umbrella. Threatening to 'turn' me because I hadn't had a 'real man'".
- "[I was] physically assaulted - punched in the face and back by a group of young men".
- "[I was] holding hands in public with my partner. Four teenage boys, drunk circled us and started shoving me. I shoved back pulled my partner through them and yeah we went home. Partner was very shaken."

Some participants reported verbal and/or physical abuse by people in cars because of their sexual orientation such as "[I experienced] verbal abuse by people in cars", "I was kissing my girlfriend and we had a drink thrown at us from a car driving past and were shouted at" and "[I experienced] homophobic abuse and threats of violence yelled at me and gay friends from passing car in Melbourne".

Intersex Human Rights Australia has also reported community members being shamed for their "intersex lifestyles" in the media and one intersex person being described in public as a "paedophile" and "mutilated freak".¹²⁴

Part 5.2.1 recommends extending legal protections to LGBTIQ people.

3.5.2 Women

Women experience high rates of hate conduct, with particularly high rates of online abuse and harassment. The EOA protects women from hate conduct of a sexual nature if it happens in particular areas of public life, such as the workplace, the provision of goods of services, accommodation and clubs.¹²⁵ However, conduct that is not of a sexual nature or that happens more broadly is not covered by the EOA.

The high prevalence of hate conduct for women was confirmed in recent research and has been argued as part of a spectrum of gender-based violence.¹²⁶

- A 2018 Australian Amnesty International poll found that 47 per cent of women aged 18-24 had experienced online abuse, with 54 per cent of women reporting abuse from a stranger. About a third of women (32 per cent) reported experiencing online abuse from people they knew offline, with 15 per cent reporting online abuse from a current or former partner.¹²⁷
- The fourth (2018) national survey on sexual harassment in Australian workplaces found that in relation to 'lifetime sexual harassment' (occurring at any time or anywhere):
 - 85 per cent of Australian women 15 years and older had been sexually harassed at some point in their lifetimes¹²⁸
 - 59 per cent of women experienced sexually suggestive comments or offensive jokes and 54 per cent experienced inappropriate physical contact¹²⁹
 - almost one quarter of women (23 per cent) had experienced actual or attempted rape or sexual assault¹³⁰
 - almost one in three women over 15 (29 per cent) had been sexual harassed online or via some form of technology¹³¹

The Women's Legal Service Victoria (WLSV) told the Commission that verbal abuse towards women – both clients and their own legal practitioners – has increased, including threats of rape.¹³² Women who are outspoken or active in public debate about women's rights are more likely to be targeted, particularly online.¹³³ WLSV explained that online hate has a much broader reach than offline hate (including 'likes', 'shares' and 're-tweets') which amplifies hate speech and its impacts on women and their voices.¹³⁴

Hate conduct targeted at women is often intersectional in nature. For example:

- the most recent Islamophobia in Australia Report (2016-17) found that nearly three quarters of victims of Islamophobia were women and almost all were wearing a headscarf (hijab) at the time¹³⁵
- the 2018 Amnesty International poll found that nearly half (48 per cent) of female participants who had experienced online hate said it included racism, sexism, homophobia or transphobia.¹³⁶

The intersectional nature of hate conduct was repeatedly conveyed to us by participants in our multicultural and multifaith consultations who told us about everyday experiences of Muslim women and Muslim-African women being targeted and harassed on and offline.¹³⁷

D'Souza, Griffin, Shackleton and Walt recently commented that 'although largely unrecognised by law, [gendered hate speech] permeates all levels of social interactions and spaces from media personalities, to educational institutions and social media outlets. Many examples ... show that whilst the degree of harm varies, [gendered hate speech] is so prevalent as to be customary and, in some circumstances, is even openly defended'.¹³⁸

Part 5.2.1 recommends extending legal protections to women.

3.5.3 People with a disability

Although there is limited data on the prevalence of hate conduct targeted at people with a disability, the Commission understands that people with a disability continue to

experience hate on the basis of their disability (including mental health conditions) and that hate is often accompanied by discrimination.¹³⁹

For example, the Commission's focus group with members of the disability sector revealed that hate is often expressed as verbal abuse and offensive language targeted at people with a disability.¹⁴⁰ Focus group participants explained that hate conduct often occurs in public settings, including schools, and that there is a high prevalence of harmful depictions of mental health in the media.¹⁴¹ Participants also noted that hate conduct is often "part of daily life" for people with a disability who can "develop a thick skin" and as a result, may choose not to make a complaint.¹⁴²

The Victorian Advocacy League for Individuals with Disability (VALID) told the Commission that hateful words such as 'retards', 'moron', 'imbecile' and 'idiot' are often directed at a third person but are also harmful to people with an intellectual disability.¹⁴³ This form of hate often starts at school so is normalised and more difficult to identify. VALID explained that hate is often directed at people with a disability in closed spaces which means that it is difficult to be captured by vilification laws.¹⁴⁴

Examples of hate targeted at people with a disability

Participants in the Commission's online survey reported several experiences of hate conduct directed at people with a disability in the workplace, including one participant who said that "my manager at work demeaned me in front of peers by loudly clapping hands during meeting drawing attention to the fact my reduced lung capacity was apparently having me look tired".

Other examples of hate conduct reported to the Disability Discrimination Legal Service via a survey included:

- ridicule of a person with a mental illness by staff in a Commonwealth department in front of other staff and clients
- ridicule and harassment of a person with a mental illness by police
- ridicule of a person using a wheelchair in a coffee shop which attracted laughter from other customers in the shop
- taunting and ridicule of a person with cerebral palsy using a wheelchair by a group of young people whilst waiting for a train
- mimicking the personal characteristics of a person with a disability and attracting laughter from a group
- pointing and laughter from workers on a building site when a person using an electric wheelchair passed by
- a group of young people switched off the power on a person's electric wheelchair and spun the chair around whilst laughing at the person
- negative comments referring to a person's disability and physical features posted on their Facebook wall
- being called a 'retard' in front of a group of fellow students because of a personal characteristic
- ridicule in relation to a person's sex and physical disability by members of the opposite sex.¹⁴⁵

The Commission also heard that hate speech towards women with disabilities was likely to be intersectional, targeting their gender and their disability.¹⁴⁶

The Disability Discrimination Legal Service (DDLS) has commented that:

‘Our research has indicated that vilifying treatment manifests as both individual and group behaviours ranging along a spectrum from generally accepted usage of words such as ‘retard’ or ‘spastic’, taunting and teasing, or imitating perceived characteristics of a person with a disability to more serious assaults’.¹⁴⁷

In Tasmania, which protects the attribute of ‘disability’ for the purposes of its incitement and harm-based vilification laws, the majority of complaints to Equal Opportunity Tasmania over the last two financial years were on the ground of disability. For example:

- In 2018-19, 96 complaints were made under the harm-based test (50 per cent) and 72 complaints were made under the incitement test (79 per cent).¹⁴⁸
- In 2017-18, 45 complaints were made under the harm-based test (52 per cent) and 29 complaints were made under the incitement test (66 per cent).¹⁴⁹

In Victoria, in 2018-19, the largest number of complaints of discrimination received by the Commission were about disability discrimination, with 595 complaints being recorded. 1710 enquiries over this period also related to the attribute of disability.¹⁵⁰ While the Commission does not specifically record vilification against people with disability (as disability is not an attribute under the RRTA), a portion of our enquiry and complaint data would likely involve vilification as well as discrimination.

Part 5.2.1 recommends extending legal protections to people with a disability.

3.5.4 Personal association

The RRTA does not currently protect the attribute of ‘personal association’. This means that a person who is associated with a person with a protected attribute (such as a parent, carer, advocate or partner) cannot bring a complaint under the RRTA or make an application to VCAT. Through our consultations, we heard that associates of people who are protected by vilification laws can also be targeted by hate.

For example, a participant in the Commission’s online survey reported experiencing hate based on her personal association with her partner who is Muslim. The participant told us that “I have had comments made by people in relation to marrying someone born in a Muslim country and with skin of a different colour”. The Commission also heard examples of parents of trans and gender-diverse children being targeted by hate because of their children’s gender identity.¹⁵¹

Protections in other jurisdictions

A number of jurisdictions in Australia protect personal associates. For example:

- ‘Personal association’ is protected under s 6(q) of the *Equal Opportunity Act 2010* (Vic), as well as most other discrimination laws in Australia.
- ‘Associates’ is protected as an attribute for the purposes of the vilification provisions in South Australia under s 3 of the *Racial Vilification Act 1996* (SA).
- As intended by the Victorian Parliament, s 5(2)(daaa) of the Sentencing Act applies to a broad range of victims, including a member of the group, a ‘Good Samaritan’ who assists a victim, an advocate or lobbyist of the group, someone in employment related to the group, or an acquaintance or family member who is victimised due to hatred or prejudice against the group.¹⁵²

Part 5.2.1 recommends extending legal protections to personal associates.

3.6 Hate has profound negative impacts

Hate in our community can have profound negative impacts on individuals, target communities and broader society. It can also have a broad ripple effect beyond an immediate victim, to witnesses and even perpetrators.¹⁵³ As explained by Professor Katharine Gelber in relation to recent anti-Semitic abuse of Jewish school students:

‘Communities targeted with hate speech suffer cumulative effects from being exposed directly to vilification or indirectly through family and community members, from a young age. Since the harms are experienced cumulatively, those who begin to experience those harms as children are much more likely to feel the full effect of those harms over time. This means they are experiencing the most egregious types of harm, even when they come into contact with, say, one comment as an adult because it builds on what they, and their community, have experienced previously’.¹⁵⁴

The impacts of hate conduct can also be intergenerational. Intergenerational trauma has been the experience of some Aboriginal people and their families for whom fear, insecurity and exclusion have become embedded in their collective identities and experiences as a result of colonisation and ongoing racism.¹⁵⁵

Research suggests that the impacts of hate can be ‘constitutive’ and ‘consequential’:

- ‘constitutive harm’ is the damage that incidents, singularly and cumulatively, do to individuals and communities who are targeted by hate
- ‘consequential harm’ is the risk that others will be encouraged to hold negative views of the targets group and act on them in discriminatory or violent ways.¹⁵⁶

The Victorian Parliament’s intention to reduce the harmful impacts of hate in the community is reflected in the preamble to the RRTA which states that:

‘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. It is therefore desirable that the Parliament enact law for the people of Victoria that supports racial and religious tolerance’.¹⁵⁷

This part of our submission highlights research that demonstrates the impacts of some common forms of hate in the Victorian community, including racism, hate targeted at the LGBTIQ community, and online hate.

The Commission also recognises that hate has a broader impact on diverse groups of people in Victoria. For example, Griffin and Shackleton told us that one of the most significant impacts of hate for women is fear, which works to exclude and silence women.¹⁵⁸

3.6.1 The impact of racism

Racism and hate have specific and intersecting negative impacts on communities.¹⁵⁹ For example, research demonstrates that:

- Adults in Victoria who experience racism are significantly more likely to have poor physical health outcomes (which is largely due to racism being a significant

stressor for victims).¹⁶⁰ As a result, victims will often engage in unhealthy coping mechanisms, such as higher rates of smoking, alcohol and substance misuse.¹⁶¹

- The mental health impacts of racial discrimination in Victorian Aboriginal communities is substantial. A study found that 50 per cent of all participants (and 65 per cent of participants exposed to 12 or more incidents of racism) reported high or very high levels of mental distress.¹⁶² The risk of mental distress increased with the volume of racism experienced.¹⁶³
- Victims of racism can tend to avoid situations and self-isolate.¹⁶⁴ For example, a Victorian Health report found that 79 per cent of participants would avoid situations where they thought racism would take place.¹⁶⁵

Significantly, for the period 2001-2011, the economic burden (due to negative health outcomes) of racism was estimated at a total equivalent to \$37.9 billion to the Australian economy or roughly 3.02 per cent of the annual average GDP.¹⁶⁶

An Australian study found that the incidents of public racism have a range of short and long-term negative impacts, including feeling offended, upset, hurt and angry, experiencing fear, intimidation and paranoia, suffering diminished self-esteem, feeling paralysed and silenced, and feeling excluded from wider community.¹⁶⁷ In that study, responses by victims of hate included modifying public behaviour to avoid censure and stereotyping, restrictions on social interactions in public, unwillingness to identify with their ethnicity in the workplace, and only speaking English in public.¹⁶⁸

In consultation with multifaith and multicultural stakeholders, the Commission heard about similar impacts, such as withdrawal from public spaces and social life, silencing victims, diminished education and career opportunities, physical harm, mental health impacts and sometimes suicide.¹⁶⁹

Participants in the Centre for Multicultural Youth's 2016 research on growing up South Sudanese in Victoria suggested that increased racial abuse has:

'collectively contributed to a heightened sense of exclusion, isolation and powerlessness among young South Sudanese Australians. They also voiced concerns about how these negative stereotypes were impacting their ability to make the most of 'amazing' opportunities that exist in Victoria'.¹⁷⁰

A young African community leader also spoke about how vilification makes him and his community retreat and become silent. He said parents, concerned for their children's safety, try to instil this fear to protect them. They remind them "don't bring attention to yourself"; "people who get noticed, get killed".¹⁷¹

3.6.2 The impact of hate on the LGBTIQ community

The impact of hate on the LGBTIQ community is well established, including the significant impact of hate on mental health.¹⁷² The Human Rights Law Centre's 'End the Hate' report stated that 'the cumulative impact of experiencing public harassment causes a broad range of harms, including emotional and psychological impacts, physical impacts, social exclusion and identity expression.¹⁷³ For example:

- Gay, lesbian, bisexual and trans people are three times more likely to experience depression compared to the broader population.¹⁷⁴
- Lesbian, gay and bisexual Australians are at greater risk of suicide and self-injury than heterosexual Australians.¹⁷⁵

- Many LGBTIQ people hide their sexuality or gender identity when accessing services, at social and community events and at work.¹⁷⁶ Young people aged 16 to 24 are most likely to hide their sexuality or gender identity.¹⁷⁷
- A 2017 survey on the mental health of trans young people in Australia found that almost 80 per cent of young trans people had self-harmed and almost half had attempted suicide, as a result of discrimination, violence and bullying.¹⁷⁸

LGBTIQ hate conduct tends to spike during political and social debates that play out in the media, such as the 2017 marriage equality postal survey,¹⁷⁹ and in subsequent discussions about the Safe Schools program,¹⁸⁰ amendments to the Births, Deaths and Marriages Registration Amendment Bill 2019¹⁸¹ and the federal debate on the Religious Discrimination Bill.¹⁸²

3.6.3 The impact of online hate

Online hate has real life consequences for individuals and targeted communities. In 2018, the Australia Institute surveyed over 1,500 Australian about online harassment and cyberhate. The findings on impact included that:

- A third of respondents (37 per cent of women and 30 per cent of men) said that online hate had negatively affected their physical or mental wellbeing (equivalent to 2.2 million Australians).¹⁸³
- Of those, 28 per cent reported seeing a health professional as a result (equivalent to 744,000 Australians).¹⁸⁴
- Online harassment and cyberhate has cost the Australian economy an estimated \$3.7 billion in health costs and lost income.¹⁸⁵

Recent research by Amnesty International revealed the significant impact online hate is having on women in Australia, including that:

- 27 per cent of women said that on at least one occasion, online hate made them feel that their physical safety was threatened
- 24 per cent of women said online hate made them fear for their family's safety
- 62 per cent of women experienced lower self-esteem or loss of self-confidence
- 59 per cent of women experienced stress, anxiety or panic attacks.¹⁸⁶

Women also reported the silencing effect of online hate, including that:

- 40 per cent of women ceased or decreased their use of social media platforms
- 27 per cent stopped posting content that expressed their opinion
- 23 per cent stopped sharing content that expressed their opinion.¹⁸⁷

For professions, such as journalism, there can be a trade-off between income and safety – for example, for women who need to maintain an online presence.¹⁸⁸

In many cases, Australians make the decision to reduce, augment or stop their use of social media platforms.¹⁸⁹ Given that this effects some communities more than others, it creates inequities in access to and use of technologies and shuts down 'safe' online spaces for women. When these technologies occupy a significant portion of the public space, this functions as an exclusion of some voices to the benefit of others¹⁹⁰ - or in other words, the restriction of freedom of expression for some people to the benefit of others.

Research on children and young people also indicates higher rates of self-harm or attempted suicide for victims and perpetrators of cyberbullying.¹⁹¹

4. The limitations of law and enforcement

Summary

Part 4 of our submission sets out the limitations of law and enforcement in effectively responding to and remedying the harmful impacts of hate. This includes:

The limited operation of the RRTA

- The RRTA is under-utilised in practice (part 4.1.1).
- There are significant barriers to using the RRTA (part 4.1.2).
- The threshold for vilification is too high and too complex (part 4.1.3).
- The public conduct exception for vilification is too broad (part 4.1.4).
- The threshold for serious vilification is too high and too complex (part 4.1.5).

Barriers to enforcement of the RRTA

- The Commission is not empowered to identify respondents (part 4.2.1).
- The RRTA does not allow anonymous representative complaints (part 4.2.2).
- The burden of enforcement is on an individual (part 4.2.3).
- The criminal offences are not effectively enforced (part 4.2.4).

The inadequate sanctions for hate crime

- The penalties for serious vilification are too low (part 4.3.1).
- The prejudice-motivated sentencing provision is rarely used (part 4.3.2).

4.1 The limited operation of the RRTA

4.1.1 The RRTA is under-utilised in practice

Despite the fact that the RRTA has been in operation for almost two decades, there is limited use of the Act in practice. As discussed above, there has only been two successful cases of vilification before VCAT.¹⁹²

Data provided by the Crime Statistics Agency shows that in the 15 years from July 2004 to June 2019, there were 104 offences recorded by Victoria Police (on average, 7 reports per year) of serious vilification under the RRTA (see discussion below).¹⁹³ Yet there has been only one criminal prosecution of serious religious vilification under the RRTA, *Cottrell v Smith* [2019] VCC 2142. There have been no criminal prosecutions of racial vilification under the RRTA (discussed in section 4.2.4).

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.

4.1.2 There are significant barriers to using the RRTA

In the Commission's experience, there are a range of barriers to multicultural and multifaith communities in Victoria accessing and using the RRTA. These include:

- a lack of awareness or understanding of the RRTA (discussed below)
- toleration of vilification due to normalisation¹⁹⁴
- cultural perspectives (discussed below)
- a reluctance to engage with the criminal justice system (discussed below)
- a lack of confidence in complaints and justice systems
- a fear of victimisation – for example, the Ballarat African Association told us that “people are not accessing the law because they are concerned that invoking their rights will attract retribution and victimisation”¹⁹⁵
- the complexity and high threshold of the tests for vilification, meaning that people who experience vilification and/or their representatives may choose to use alternative laws to seek redress (such as s 18C of the RDA) (part 4.1.3)
- the inability for the Commission to compel information to identify an unknown respondent to a dispute (part 4.2.1)
- the inability to make a representative complaint without identifying a complainant who may fear victimisation for making a complaint (part 4.2.2).

Significantly, the Commission’s consultations identified that multicultural and multifaith communities often face barriers to accessing and using the RRTA.¹⁹⁶ We heard that many people are not aware of the RRTA, do not understand their rights and may not know where to go for information, advice or to report vilification. Unlike the Equal Opportunity Act, there is limited community awareness of the RRTA. We heard of confusion between the terms ‘discrimination’ and ‘vilification’ and coverage of the EOA and RRTA, particularly when vilifying incidents also involves discrimination.

The Victorian Aboriginal Legal Service (VALS) told us that its clients are not generally not aware of the RRTA and it can be difficult to explain the different legal tests under the RRTA.¹⁹⁷

The barriers to police using the RRTA are discussed in part 4.2.4.

Barriers reporting hate conduct identified in our survey

The vast majority of respondents to the Commission’s online survey chose not to report hate conduct for a range of reasons, including the perception that reporting wouldn’t make a difference, fear of victimisation, not knowing who to report to, and the perception that reporting processes are difficult to navigate. For example:

- “I don't believe anyone will do anything about it; don't want to put myself through the stress of reporting when the likely outcome is nothing but being told to 'protect myself'; it happens so often, it is normalised and almost not recognised as a problem or wrong.”
- “There is an immense anxiety to report and the process seems to be long and exhausting!”
- “I have never known who to report things like this to, and if I did, I don't feel like I would be taken seriously. I feel like most people think that by being out of the closet I have brought this sort of thing upon myself.”
- “[I feared] that this might create further unpleasant situation for me and pushed to a level of resigning the job or even sacking/redundancy.”

Of the survey respondents who did report hate conduct, few reported receiving a successful outcome where action was taken against the perpetrator.

Cultural perspectives

The Commission heard in consultations that there is “a massive disconnect between the law and the community”.¹⁹⁸ In part, we heard that this is due to a lack of culturally appropriate services to support people to access the RRTA, as well as a lack of awareness and understanding of the RRTA.¹⁹⁹

Barriers to reporting hate conduct identified by the Islamic Council of Victoria

The Islamic Council of Victoria (ICV) ran a survey in 2019 with Victorian Muslim community organisations about reporting Islamophobia. The survey identified that:

- only 36 per cent of respondents were clear on how and where to report Islamophobic incidents
- 40 per cent noted that they didn’t have a referral process in place to support community members who had experienced Islamophobic incidents
- when given the opportunity to identify one or multiple reporting barriers, 50 per cent of respondents identified that a lack of resources or manpower was a barrier in responding to Islamophobic incidents, and 27 per cent indicated that they were not aware of existing reporting services
- 62 per cent of respondents were aware of the Islamophobia Register Australia as a reporting and complaint service for Islamophobic incidents, but only 50 per cent indicated that they understood how to submit a report via this service
- 62 per cent of respondents were aware of the Commission as a reporting and complaint service for Islamophobic incidents, but only 23 per cent indicated that they understood how to submit a report via this service

95 per cent of respondents were aware of Victoria Police as a reporting and complaint service for Islamophobic incidents, but only 65 per cent indicated that they understood how to submit a report via this service.²⁰⁰

Research confirms that barriers to accessing the law are particularly acute for multicultural and multifaith communities²⁰¹ who can have difficulty accessing the law because of unfamiliarity with the Australian legal system and different cultural perspectives.²⁰² Additionally, some people from multicultural and multifaith communities may have limited English proficiency, which can affect their ability to access resources and services, and exercise their rights.²⁰³

Importantly, the Commission's consultations identified that some groups and individuals attempt to bridge the cultural divide between the law and the community through a range of initiatives. We consistently heard that there is often a preference to report incidents within communities, including to community or religious leaders in positions of trust as a more intuitive and culturally safe form of reporting. Participants from the Jewish community noted establishing a relationship with Victoria Police, which meant that reporting hate crime to police may be more accessible than for other less established communities.²⁰⁴

For Aboriginal Victorians, cultural perspectives can shape the way hate in the community is perceived or responded to. For example, 'shame' is a cultural concept which describes a situation in which a person has been singled out, for a negative or positive purpose, in which the person loses a sense of security in anonymity.²⁰⁵ 'Shame' has been compared to words such as 'shyness' or 'embarrassment' and has been reported as a barrier to accessing services, such as in an education and health context.²⁰⁶

Examples of initiatives to address issues with access to the law

The provision of culturally competent, informed services is considered a hallmark of success when engaging culturally diverse groups.²⁰⁷ This includes ensuring that complaint mechanisms are flexible enough to consider the contexts of diverse and distinct groups of complainants. In recent years, the Commission has actively taken steps to engage multicultural and multifaith communities in Victoria, including:

- the development of our MMEAP, which is designed to ensure greater numbers of multicultural and multifaith Victorians and their advocates have the confidence and information to access the Commission and exercise their rights
- our 2019 *Reducing Racism* project, which was intended to support members of Victoria's African and Muslim communities to understand and exercise their rights, and to report racism under the EOA and RRTA. The project supported 10 young African Ambassadors to act as advocates for their communities on understanding and exercising their rights
- partnering with the Victorian Local Government Multicultural Issues Network to pilot a new Community Reporting Tool. The tool aimed to address issues with accessing the law and make it easier for culturally and linguistically diverse groups to make complaints about racism and discrimination.

Reluctance to engage with the criminal justice system

Participants in the Commission's multicultural and multifaith focus groups told us that there was a reluctance by some community members to engage with the justice system due to a distrust of authorities, a perception of institutional racism or discrimination, and the view that police are sometimes the perpetrators of hate.²⁰⁸

Mason et al found that 'studies consistently find that most hate crime victims do not notify the police, with estimates suggesting that hate crime is reported less than 30 per cent of the time'.²⁰⁹ As explained, 'underreporting is both a function of poor police-minority relations and definitional challenges as to what legally constitutes

hate crime'.²¹⁰ In addition, 'as is the case internationally, underreporting is extremely common amongst victims of hate crime in Australia. Studies find that victims are hesitant to report hate crime as they are fearful of retributive attacks and lack of confidence in the criminal justice system'.²¹¹

Our submission makes recommendations to address these barriers, including:

- incorporating Victoria's vilification laws in the EOA (part 5.1.1)
- lowering the threshold for vilification (part 5.3.1)
- introducing a complementary harm-based civil provision (part 5.3.2)
- lowering the threshold for the criminal offences (part 5.3.4)
- allowing anonymous representative complaints (part 5.4.1)
- empowering the Commission to identify respondents (part 5.4.2)
- shifting the burden of enforcement (part 5.6)
- strengthening the policy response to hate (part 6).

4.1.3 The threshold for vilification is too high and too complex

As set out below, the threshold for vilification under the RRTA is too high because:

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.

In the Commission's consultations on the RRTA, we consistently heard that the threshold is too high and is a significant barrier to using the Act. In addition, we heard that a continuum of conduct should be prohibited including conduct that causes significant harm to individuals alongside conduct that incites others. It is in the public interest that Victorians are protected from both types of conduct.

The test focuses exclusively on the effect of conduct on a third party

The RRTA prohibits conduct that incites hatred, serious contempt for, revulsion or severe ridicule of a person or group of people because of their race or religion.

The test for vilification is an incitement test. It focuses exclusively on the effect of conduct on a third party – that is, whether the respondent's conduct incited strong negative emotions in a third party (or audience) – rather than focusing on the harm caused.

In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 (Catch the Fire), the Victorian Court of Appeal set out the test for vilification under the RRTA as 'whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case'.²¹² 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'.²¹³

The test requires identification of a potentially hypothetical audience

In order to meet the civil test for vilification under the RRTA, a complainant must identify the relevant audience to the respondent's conduct to assess whether the conduct was capable of inciting an ordinary member of that audience to hatred, serious contempt, revulsion or severe ridicule because of race or religion.²¹⁴

Requiring a complainant to prove whether the natural and ordinary effect of conduct was to incite specific feelings in a potentially hypothetical audience places a significant burden on a complainant. A complainant may be vulnerable or may have difficulties providing evidence on issues that are wholly outside of their experience. In the context of civil claims, complainants frequently don't have legal representation.

In some cases, the audience will be known to the complainant (for example, participants in a meeting). In other cases, the audience may be discerned from information maintained by media organisations about the demographics of their viewers, listeners or readers. In other cases, the actual audience may be impossible to identify so the complainant is left to hypothesise about the audience and the hypothetical ordinary audience member's response to the respondent's conduct (for example, where an incident occurs on public transport and is witnessed by strangers).

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'.²¹⁵ 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).²¹⁶ The outcome of this case illustrates the limitations of the current vilification test.

The test requires incitement of 'extreme responses'

In *Catch the Fire*, the court confirmed that the threshold for contravening the RRTA is high – the alleged conduct must incite 'extreme responses'.²¹⁷ Following the court's interpretation, VCAT noted in *Fletcher v Salvation Army* [20015] VCAT 1523 that:

'The section is not concerned with conduct that provokes thought; it is directed at conduct that is likely to generate strong and negative passions in the ordinary person. An example of such passions would be where persons are so moved that violence might result'.²¹⁸

It is difficult to prove that conduct is capable of inciting strong emotions

In *Catch the Fire*, the court confirmed that conduct only needs to be 'capable' of inciting hatred and other emotions, rather than actually inciting those emotions.²¹⁹ The court also explained that the word 'incites' should be interpreted in accordance with its plain and ordinary meaning – to urge, spur on, stir up, animate or stimulate.²²⁰ However, in practice, the incitement test is difficult to prove.

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'.²²¹ 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'.²²²

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'.²²³

In contrast, complaints have been upheld under section 18C of the RDA (which doesn't require incitement) involving the publication of harmful comments. For example, a newspaper columnist wrote a factually incorrect article about a number of 'fair-skinned Aboriginal persons' which suggested they fabricated or exaggerated their Aboriginality for personal advantage.²²⁴

The incitement test does not consider the harm caused by the conduct

Vilification laws are designed to protect individuals and communities from the harms caused by prejudice-motivated abuse and to promote social cohesion. However, the RRTA focuses exclusively on the effect of the respondent's conduct on a third party – that is, whether an ordinary member of the relevant audience was capable of being incited to 'strong and negative passions' after witnessing the conduct.

In *Catch the Fire*, Neave JA confirmed that:

'[T]he question under section 8 is not whether the conduct offends a group of persons but whether it incites hatred or other relevant emotion of or towards that group of persons. Things might well be said of a group of persons which would be deeply offensive to those persons and yet do nothing to encourage hatred or other relevant emotion of or towards those persons'.²²⁵

In other words, under the RRTA it is irrelevant how an individual receives and is impacted by hate conduct. This can have the unintended and cumulative effect of diminishing the victim's experience. By comparison, harm-based laws in the Commonwealth and Tasmania prohibit conduct that offends, insults, humiliates or intimidates a person (with Tasmania also prohibiting conduct that 'ridicules' a person). This focuses on the harm caused rather than whether incitement occurred.

Existing harm-based laws

Section 18C of the RDA provides that:

1. It is unlawful for a person to do an act, otherwise than in private, if:
 - a. the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - b. the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Section 17 of the *Anti-Discrimination Act 1998* (Tas) provides that:

1. A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of [a protected attribute] in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Section 17 protects a broad range of attributes, including race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex variations of sex characteristics, disability, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.

Unlike section 18C of the RDA which applies to any act 'otherwise than in private', section 17 only applies in connection with employment, education and training, provision of facilities, goods and services, accommodation, membership and activities of clubs, the administration of any State law or program, and awards, enterprise agreements or industrial instruments (s 22).

4.1.4 The public conduct exception is too broad

As set out in part 2.3.4, section 11 of the RRTA provides certain exceptions for public conduct. The Explanatory Memorandum for the RRTA explains that:

'This provision requires, on an objective review, that the conduct must have been engaged in "reasonably and in good faith". The exception will not apply to conduct or statements which are immoderate or inflammatory. For example, the exception will not protect academic debate which, when objectively considered, appears designed to be inflammatory or offensive to an ethnic or religious group.

The provision also requires that conduct genuinely engaged in for an academic, artistic, religious or scientific purpose must, when objectively considered, be engaged in truly for that purpose. The exception will not apply to conduct disguised as discussion for one of these purposes if it is not engaged in reasonably and in good faith. For example, a member of a religious body cannot use the religious exception to racially vilify an ethnic group'.²²⁶

Section 11(1)(b)(i) of the RRTA exempts conduct engaged in reasonably and in good faith 'in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in' for any genuine 'religious purpose'. A 'religious purpose' is defined broadly under s 11(2) as a purpose that 'includes but is not limited to, conveying or teaching a religion or proselytising'.

Section 11(2) was added after the decision in *Fletcher v Salvation Army* [2005] VCAT 1523, in which VCAT found that the RRTA does not prevent people from evangelising or proselytising, but that they must do so 'without inciting hatred of those who follow differing religious beliefs'.²²⁷

In *Catch the Fire*, the Supreme Court of Appeal provided guidance on the 'religious purpose' exception under the RRTA, noting that 'comparative religion and proselytism are both "religious purposes" and ... it does not matter which religions are being compared or to which religious persons are sought to be converted'.²²⁸ In terms of whether a religious purpose is 'genuine', the court noted that:

'That would depend simply on whether the defendant's alleged religious purpose in engaging in the conduct were truly the defendant's purpose in engaging in the conduct. If it were, it would be a *genuine* religious purpose. If it were not, or if the defendant had engaged in the conduct for more than one purpose of which the dominant purpose or purposes was or were not a religious purpose or purposes, it would not be'.²²⁹

The court also found that to engage in conduct 'reasonably and in good faith' for a religious purpose is to 'engage in it honestly and conscientiously for that purpose'.²³⁰

The Commission heard in consultations 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). In these circumstances, the Commission does not consider that the exception would strike an appropriate balance between protecting the right to freedom of expression and protecting the rights of people who disproportionately experience hate conduct.

Although the exception supports the right for a person to manifest a religious belief under human rights law, the definition of ‘religious purpose’ is broader than the manifestation of religion under international and Victorian human rights law to mean ‘worship, observance, practice and teaching’ as reasonably limited to protect the rights of others.²³¹

The Commission also heard that the exception for ‘any purpose that is in the public interest’ under section 11 of the RRTA is also unnecessarily broad and inconsistent with the comparable exception under section 18D of the RDA which requires that conduct is for a ‘genuine’ purpose in the public interest.

Part 5.3.3 recommends that the ‘religious purpose’ exception should be narrowed.

4.1.5 The threshold for the criminal offences is too high and too complex

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 (see section 2.3.5 for further analysis).

Other jurisdictions

A number of other Australian jurisdictions criminalise hate crime, including the Commonwealth, New South Wales, South Australia, Queensland and Western Australia.²³² The offences criminalise different types of conduct, including:

- incitement offences: Commonwealth, South Australia, Queensland and Western Australia
- threatening or inciting violence: New South Wales
- racial harassment: Western Australia
- possession of material for dissemination: Western Australia.

4.2 Barriers to enforcement of the RRTA

4.2.1 The Commission is not empowered to identify respondents

Sometimes when a person experiences vilification – either online or offline – they are unable to identify the perpetrator. However, unlike comparative jurisdictions in Australia, the Commission is not empowered to compel a person to provide information or to produce a document that is relevant to a complaint. This means that the Commission does not have the power to request information to identify a respondent and ultimately to conciliate a complaint if the name and contact details of the respondent is unknown. This is a particular barrier to using the RRTA if vilification occurs in public. For example where:

- alleged vilification has occurred in public and police have attended the scene, the Commission cannot compel the name of the respondent from police
- a bus driver has allegedly vilified a passenger, the Commission cannot compel the name of the driver from the bus company
- a ‘troll’ with an ‘anonymous’ Facebook account posts vilifying content on a trans advocate’s Facebook page, the Commission cannot compel Facebook to disclose the name of the account holder.

In the Commission’s experience, the inability to identify unknown respondents is a barrier to making a complaint to the Commission. For example, in the six years from July 2013 to June 2019, 23 complaints under the RRTA were not accepted for dispute resolution because the identity of the respondent were unknown.

Stakeholders also raised the same barrier to enforcing the RRTA. For example, VALS told us that identifying a respondent is a barrier to using the RRTA (for example, where vilification happened online or in the general community).²³³ The Women’s Legal Service Victoria also considered that if the law is extended to protect women, it will be important to be able to identify respondents, particularly online.²³⁴

The Commission was previously empowered under s 114(2)(b) of the *Equal Opportunity Act 1995* (Vic) to compel the production of documents if it was reasonably necessary for the purpose of conciliating a complaint. However, this power was not retained in the 2010 EOA.

All other Australian jurisdictions empower the relevant equality commission to compel information and documents in relation to a complaint (except for South Australia which does not have a mechanism for resolving vilification disputes).²³⁵ Empowering the Commission in this way would bring Victoria in line with other jurisdictions.

Part 5.4.1 recommends empowering the Commission to identify respondents.

4.2.2 The RRTA does not allow anonymous representative complaints

Section 20 of the RRTA allows a representative body to bring a dispute to the Commission for dispute resolution ‘on behalf of a named person or persons’.

In the Commission’s experience, the requirement for a complainant to be identified to enable a representative complaint is a barrier to reporting vilification under the RRTA. The fear of victimisation can prevent people from making a complaint who would otherwise feel safe to be represented by a representative body, such as a religious body, community organisation or union.

Part 5.4.2 recommends enabling anonymous representative complaints.

4.2.3 The burden of enforcement is on individuals

Under the RRTA, the burden of enforcement is on individuals to enforce the law by making a complaint to the Commission, making an application to VCAT or reporting hate crime to police. This individualises the harm of hate conduct, rather than recognising and addressing the harm to target communities and broader society. The impacts of hate can be compounded by the experience of seeking a remedy for the conduct.

The Commission does not have the power to proactively address hate in the community. There is also no positive duty on duty holders such as employers and service providers to take proactive steps to prevent vilification.

Part 5.6 makes recommendations to shift the burden of enforcement in part to the Commission as Victoria's key human rights regulator and to relevant duty holders.

4.2.4 The criminal offences are not effectively enforced

The Commission's consultation with Victoria Police²³⁶ identified that there are a number of possible barriers to police prosecuting serious vilification under the RRTA including:

- 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 language²³⁷ – that police are familiar with
- 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).

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.

Data from the Crime Statistics Agency shows that Victoria Police record relatively high numbers of 'prejudicially motivated crime' related to sexual orientation, disability, political beliefs/activity, race/ethnicity and religion (part 4.3.2). However, identifying a prejudice motivation for a crime has not translated to prosecutions under the RRTA.

Although Victoria Police has only prosecuted serious vilification once under the RRTA, the Commission is aware that Victoria Police use alternative offences to serious vilification to prosecute hate crime. For example:

- 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.²³⁸

- 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.²³⁹
- 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.²⁴⁰

Victoria Police told the Commission that when officers record summary offences, they can select a field to indicate that the crime was prejudice-motivated (see part 4.3.2). However, the victim's attribute isn't necessarily listed on the charge. If an offence such as common assault is prejudice-motivated, this is an aggravated assault.²⁴¹

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.²⁴²

The use of summary offences, as an alternative to serious vilification under the RRTA, 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).

Other possible barriers to prosecution of hate crime in Australia, raised by stakeholders, include the absence of a definition of 'hatred', a victim's unwillingness to proceed, inability to identify the offender, and a concern that a prosecution will give publicity to racist groups.²⁴³

Part 5.5 makes recommendations to strengthen enforcement of hate crime by Victoria Police, including moving serious vilification offences to the *Crimes Act 1958* (Vic).

4.3 The inadequate sanctions for hate crime

4.3.1 The penalties for serious vilification are too low

The maximum penalty for serious vilification under the RRTA is:

- 60 penalty units (\$9,913.20 at 1 July 2019) for an individual and/or 6 months' imprisonment
- 300 penalty units (\$49,566 at 1 July 2019) for a body corporate.

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 (see tables below), 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.²⁴⁴

Most recently, as part of reforms to racial vilification offences in NSW, the penalty for the new offence of publicly threatening or inciting violence in NSW was increased to:

- 100 penalty units (\$11,000) and/or three years imprisonment for an individual (from 50 penalty units and/or six months imprisonment for the old offences)
- 500 penalty units (\$66,000) (from 100 penalty units for the old offences).

The penalty reforms in NSW followed concerns raised with the Standing Committee on Law and Justice's as part of its Inquiry into racial vilification law in NSW that the maximum penalties available were relatively lenient compared to the penalties for comparable offences under the *Crimes Act 1900* (NSW).²⁴⁵ The committee noted that 'there was a sense amongst a number of stakeholders that this discrepancy, in conjunction with the high evidentiary threshold ... leads to a preference for prosecutors to use [other offences] to address race hate crimes'.²⁴⁶

Penalties for comparative vilification offences

The penalties for vilification offences in Australia include:

Jurisdiction	Offence	Maximum penalties
VIC	Serious vilification	Individual: 60 penalty units (\$9,913) and/or six months' imprisonment Corporation: 300 penalty units (\$49,566)
NSW	Publicly threatening or inciting violence	Individual: 100 penalty units (\$11,000) and/or three years' imprisonment Corporation: 500 penalty units (\$66,000) ²⁴⁷
SA	Racial vilification	Individual: \$5,000 and/or three years' imprisonment Corporation: \$25,000 ²⁴⁸
WA	Conduct intended to incite racial animosity or racist harassment	Individual: 14 years' imprisonment ²⁴⁹
	Conduct likely to incite racial animosity or racist harassment	Individual: Five years' imprisonment (or two years imprisonment and \$24,000 for a summary conviction) ²⁵⁰
QLD	Serious vilification	Individual: 70 penalty units (\$9341.50) or six months' imprisonment Corporation: 350 penalty units (\$46,707.50) ²⁵¹
Cth	Urging violence against groups	Individual: Five years' imprisonment and seven years imprisonment where it would threaten peace, order and good government. ²⁵²

	Urging violence against members of groups	Individual: Five years' imprisonment and seven years imprisonment where it would threaten peace, order and good government. ²⁵³
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Penalties for alternative offences

The penalties for alternative offences used by police in Victoria include:

Jurisdiction	Offence	Maximum penalty
Victoria (1 penalty unit is \$165.22 at 1 July 2019).	Common assault	15 penalty units (\$2,478) or three months imprisonment ²⁵⁴
	Aggravated assault	25 penalty units (\$4,130) or six months imprisonment ²⁵⁵
	Assault	5 years imprisonment ²⁵⁶
	Wilful destruction, damage of property	25 penalty units (\$4,130) or six months imprisonment ²⁵⁷
	Obscene, indecent, threatening language and behaviour in public	10 penalty units (\$1,652) or two months imprisonment ²⁵⁸
	Threats to inflict serious injury	5 years imprisonment ²⁵⁹
	Threats to kill	10 years imprisonment ²⁶⁰
	Threats to destroy or damage property	5 years imprisonment ²⁶¹
	Affray	5-7 years imprisonment ²⁶²
	Destroying or damaging property	10-15 years imprisonment ²⁶³
	Causing serious injury intentionally	20 years imprisonment ²⁶⁴
	Causing serious injury recklessly	15 years imprisonment ²⁶⁵
Violent disorder	10-15 years imprisonment ²⁶⁶	
Cth	Using a carriage service to menace, harass or cause offence	3 years imprisonment ²⁶⁷

Further, incitement to commit any *Crimes Act 1958* (Vic) offence (regardless of whether it is motivated by prejudice) carries the same maximum penalty as for the offence incited.²⁶⁸ For example, the maximum penalty for incitement to assault would be 5 years imprisonment (the same as the maximum penalty for committing an assault).²⁶⁹

4.3.2 The prejudice-motivated sentencing provision is rarely used

Since its introduction in 2009, section 5(2)(daaa) of the *Sentencing Act 1991* (Vic) has rarely been used in practice. The Commission is only aware of nine judgments which have considered the provision. Of those, conduct was found to be partially

motivated by prejudice in four matters (two crimes motivated by race and two by homosexuality).²⁷⁰

In one decision, the court clarified that the sentencing court must be satisfied 'beyond reasonable doubt' of the existence of a hateful or prejudicial motive.²⁷¹ One stakeholder in the Commission's consultation recommended changing the burden of proof to the 'balance of probabilities' to support more effective use of the provision.²⁷²

The Human Rights Law Centre's 'End the Hate' report explains other difficulties with the use of the sentencing provision:

'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'.²⁷³

Police recording of prejudice-motivated crime

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).²⁷⁴

Note: Victoria Police may select multiple codes for an offence so offences may be counted more than once in the figures stated above.

However, in practice, this has not translated to prosecutions under the RRTA or to the adequate use of section 5(2)(daaa) by prosecutors in sentencing hearings.

Section 5(2)(daaa) explicitly includes 'partial' motive, meaning that the prosecution does not need to establish that hatred or prejudice was the sole motivation for the offence. Mason and Dyer explained that 'the question of the degree to which an offender must be motivated by prejudice is especially important in light of empirical research that suggests that it is more common for hate crime offenders to have mixed motives than it is for them to be motivated by prejudice alone'.²⁷⁵

The Victorian Supreme Court's decision in *R v Rintoull* [2009] VSC 617 demonstrates the challenge where offenders have mixed motivations.²⁷⁶ 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, 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'.²⁷⁷

Curtain J acknowledged that it could not be denied that there was a 'racial aspect' to Rintoull's 'derogatory and insulting' comments.²⁷⁸ However, her Honour was not satisfied beyond reasonable doubt that 'racism per se was a motive for the attack'.²⁷⁹ The Commission heard from community lawyers that police have been reluctant to raise the sentencing provision since this decision given the difficulties establishing motivation.²⁸⁰

Part 6.4 recommends education for police and judicial officers to support more effective use of s 5(2)(daaa) of the Sentencing Act.

5. Strengthening law and enforcement

Summary

Part 5 of our submission sets out how the law can be strengthened to provide better redress for hate in the Victorian community. This includes:

Strengthening access to the law

- Victoria's vilification laws should be incorporated in the EOA (part 5.1.1).

Strengthening protections

- The law should protect a broader range of people (part 5.2.1).

Strengthening the law

- The threshold for vilification should be lowered (part 5.3.1).
- A complementary harm-based civil provision should be introduced (part 5.3.2).
- The public conduct exception should be narrowed (part 5.3.3).
- The serious vilification offences should be lowered and simplified (part 5.3.4).
- The definition of prohibited conduct should be broadened (part 5.3.5).

Strengthening dispute resolution

- The Act should allow anonymous representative complaints (part 5.4.1).
- The Commission should be empowered to identify respondents (part 5.4.2).

Strengthening criminal enforcement

- The serious vilification offences should be moved to the *Crimes Act 1958* (Vic) (part 5.5.1).
- The penalties for serious vilification should be increased (part 5.5.2).

Shifting the burden of enforcement

- The Commission's functions and powers should apply to vilification (part 5.6.1).
- The Commission's full range of regulatory powers and functions should be reinstated and strengthened (part 5.6.2).
- Consideration should be given to extending the positive duty to the prevention of vilification (part 5.6.3).

5.1 Strengthening access to the law

5.1.1 Victoria's vilification laws should be incorporated in the EOA

The Commission considers that Victoria's vilification laws should be incorporated in the EOA, rather than in a standalone Act, such as the RRTA. This would make the law more accessible and would be consistent with most other jurisdictions in Australia whose vilification protections are included in anti-discrimination laws, including the Commonwealth, NSW, Queensland, Tasmania and the ACT.

As explained by one participant in the Commission's consultations, vilification should be considered in the context of a range of other unlawful conduct including discrimination.²⁸¹ As an example, there may be circumstances where the same conduct potentially constitutes vilification and discrimination or sexual harassment. In these circumstances, the Commission 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.

In Victoria, there is greater awareness, understanding and use of the EOA by community members and their advocates and legal representatives. Including vilification protections in the EOA would support better awareness and use of hate laws in Victoria and would ensure a consistent approach to preventing and responding to discrimination, sexual harassment and vilification.

The Commission acknowledges the important symbolic value the RRTA has played in Victoria since its introduction but considers this symbolic value to have been undermined by the ineffectiveness of the RRTA in its current form. Fundamentally, effectively preventing and responding to vilification is about promoting the full and equal participation of all Victorians in our community. It is also about promoting the benefits of diversity for the whole community.

The historical context and purpose of the RRTA should be captured in a reformed EOA (for example, in the preamble, purposes and objectives of the Act).

Incorporating Victoria's vilification laws in the EOA would require consequential amendments to the EOA to:

- update the purposes and objectives of the EOA
- extend the Commission's functions and powers to vilification (part 5.6)
- update and modernise the protected attributes of 'sexual orientation', 'gender identity', and 'gender', and introduce a new attribute to protect intersex people, in consultation with relevant stakeholders from the LGBTIQ community (part 5.2.1).

If vilification continues to be regulated in a standalone Act, the Commission considers that the title of the RRTA should be replaced with a title that:

- is inclusive of any additional attributes protected by a reformed Act
- removes the word 'tolerance' to promote respect for and the celebration of diversity, rather than tolerance.

As suggested by the Ballarat African Association, we need to "move beyond tolerance to acceptance and to embrace other people's values".²⁸²

Recommendation 1.

The Victorian Government should incorporate Victoria's vilification laws in the *Equal Opportunity Act 2010* (Vic).

If vilification continues to be regulated in a standalone Act, the Victorian Government should replace the title of the *Racial and Religious Tolerance Act 2001* (Vic) with a title that is inclusive of any additional protected attributes and which removes the word 'tolerance' to promote respect for diversity.

5.2 Strengthening protections

5.2.1 The law should protect a broader range of people

The RRTA currently only protects Victorians from vilification because of their race or religion. This is despite the fact that the impacts of hate extend to a much broader range of people. As demonstrated in part 3.5, there is compelling evidence to extend Victoria's vilification laws to the following protected attributes:

- sexual orientation (part 3.5.1)²⁸³
- gender identity (part 3.5.1)²⁸⁴
- sex characteristics (part 3.5.1)²⁸⁵
- gender (part 3.5.2)²⁸⁶
- disability²⁸⁷ (part 3.5.3)
- personal association (part 3.5.4).

Extending protections to the proposed attributes would:

- ensure consistency with best practice jurisdictions in Australia
- acknowledge and seek to remedy the profound harm experienced by the broad range of people who are targeted by hate in the Victorian community
- provide more effective redress for people who experience high rates of compounding intersectional forms of hate, such as Muslim and African women
- ensure that the Victorian Government sends a strong message about the standards of behaviour expected in the diverse Victorian community.

Importantly, to address the intersectional nature of hate, a person should be able to bring a complaint, make an application to VCAT or report a crime to police on the basis of multiple intersecting attributes, recognising the way different attributes interact with one another to exacerbate and particularise harm.

In addition to including additional attributes, the reformed law should acknowledge the intersectional nature of vilification (as well as discrimination and sexual harassment) in its preamble, purposes or objectives. This would help to acknowledge the compounding impact of hate for people who are targeted on the basis of multiple attributes.²⁸⁸

The Commission considers that the ‘sex’ inclusive attribute of ‘gender’ is the most appropriate attribute to protect women from vilification (even though the EOA does not include this attribute but instead protects ‘sex’). As noted by the Women’s Legal Service Victoria (WLSV) and the Centre Against Sexual Assault Forum (the peak body for Victoria’s Centres Against Sexual Assault), it is important that the law provides context for the inclusion of ‘gender’ as an attribute to protect women.²⁸⁹ For example, this could be done through the preamble, purposes or objectives of the law or a second reading speech.²⁹⁰

Significantly, any reform to extend protections to women should be linked to the broader public policy context of violence against women and family violence.²⁹¹

The proposed additional attributes (as well as the existing attributes of ‘race’ and ‘religious belief or activity’) should be protected by the reformed vilification laws including the reformed civil incitement provision (part 5.3.1); complementary harm-based civil provision (part 5.3.2) and the reformed criminal offences (part 5.3.4).

Recommendation 2.

The Victorian Government should extend the protections under Victoria’s reformed vilification laws to the following attributes:

- race
- religious belief or activity
- sexual orientation
- gender identity

- sex characteristics
- gender
- disability
- personal association.

The law should also acknowledge the intersectional nature of vilification and the cumulative impact of vilification when it occurs because of multiple intersecting attributes.

All of these attributes should be protected under the reformed civil incitement provision (recommendations 5 and 6), the proposed complementary civil harm-based provision (recommendation 7) and the reformed criminal offences (recommendations 9 and 10).

Recommendation 3.

For consistency with the reforms in recommendation 2, the Victorian Government should reform the attributes of 'sexual orientation' and 'gender identity' and introduce a new attribute of 'sex characteristics' under the *Equal Opportunity Act 2010* (Vic) for the purposes of discrimination law.

Recommendation 4.

The Victorian Government should finalise the names and definitions of the attributes relating to 'sexual orientation', 'gender identity', 'sex characteristics' and 'gender' in consultation with affected community stakeholders, particularly from the LGBTIQ community, including intersex organisations.

5.3 Strengthening the law

5.3.1 The threshold for vilification should be lowered

As set out in part 4.1.3, the test for vilification under the RRTA is too high and difficult to prove. The Commission considers that it is critical to simplify and lower the test for vilification to ensure that it is accessible and provides effective redress for the significant harm caused to individuals, target communities and broader society.

To simplify the law, there should be a single incitement provision that prohibits vilification on the ground of the proposed attributes set out in recommendation 2. The law should prohibit a spectrum of conduct, retaining an incitement test aimed at preventing the incitement of hatred against others, while also enacting a complementary, harm-based test (discussed below).

The Racial and Religious Tolerance Amendment Bill 2019 proposed amending the incitement test by substituting the word 'incites' for the words 'is likely to incite'²⁹² to ensure 'that the threshold test for vilification does not exceed that for serious vilification'.²⁹³ The serious vilification provision prohibits conduct 'an offender knows is likely to incite'.

Amending the threshold for incitement to conduct that is 'likely to incite' is an important way of clarifying the existing judicial interpretation of the civil test to include conduct that is 'capable of inciting'.²⁹⁴ However, given the established difficulties of proving incitement – including the effect of the conduct on a potentially hypothetical third party – the Commission considers that it would be useful to reform the civil incitement test so that it also captures conduct that expresses hatred.

For example, the civil incitement provision could be modelled on sections 7 and 8 of the RRTA. However, the word ‘incites’ could be replaced with ‘expresses or is reasonably likely in the circumstances to incite’ hatred. For example:

‘A person must not engage in conduct that expresses or is reasonably likely in the circumstances to incite hatred, serious contempt for, revulsion or severe ridicule of a person or group of persons on the ground of the following protected attributes ...’

The ACT Law Reform Advisory Council recommended this approach in its 2015 review of the *Discrimination Act 1991* (ACT).²⁹⁵ The Advisory Council explained that a variation to a civil incitement test is for legislation to:

‘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’.²⁹⁶

This approach would ensure that the law captures conduct that expresses strong negative emotions because of a person’s identity and that is capable of incitement, without requiring proof of incitement. The focus of this test is on the respondent’s conduct rather than that of a third party or audience, while still being an incitement test. The Commission considers it important to retain an incitement test, as consistent with the requirement in Article 20 of the ICCPR to outlaw vilification of persons on national, racial or religious grounds. It also has significant symbolic value.

Recommendation 5.

The Victorian Government should simplify the vilification provisions under sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic) by introducing a single incitement provision that prohibits vilification on the ground of the proposed attributes set out in recommendation 2.

Recommendation 6.

The Victorian Government should reform the vilification provision by replacing the word ‘incites’ with the words ‘expresses or is reasonably likely in the circumstances to incite’. In the event that this does not occur, the word ‘incites’ should be replaced with the words ‘is likely to incite’.

5.3.2 A complementary harm-based civil provision should be introduced

As set out in part 4.1.3, Victorian law does not currently protect people who are targeted by hate conduct unless the conduct incites a third party to serious negative emotions. This means that there is currently no legal redress for the profound harm caused to a significant part of the Victorian community who experience hate. As explained by the President of the Jewish Community Council of Victoria, ‘the requirement to incite a third party doesn’t get to the heart of the harm suffered’.²⁹⁷

Dr Michael Akindeju from the Ballarat African Association told us that:

“[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”.²⁹⁸

A young African community leader also spoke about how a harm-based test is easier to quantify and satisfy, from the perspective of a complainant.²⁹⁹

The Commission considers that a complementary harm-based test should be introduced in Victoria that:

1. assesses harm objectively from the perspective of the target group
2. protects the same attributes proposed for the incitement test
3. exempts private conduct (ensuring that the onus is on a respondent to prove that conduct was intended to be in private)
4. includes an exception to balance freedom of expression.

These elements are discussed in detail below.

Despite the perception by some people that existing harm-based tests in the Commonwealth and Tasmania set the bar too low by using the terms ‘offend’ and ‘insult’, in practice, the tests have been interpreted by courts to:

- require ‘serious and profound effects’
- interpret the term ‘offend’ consistently with the terms ‘insult’, ‘humiliate’ and ‘intimidate’
- assess harm objectively from the perspective of an ordinary or reasonable member of the target group.

Critically, the government should safeguard against any actual or perceived ‘watering down’ of existing harm-based laws in a Victorian context.

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.

Professor Luke McNamara explained to the Commission that:

“From a public policy point of view, the harm-based model is more appropriate because it deals with the nature of the social problem – the harm from hate speech. It is also influenced by the challenges that an incitement model creates. The conduct to meet the incitement threshold is a bar that not all complainants can reach. This means that complainants are often without a remedy in a context where there is real evidence of the impact of hate speech on individuals and members of their community”.³⁰⁰

Introducing a complementary harm-based test would be consistent with the law in the Commonwealth and Tasmania and would reflect the approach in Tasmania which includes both an incitement test and a harm-based test.

Existing harm-based tests in practice

From 2012-2016, the Australian Human Rights Commission (AHRC) received an average of 2,282 complaints each year. Of this total number, 117 complaints per year (5 per cent) on average alleged a breach of section 18C of the RDA.³⁰¹

The majority of complaints under section 18C are resolved at conciliation and result in outcomes such as an apology, an agreement to remove online content, changes to policies and procedures, or a financial settlement.³⁰²

In 2015-16, 51 per cent of finalised complaints at the AHRC under section 18C of the RDA were resolved at conciliation, 29 per cent were withdrawn or discontinued and 20 per cent were terminated by the AHRC.³⁰³ Of all finalised complaints between 2012-2016, only 18 proceeded to court (3 per cent of finalised complaints).³⁰⁴

Complaints made to the AHRC in the following two financial years include 89 complaints in 2017-18³⁰⁵ and 97 complaints in 2018-19.³⁰⁶

Similarly, in Tasmania:

- in 2017-18, there were 87 complaints made under the harm-based test and 44 complaints made under the incitement test³⁰⁷
- in 2018-19, there were 193 complaints made under the harm-based test and 91 complaints made under the incitement test.³⁰⁸

The complaint data suggests that a harm-based test does not set the bar too low or give rise to a high volume of complaints.

As demonstrated in case law, existing harm-based tests set a high threshold for the seriousness of prohibited conduct. Section 18C of the RDA, which prohibits conduct that is reasonably likely to 'offend, insult, humiliate or intimidate' was modelled on the prohibition of sexual harassment under s 28A the *Sex Discrimination Act 1984* (Cth), prohibiting unwelcome sexual conduct that could reasonably 'offend, humiliate or intimidate'. The same language is used in the prohibition of sexual harassment in Victoria.³⁰⁹

In recent years, the terms 'offend' and 'insult' have been criticised for setting the bar too low. However, the courts have interpreted section 18C to require 'profound and serious effects, not to be likened to mere slights'³¹⁰ and to interpret the term 'offend' consistently with the words 'insult', 'humiliate' and 'intimidate':

'The definitions of 'insult' and 'humiliate' are closely connected to a loss of or lowering of dignity. The word 'intimidate' is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners'.³¹¹

Importantly, existing harm-based laws protect against consequences that are 'more serious than mere personal hurt, harm or fear'.³¹² In *Eatock v Bolt* [2011] FCA 1103, the Federal Court acknowledged that although the ordinary meaning of the words 'offend, insult, humiliate or intimidate' was 'potentially quite broad', the section is directed towards public, not private, purposes.³¹³ Bromberg J stated:

'In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA [Prohibition of offensive behaviour based on racial

hatred] is directed to avoid. That public consequence need not be significant. It may be slight ... conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion'.³¹⁴

Similarly, the Tasmanian Anti-Discrimination Tribunal has found that the equivalent section 17 of the *Anti-Discrimination Act 1998* (Tas) 'seeks to prevent and redress conduct which is seen as unjust, divisive and anathema to modern society'.³¹⁵

Importantly, the Commission considers that a Victorian harm-based test should provide the same level of protection as existing harm-based laws. Rather than modifying existing harm-based tests in a Victorian context to codify the high threshold applied in practice, the judicial interpretation of existing tests could be clarified in explanatory materials for an amendment Bill or a note in the legislative provision. This would mitigate against any actual or perceived 'watering down' of existing harm-based laws in a Victorian context.

Harm should be assessed objectively from the perspective of the target group

Courts have interpreted existing harm-based tests from the perspective of a hypothetical reasonable member of the relevant target group. For example, in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, Keifel J stated that the question to be determined is whether the conduct can, 'in the circumstances be regarded as reasonably likely to offend or humiliate a person in the applicant's position'.³¹⁶ Courts have also said that extreme, atypical or intolerant reactions of members of the relevant group should not be taken into account.³¹⁷

As explained by the Human Rights Law Centre:

'Assessing conduct against the objective standard or a reasonable person from the relevant group ensures that the specific experiences, values and circumstances of different minority groups, who are most at risk of racial vilification, are considered in assessing the impact. Courts have warned that "to import general community standards into the test ... runs a risk of reinforcing the prevailing level of prejudice"'.³¹⁸

The Commission endorses this approach for a Victorian harm-based test.

The test should protect the same attributes proposed for the incitement test

The Commission considers that a harm-based test should protect the same attributes as the incitement test (part 5.2.1), including:

- race
- religious belief or activity (see discussion below)
- sexual orientation
- gender identity
- sex characteristics
- gender
- disability
- personal association.

Protecting 'religious belief or activity'

As set out in part 3.4, people from multifaith communities continue to experience high levels of hate conduct in the Victorian community (in particular, Muslim and Jewish people).

The Commission considers that the existing attribute of 'religious belief or activity' under the RRTA should also apply to the proposed harm-based test to:

- acknowledge and seek to remedy the profound harm experienced by people who experience religious hate including Islamophobia and anti-Semitism
- ensure consistency with the existing protection of 'religious belief or activity' from religious vilification under the RRTA
- reflect the existing federal protection for some multifaith people under the racial hatred provisions of the RDA, including Jewish and Sikh people
- provide more effective redress for multifaith people who experience high rates of compounding intersectional forms of hate, such as Muslim women.

The Commission acknowledges concerns that harm-based laws should not protect 'religious belief or activity' because religious expression or criticism of a religion commonly cause offence to adherents of a particular religion.³¹⁹ However, the Commission considers it is critical to provide legal protection to multifaith people who, as the evidence demonstrates, experience the profound negative impacts of hate conduct (for example, Muslim women who experience high rates of public abuse).

Any legal protection on the ground of religious belief or activity must be complemented by effective statutory exceptions for conduct engaged in 'reasonably and in good faith' to balance the right to freedom of expression and safeguard against the unintended consequence of a harm-based test prohibiting mere criticism.

In *Catch the Fire*, for the purposes of the public conduct exception, the Court of Appeal found that whether conduct was engaged in 'reasonably' must be assessed according to the objective standard of a reasonable person who is a member of an open and just multicultural society.³²⁰ Justice Nettle commented that:

'[T]he standards of an open and just multicultural society allow for different views about religions. They acknowledge that there will be differences in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion ... It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable'.³²¹

Existing civil protections for multifaith people

In Australia, religious vilification is prohibited by civil incitement laws in Victoria, QLD, the ACT and TAS. In NSW, the definition of 'race' for the purposes of racial vilification was amended in 1994 to include 'ethno-religious' origin to 'clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act'.³²²

The definition of 'race' for the purposes of section 18C of the RDA includes 'ethnic origin' and for the purposes of section 17 of the *Anti-Discrimination Act 1998* (Tas) includes 'ethnic' and 'ethno-religious' origin.

The term 'ethnic origin' has been interpreted to include Jewish and Sikh people.³²³

In 2018, the Expert Panel for the federal Religious Freedom Review noted they heard ‘examples about hate speech directed at people of faith, generally directed towards people of minority religions in Australia’.³²⁴ Many examples went ‘beyond questions of vilification’:

‘More serious incidents involved the forcible removal of items of clothing, mainly religious head coverings; death threats; vandalism; and more extreme forms of verbal abuse. Identifiably religious persons are often singled out’.

As part of the federal inquiry into freedom of speech in Australia, a number of organisations submitted that section 18C of the RDA should be amended to include religion as a ground for protection.³²⁵

The test should exempt private conduct

The private conduct exception under section 12 of the RRTA should also apply to the proposed harm-based test to ensure that the onus is on a respondent to prove objectively that conduct was intended to be private (rather than requiring an applicant to prove that conduct was done ‘otherwise in private’ as is the case with s 18C of the RDA). The Victorian approach to exempting private conduct has been endorsed by Professors Simon Rice and Neil Rees in the context of criminal reforms in NSW:

‘We propose adoption of the approach in Victoria which has shifted the public/private dividing line in offences of this nature: s 12 of the RRTA contains an exception to liability when the person concerned can establish, objectively, that his or her conduct was intended to be private’.³²⁶

Extending the exception for private conduct to the proposed harm-based test will ensure that the burden of proof is not too onerous for complainants or unrepresented applicants in civil matters.

Consistent with the existing scope of vilification laws in Victoria, the harm-based test should not be limited to specific areas of public life (as is the case with s 17 of the *Anti-Discrimination Act 1998* (Tas)).³²⁷ This approach is supported by research which demonstrates that hate conduct often occurs in a range of public settings, including on the street, on public transport, in shopping centres, online, at public rallies, or through public graffiti, flyers, posters or stickers.

The test should include an exception to balance freedom of expression

The Commission considers that the harm-based test should include the same public conduct exception that applies to the incitement test to balance freedom of expression (part 5.3.3). As set out in part 2.3.4, freedom of expression is a fundamental human right that is protected under international and Victorian law and must be balanced against the human rights of other people in Victoria.

Recommendation 7.

The Victorian Government should introduce a complementary civil harm-based provision that:

1. assesses harm objectively from the perspective of the target group
2. protects the same attributes proposed for the incitement test
3. exempts private conduct
4. includes the same public conduct exception as the civil incitement test to balance freedom of expression.

Importantly, the Victorian Government should safeguard against any actual or perceived ‘watering down’ of existing harm-based laws in a Victorian context.

5.3.3 The ‘religious purpose’ exception should be narrowed

Narrowing the ‘religious purpose’ exception

As set out in part 4.1.4, the definition of ‘religious purpose’ under the RRTA’s public conduct exception is broader than the manifestation of religion under human rights law which is defined to mean ‘worship, observance, practice and teaching’ as reasonably limited to protect the human rights of others.

The Commission reiterates that freedom of expression is not absolute and considers that the ‘religious purpose’ exception unreasonably protects a broad range of ‘religious purposes’ above the protection of Victorians from hate conduct, which would have particular consequences for LGBTIQ Victorians under reformed laws. This applies to both the current incitement tests in sections 7 and 8, as well as the recommended harm-based test proposed in recommendation 7.

The right to freedom of religion and belief is protected by international law and the Charter:

International law

Article 18(1) of the ICCPR states that:

‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching’.

Article 18(3) of the ICCPR confirms that:

‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.

The Charter

In Victoria, s 14 of the Charter protects the right to freedom of thought, conscience, religion and belief and is modelled on article 18 of the ICCPR. It provides that:

1. Every person has the right to freedom of thought, conscience, religion and belief, including:
 - a. the freedom to have or adopt a religion or belief of his or her choice
 - b. 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.
2. A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance practice or teaching.

Under s 7(2) of the Charter, the right to freedom of religion and belief may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

Significantly, the right to freedom of religion and belief includes two elements:

1. the **absolute** right to have or adopt a religion or belief³²⁸
2. the **limited** right to manifest a religious belief in 'worship, observance, practice and teaching' (limited by article 18(3) of the ICCPR and s 7(2) of the Charter).

The UN Human Rights Committee has provided useful guidance on the scope of the terms 'worship, observance, practice and teaching':

- 'Worship' includes ritual and ceremonial acts giving direct expression to belief, and various practices integral to such acts (e.g. building places of worship, use of ritual formulae and objects, display of symbols, observance of holidays and days of rest).
- 'Observance' and 'practice' include ceremonial acts and customs (e.g. observance of dietary regulations, wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and use of a particular language customarily spoken by a group).
- 'Teaching' includes acts integral to the conduct by religious groups of their basic affairs (e.g. freedom to choose their religious leaders, priests and teachers, freedom to establish seminaries or religious schools, and freedom to prepare and distribute religious texts or publications).³²⁹

The right to manifest a religious belief could not then exempt transphobic verbal abuse by a religious person in a public place under the guise of proselytising or attempting to convert passers-by.

To ensure that the law provides effective redress for vilification, it is critical that the religious purpose exception is confined to purposes that reflect the limited ability for a person to manifest their religion under human rights law. This will ensure that any manifestation of a religious belief effectively balances the fundamental rights and beliefs of other people set out in the Charter, such as:

- the right to enjoy all human rights without discrimination (s 8)
- freedom of thought, conscience, religion and belief (s 14)
- freedom of expression (s 15)
- the right to take part in public life (s 18)
- cultural rights (s 19).

Any review of current exceptions in the RRTA (and EOA) – as they apply to the current incitement provisions, as well as a possible harm-based provision – should ensure the balancing of competing rights and be careful not to broaden the ambit of permitted vilification or discrimination. The concerns of LGBTIQ communities about the impact of overly broad religious exceptions should be addressed in any reform process.

Recommendation 8.

The Victorian Government should narrow the public conduct exception under section 11 of the *Racial and Religious Tolerance Act 2001* (Vic) by:

- replacing the definition of 'religious purpose' with a definition that reflects the limited ability for a person to manifest a religious belief under human rights law in 'worship, observance, practice and teaching'
- including the word 'genuine' before the word 'purpose' in section 11(1)(b)(ii).

The reformed public conduct exception should apply to the reformed civil incitement test (recommendations 5 and 6) and the proposed complementary harm-based test (recommendation 7).

5.3.4 The serious vilification offences should be lowered and simplified

As set out in part 4.1.5, the threshold for the serious vilification under the RRTA is too complex and too high.

Reforming the existing criminal offences

The RRTA should be reformed to simplify the offences and lower the threshold. However, importantly, criminal offences should only apply to the most extreme conduct that justifies the potential outcome of restricting a person's liberty.

To simplify the offences, there should be a single offence that prohibits serious vilification on the ground of the proposed attributes set out in recommendation 2. Victoria Police also suggested drafting the offence in a simpler more accessible way similar to summary offences that are commonly used.³³⁰

To lower the threshold for the criminal offences, the Commission considers that:

- the fault element should be amended to 'intentionally or recklessly'
- the subjective test of conduct that 'the offender knows is likely to incite' should be replaced with an objective test of conduct that 'is likely to incite'
- the offence should prohibit threats or incitement (rather than threats and incitement in the existing criminal offences).

For example, the offence could provide that:

A person must not, intentionally or recklessly, engage in conduct that:

- (a) is likely to incite hatred, serious contempt for, revulsion or severe ridicule; or
- (b) threatens violence or property damage

towards another person or group of people on the ground of the following attributes ...

The criminal offence should include an exception for 'private conduct' modelled on the private conduct exception under section 12 of the RRTA. This will provide consistency with the civil provisions and ensure that the onus is on the alleged offender to prove objectively that conduct was intended to be private. Notably, in 2013 the Standing Committee on Law and Justice recommended that the NSW Government consider including a private conduct exception modelled on section 12 of the RRTA.³³¹

NSW reforms

In June 2018, the NSW Parliament passed the Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018. Following an Inquiry by the Standing Committee on Law and Justice on racial vilification law in NSW, the bill substantially reformed NSW's criminal vilification offences (which were drafted in similar terms to the serious vilification offences in Victoria).

The reforms made a number of changes to the offence such as:

- moving the offences from anti-discrimination law to the *Crimes Act 1900* (NSW)

- providing that recklessness is sufficient to establish intent
- prohibiting conduct that threatens *or* incites violence
- extending protections from ‘race’ and ‘HIV/AIDS status’ to also include ‘religious belief or affiliation’, ‘sexual orientation’, ‘gender identity’ and ‘intersex status’.
- increasing the penalties to \$11,000 and/or imprisonment for three years for an individual or \$55,000 for a corporation.³³²

The result was a new offence located in the *Crimes Act 1900* (NSW) providing that:

‘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 (s 93Z)’.

The new offence also provides that in determining whether an alleged offender committed an offence it is irrelevant whether or not, in response to the alleged offender’s act, any person formed a state of mind or carried out any act of violence.

The reforms were well received by advocacy organisations in NSW.³³³ However, some stakeholders argued that the reforms were incomplete because they did not consider the civil provisions and that the attribute of ‘sex’ was not protected.³³⁴

Consideration of complementary offences

Possessing, distributing or displaying material

As set out in part 3.1, one of the ways hate manifests in our community is distributing or displaying materials and symbols of hate, through mediums such as publications, graffiti, flyers, posters, stickers or flags. 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.

For example, the Racial and Religious Vilification Bill 1992 (Vic), which lapsed before being passed by the Victorian parliament, included offences for the possession, distribution or display of threatening or vilifying material that is intended to ‘create, promote or increase’ hatred or to ‘intimidate’. This included:

- Clause 6(1): A person must not publish, distribute or display written or pictorial material that is threatening or vilifying with the intention of thereby creating, promoting or increasing hatred of any group of persons on the ground of their race or religion.
- Clause 6(2): A person must not publish, distribute or display written or pictorial material that is threatening or vilifying with the intention of thereby intimidating any group of persons on the ground of their race or religion.
- Clause 7: A person must not possess written or pictorial material that is threatening or vilifying with the intention of publishing, distributing or displaying it and thereby:
 - a. creating, promoting or increasing hatred of any group of persons on the ground of their race or religion; or

b. intimidating any group of persons on the ground of their race or religion.

The Bill also included the power for a municipal council to remove written or pictorial material that, in the opinion of the council, was likely to create, promote or increase hatred or any group of persons on the ground of their race or religion, or to intimidate any group of persons on the ground of their race or religion (clause 8).

Western Australia also has a range of criminal offences that could address the possession, distribution or display of hateful material including:

- possession of material for dissemination with intent to incite racial animosity or racist harassment³³⁵
- possession of material for dissemination that is likely to incite racial animosity or racist harassment³³⁶
- conduct intended to racially harass³³⁷ and likely to racially harass (which do not require proof of incitement).³³⁸

In considering enacting similar offences, the Victorian Government should be careful to ensure that only the most egregious and harmful forms of hate material are captured.

Causing a person to have a reasonable fear

In the Inquiry into Racial Vilification Law in NSW, Professors Simon Rice and Neil Rees recommended introducing a criminal offence that prohibits an act that:

‘is intended, or is reasonably likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of property of their family or associates’.³³⁹

As explained by the professors, ‘the proposed offence requires proof either of intent to generate fear in another person or that a reasonable person would be aware of the likelihood that fear would be caused. The alternative to intent – a reasonable person’s awareness of the likelihood – ensures that a perpetrator of racial vilification is not able to rely on their own lack of awareness, insight or wilful blindness as to the effect of their conduct, or on a belief that what they said was true’.³⁴⁰

The intention of the ‘reasonable fear’ test is to shift the focus away from incitement of a third party to the objective harm that results from an offender’s conduct.

Recommendation 9.

The Victorian Government should introduce a single criminal offence for serious vilification that is modelled on the offences for serious vilification under section 24 and 25 of the *Racial and Religious Tolerance Act 2001* (Vic) with the following modifications:

- the fault element should be amended to ‘intentionally *or recklessly*’
- the subjective test of conduct that ‘the offender knows is likely to incite’ should be replaced with an objective test of conduct that ‘is likely to incite’
- the offence should prohibit threats *or* incitement (rather than threats *and* incitement in the existing criminal offences).

The offence should protect the same attributes set out in recommendation 2.

The offence should include an exception for ‘private conduct’ modelled on section 12 of the *Racial and Religious Tolerance Act 2001* (Vic).

Recommendation 10.

The Victorian Government should consider introducing complementary offences to criminalise:

- the possession, distribution or display of hateful material; and
- hate conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property.

5.3.5 The definition of prohibited conduct should be broadened

In line with recent reforms to the criminal vilification offences in NSW, the Commission considers that the definition of prohibited conduct for the purposes of civil and criminal vilification laws in Victoria should be broadened. This will help to clarify that prohibited conduct includes any form of communication, conduct or distribution or dissemination of material to the public. It will also clarify that conduct will constitute public conduct even if it occurs on private land.

In particular, the term 'conduct' under Victorian law should adopt the definition of 'public act' under s 93Z(5) of the *Crimes Act 1900* (NSW) to include:

- '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
- any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public; and
- 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'.

Recommendation 11.

The Victorian Government should adopt the definition of 'public act' under section 93Z(5) of the *Crimes Act 1900* (NSW) for the purposes of all of the civil provisions and criminal offences in Victoria's reformed vilification laws to clarify the broad scope of conduct covered by the Act.

5.4 Strengthening dispute resolution

5.4.1 The Commission should be empowered to identify respondents

To enable the Commission to identify unknown respondents, the Commission should be empowered to direct a person to provide information or produce a document that is relevant to a complaint. As set out in part 4.2.1, this would bring Victoria in line with all other Australian jurisdictions with a mechanism for resolving vilification complaints.

The Commission should also be empowered to enforce a direction for information or documents by filing the direction with VCAT. The direction would then be enforceable as if it were a VCAT order. This is the approach in Queensland which empowers the commission to enforce a direction by filing it with a court of competent jurisdiction.³⁴¹

Empowering the Commission to identify respondents would address a key barrier to reporting vilification, support the more effective resolution of disputes, and improve redress for people who experience hate in the community.

Recommendation 12.

The Victorian Government should empower the Victorian Equal Opportunity and Human Rights Commission to:

- direct a person (including natural and non-natural persons) to provide information or produce a document that is relevant to a complaint
- enforce a direction by filing it with the Victorian Civil and Administrative Tribunal (which would then be enforceable as if it were an order of the Tribunal).

5.4.2 The Act should allow anonymous representative complaints

As set out in part 4.2.2, the RRTA does not currently allow a representative body to bring a dispute to the Commission on behalf of an anonymous complainant.

The Commission considers that the Act should be amended to allow representative complaints without the need to name individual complainants or for individual consent for the application to be made by the representative. If the Commission is satisfied that the representative body has sufficient interest in the application and identifies systemic issues affecting a broad section of a workforce, for example, then this should be sufficient to seek and offer dispute resolution.

This would help to strengthen enforcement of the Act, encourage reporting, alleviate the fear of victimisation and improve redress for people who experience vilification.

For example, under s 46PB of the *Australian Human Rights Commission Act 1986* (Cth), a representative complaint can be made to the Australian Human Rights Commission that 'describes or otherwise identifies the class members' without the need to name individual complainants.

Recommendation 13.

The Victorian Government should amend section 20 of the *Racial and Religious Tolerance Act 2001* (Vic) to enable a representative complaint to be made without the need to name an individual complainant.

For consistency, amendments to section 114 of the *Equal Opportunity Act 2010* (Vic) should be made to enable a representative complaint to be made without the need to name an individual complainant or for individual consent for the purposes of discrimination law.

5.5 Strengthening criminal enforcement

5.5.1 The serious vilification offences should be moved to the Crimes Act

As set out in part 4.2.4, Victoria Police has identified that the location of the serious vilification offences in the RRTA is a barrier to prosecution. Victoria Police suggested that moving the offences to the *Crimes Act 1958* (Vic) would increase visibility of the offences and make it clear to police that serious vilification is a crime.³⁴² This position was consistently supported by the stakeholders we consulted with.

In line with reforms in NSW (part 5.3.4), the reformed serious vilification offences should be moved to the *Crimes Act 1958* (Vic) to support the more effective prosecution of hate crime. Importantly, the criminal offences need to 'look, read and feel like a criminal offence rather than a civil hate speech provision'.³⁴³

The Commission also considers that the EOA should include a reference to:

- the offences in the *Crimes Act 1958* (Vic)
- the ability for the Commission and Victoria Police to cross-refer matters.

This would support greater community awareness of the serious vilification offences and promote the ability for the Commission to make a soft referral to Victoria Police on behalf of a person who experiences hate crime in appropriate circumstances.

Recommendation 14.

The Victorian Government should move the serious vilification offences from the *Racial and Religious Tolerance Act 2001* (Vic) to the *Crimes Act 1958* (Vic).

The *Equal Opportunity Act 2010* (Vic) should include a reference to:

- the offences in the *Crimes Act 1958* (Vic)
- the ability for the Commission and Victoria Police to cross-refer matters.

Alternatively, if Victoria's vilification laws remain in a standalone Act, the relevant Act should refer to the same matters listed above.

5.5.2 The penalties for serious vilification should be increased

As set out in part 4.3.1, the penalties for serious racial and religious vilification under the RRTA are out of step with penalties for comparative offences in Australia and alternative offences used by police to prosecute hate crimes. The Commission considers that the penalties for serious vilification should be increased in line with comparable offences in Victoria and other Australian jurisdictions.

Recommendation 15.

The Victorian Government should increase the penalties for serious vilification in line with comparable offences in Victoria and other Australian jurisdictions.

5.6 Shifting the burden of enforcement

As set out in part 4.2.3, the burden of enforcement under the RRTA is on individuals who experience vilification. The Commission considers that the burden of enforcement should be shifted from individuals by:

- extending the Commission's functions and powers to the regulation of vilification (part 5.6.1)
- reinstating and strengthening the Commission's full range of regulatory powers and functions (part 5.6.2)
- extending the positive duty under the EOA to the regulation of vilification (part 5.6.3).

Empowering the Commission with strengthened functions and powers was supported by all stakeholders in the Commission's consultations as an important way to address systemic hate in the community.

5.6.1 The Commission's functions and powers should apply to vilification

The Commission has a limited range of functions that apply to vilification including an education function, dispute resolution function and reporting functions.³⁴⁴ The Commission also provides information about the RRTA as part of its Enquiry Line.

The Commission considers that the full range of its functions under the EOA should apply to vilification. This includes the Commission's functions to:

- issue practice guidelines³⁴⁵
- undertake research³⁴⁶
- conduct legal interventions³⁴⁷
- undertake compliance reviews³⁴⁸
- prepare action plans³⁴⁹
- conduct investigations.³⁵⁰

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.

5.6.2 The Commission's full range of regulatory powers and functions should be reinstated and strengthened

In order for equal opportunity and vilification laws to be effective, the Commission, as the regulator of both laws, requires sufficient powers to enforce them.³⁵¹ Importantly, the Commission considers that the full range of its regulatory powers and functions under the EOA should be reinstated and strengthened to effectively regulate discrimination, sexual harassment, victimisation and vilification.

The evolution of the Commission's powers and functions under the EOA

In 2008, former public advocate for Victoria, Julian Gardner, made recommendations to reform the *Equal Opportunity Act 1995* (the predecessor to the current Act).³⁵² Gardner considered that the ideal regulatory model is one that is less reliant on individuals making complaints and equips the regulator with broad tools to facilitate and enforce compliance and address systemic issues.

In 2010, the EOA 2010 was introduced and implemented many of the reforms recommended by Gardner, including introducing a positive duty requiring duty holders to proactively eliminate discrimination, sexual harassment and victimisation.³⁵³ Alongside the positive duty, were additional functions and powers to enable the Commission to enforce the Act and address systemic issues by:

- allowing the Commission to conduct investigations and public inquiries
- introducing enforcement mechanisms, such as the power for the Commission to issue compliance notices and enforceable undertakings
- strengthening the Commission's powers to compel information, documents and attendance in the context of an investigation or public inquiry.

However, before the 2010 EOA commenced, it was amended to remove the public inquiry power, prevent the Commission from conducting an investigation if the matter could reasonably be expected to be resolved by disputed resolution or

VCAT, require the Commission to apply to VCAT for an order to compel attendance, information and documents, and remove the ability of the Commission to enter into enforceable undertaking and issue compliance notices.³⁵⁴

The Commission considers that it should have the powers and functions 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 dispute resolution or the 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.³⁵⁵

These reinstated and strengthened powers and functions under the EOA should apply to the regulation of vilification and will ensure that the burden of enforcement is shifted in part from individual complainants to Victoria's human rights regulator.

Recommendation 16.

The Victorian Government should amend the *Equal Opportunity Act 2010 (Vic)* to extend the full range of the Victorian Equal Opportunity and Human Rights Commission's functions and powers to the regulation of vilification, including to issue practice guidelines, undertake research, conduct legal interventions, undertake compliance reviews, prepare action plans and conduct investigations.

Recommendation 17.

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 dispute resolution or the Victorian Civil and Administrative Tribunal (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.

These reinstated functions and powers should also apply to the regulation of vilification under the *Equal Opportunity Act 2010 (Vic)* (see recommendation 1).

5.6.3 The positive duty should apply to the prevention of vilification

Under section 15 of the EOA, relevant duty holders have a 'positive duty' to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation. The positive duty requires duty holders to take

proactive steps to prevent unlawful conduct before it occurs. It also encourages compliance with the Act, even in the absence of an individual complaint.

The Commission can encourage and facilitate compliance with the positive duty through our education, research and investigation functions. For example, the Commission undertook an investigation into mental health discrimination in the travel insurance industry, which considered insurers' compliance with the positive duty.³⁵⁶

The positive duty currently applies to everyone who already has responsibilities under the EOA, including employers and people who provide accommodation, education, and goods and services. It also applies to clubs and sporting organisations, to government, and to people in business and the community sector.

A key question that arises if the positive duty is extended to vilification is who the positive duty will apply to. Unlike discrimination and sexual harassment, the prohibition of vilification under the RRTA applies to everyone in Victoria and is not limited to specified duty holders. In theory, the positive duty could apply to all 'persons' (including natural persons, unincorporated associations and corporations) in Victoria. However, it may be impractical to place a legal duty on every Victorian to take positive steps to prevent vilification from occurring in the community.

The alternative is to restrict the positive duty, for the purposes of vilification, to the same group of duty holders that the positive duty currently applies to – that is, any person who has a duty not to engage in discrimination, sexual harassment or victimisation under the EOA. In a practical sense, this would restrict the duty to organisations that have the ability to take proactive steps to better prevent and respond to vilification in the community – such as employers, service providers, public transport agencies, social media platforms and police (who have limited duties as service providers under the EOA).³⁵⁷

Under the positive duty organisations would be required to proactively prevent cultures of vilification in their organisation and counter passive bystandership, for example, by establishing relevant policies, complaint handling and grievance procedures and educating staff about their obligations under the law. What is considered 'reasonable' and 'proportionate in discharging the position duty would depend on the size, nature and circumstances of the business or operations, the resources, business and operational priorities and the practicability and cost of the measures (as is currently the case under section 15(6) of the EOA).

If accompanied by appropriate enforcement powers (recommendation 17), the positive duty could help to drive systemic change and alleviate the burden on individuals who experience vilification. It would also ensure that key organisations turn their minds to practical and innovative ways of tackling hate in the community, rather than just responding to hate when it happens.

Recommendation 18.

The Victorian Government should consider extending the positive duty under section 15 of the *Equal Opportunity Act 2010 (Vic)* to vilification, accompanied by strengthened functions and powers for the Victorian Equal Opportunity and Human Rights Commission to effectively regulate vilification (see recommendation 17).

6. Strengthening the policy response

Summary

Part 6 of our submission sets out how the policy response to hate in the Victorian community can be strengthened to complement law reform. This includes:

- empowering target communities (part 6.1)
- addressing the barriers to reporting (part 6.2)
- promoting the celebration of diversity (part 6.3)
- improving the response to hate (part 6.4)
- strengthening research, data and reporting (part 6.5).

Our submission makes recommendations to reform the RRTA to ensure that the law is accessible, provides effective redress for hate and can be adequately and effectively enforced. However, the law alone is not enough to drive social change. A strong policy response to hate in the Victorian community can complement law reform and provide a holistic approach to an entrenched social problem.

6.1 Empowering target communities

Our consultations identified that there is limited community awareness of the RRTA. This acts as a significant barrier to multifaith and multicultural communities understanding and exercising their rights under the RRTA. As a result, there is a demonstrated need for information and education on the RRTA – including what the law says, who it applies to and what to do if someone experiences hate. There is also a need for information in different languages to increase access to the law.³⁵⁸

Information and education will be particularly critical following any reforms to the law, including extending legal protections to other groups of people, including LGBTIQ people, women and people with a disability. It is critical that people who are protected by the law are aware of their rights and know how to exercise them. As explained simply by a participant in the Commission's survey, 'people need to be educated on how to report and where to go'.

As set out in part 2.1.2, the Commission has worked to increase public awareness of the RRTA, including through our Reducing Racism project and Community Reporting Tool. However, we know that more work needs to be done to ensure that the law is visible and accessible in the Victorian community.

Importantly, information and education should be developed in partnership with, and where possible, implemented by the communities who are protected by Victoria's reformed vilification laws. As explained by a young African community leader, education should be community-led, noting that "when you provide education to a group, the educators should be from that group".³⁵⁹ He further explained:

"Co-designing and educating from within communities works because there is a shared understanding – knowing each other's story helps people develop trust and guide them to where they need to be".³⁶⁰

The Commission also heard that some communities may be reluctant to approach police, legal services or government agencies due to distrust. Instead, some people prefer to approach community leaders or organisations for help. For this reason, relevant community organisations indicated that they need more support to help their

communities to understand the law, make effective referrals and support people who experience vilification through a complaints process where necessary.³⁶¹

Further investment to enable the delivery of education and the promotion of Victoria's reformed vilification laws is required. Education should be carried out by both the Commission, other key bodies and community organisations to strengthen the link between the law and targeted communities.

Recommendation 19.

The Victorian Government should fund the Victorian Equal Opportunity and Human Rights Commission and other relevant organisations to:

- provide education and support to relevant community organisations to equip them to better support their communities to understand and exercise their rights
- develop targeted educational resources (in partnership with relevant community organisations) on what the law says, who it applies to and options for redress for communities who will be protected by Victoria's reformed vilification laws.

6.2 Addressing the barriers to reporting

As set out in part 4.1.2, there are a range of reasons why people don't report hate conduct or crime. These include a lack of awareness of the law, not knowing where to go to make a report, different cultural perspectives, a reluctance to engage with the criminal justice system, a fear of victimisation, the complex legal tests for vilification, the inability for the Commission to identify unknown respondents, and the inability to make a representative complaint without identifying a named complainant.

As recommended earlier in this submission, there are some changes to the law that will help to address the legislative barriers to reporting. Strengthening community awareness of the law and options for redress will also help to address the barriers to using the RRTA, by ensuring that communities who are targeted by hate understand and know how to exercise their rights (part 6.1).

Another way to encourage and support reporting by diverse communities is to develop simple, accessible and informal reporting tools for people who choose not to make a formal report to the Commission, VCAT or Victoria Police. For example, one respondent to the Commission's survey said that 'reporting avenues/mechanisms need to be simplified, made more accessible and marketed better' and another said that 'simple web-based reporting system would be good'.

In 2019, in partnership with Code for Australia, the Commission developed a Community Reporting Tool that provides new pathways for people to access the Commission. The tool is a simple form that is embedded on the websites of participating community organisations and local councils. The tool allows people visiting those websites to share their experiences of discrimination and vilification. These reports are secure, confidential and delivered directly to the Commission.

The Community Reporting Tool and other online reporting tools should be tested and promoted to any new communities who will be protected by Victoria's reformed vilification laws. The Community Reporting Tool is an effective way to address the barriers to reporting and to ensure that there are alternative pathways to formal reporting.

The Commission also recognises the benefit of other reporting mechanisms that have been proactively developed by communities in Australia, including the

Islamophobia Register, anti-Semitism reporting mechanisms³⁶², and most recently, an internal register to record hate incidents in the African community.³⁶³

6.3 Promoting the celebration of diversity

As set out in part 3.1, negative attitudes towards people because of their identity continue to persist in Australia and can underpin hate conduct in the community. For this reason, it is important to continue to promote respect for and the celebration of diversity in the Victorian community as a key preventative mechanism to reduce hate.

As one participant in the Commission's online survey said, there should be 'more awareness in the community to remove misconceptions/stereotypes about particular races/religions'. The Ballarat African Association also noted the importance of promoting a positive image of diverse communities in Victoria.³⁶⁴ Similarly, during our roundtables on serious harm, religious leaders raised concerns about the negative portrayal of religion and religious communities in the media, the absence of religious minority representation and a lack of 'religious literacy' by mainstream media contributing to a culture hate and bigotry.

To complement any reforms to Victoria's vilification laws, the Commission considers that it would be beneficial to run a public awareness campaign to promote diversity and social cohesion in Victoria, and to increase understanding and respect for communities who are covered by reformed laws. This would help to combat negative attitudes in the community and ensure that the Victorian Government is sending a strong message about the benefits of diversity for the whole community.

Recommendation 20.

The Victorian Government should fund a public awareness campaign to promote diversity and social cohesion in Victoria, and to increase understanding and respect for communities who are disproportionately targeted by hate conduct and crime in the community.

6.4 Improving the response to hate

To effectively respond to hate in our community, it is important that key stakeholders – including law enforcers, courts and tribunals - are equipped with a clear understanding of the law, the nature of the problem and how to effectively and sensitively respond to incidents of hate conduct and crime.

Stakeholders including community organisations, police, prosecutors and judicial officers have the greatest contact with communities who experience hate and should be provided with education to best support the communities they serve. Others such as educators, service providers (e.g. security guards) and employers should also be educated on the law and being an 'active bystander' who can prevent, de-escalate, intervene in and report when a situation arises.

Importantly, education should not only focus on the practical application of the law but on the impact of hate for the people who experience it. For example, one participant in the Commission's online survey considered that there was a need for a 'greater understanding by authorities and those in power of the effects that racism and hate have on the mental state of those who experience it'.

6.4.1 Education and training for police

Police are often first responders to hate crime and play a critical role in identifying, recording and responding to hate crime. In 2010, Victoria Police became the first police force in Australia to develop a specific strategy for combatting hate crimes.³⁶⁵ 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.³⁶⁶

A review of the strategy identified that it has had a limited effect³⁶⁷ which is compounded by longstanding issues that marginalised communities have raised about being under-protected and over-policed, including young South Sudanese Victorians,³⁶⁸ LGBTIQ people³⁶⁹ and Aboriginal Victorians.³⁷⁰

For example, one participant in the Commission's online survey said, "after learning about persistent organisational homophobia within Vic Police, I don't think I would report anything to them unless I was physically assaulted".

The Victorian Aboriginal Legal Service told us that there needs to be greater awareness of criminal offences by police and the importance of using them, noting that police sometimes treat hate crime as a civil rather than criminal issue.³⁷¹

As set out in part 4.3.2, police record some offences as prejudicially motivated by sexual orientation, disability, political belief or activity, race or ethnicity or religion. However, in practice, this has not translated to prosecutions under the RRTA or to the adequate use of s5(2)(daaa) of the *Sentencing Act 1991* (Vic) by prosecutors in sentencing hearings. As explained by Victoria Police, although an offence may be recorded as being prejudice-motivated, a victim's attribute isn't necessarily listed on the charge.

Following the review of Victoria's Police hate crime strategy, Mason et al recommended that education and training for Victoria Police on hate crime should:

- highlight the importance of hate crime prevention and policing
- be engaging and connected with the personal experiences of officers
- reinforce victim-centric approaches already being promoted in the workforce
- be clear that this practice is operationalised within larger performance indicators around human rights principles and community trust.³⁷²

Education and training for police is critical to ensure that police effectively identify, record and respond to hate crime and reduce the barriers to reporting hate crime.

6.4.2 Education and training for prosecutors and judicial officers

As set out in parts 4.2.4 and 4.3.1, there are a range of barriers to prosecuting hate crime under the RRTA or raising prejudice-motivation as an aggravating factor in sentencing hearings.³⁷³ This includes a lack of awareness and familiarity with the RRTA, and the complexity of the criminal offences for serious vilification.

Targeted education and training for prosecutors will help to ensure that prosecutors are aware of, understand and more effectively prosecute hate crime under the RRTA. This includes supporting a better understanding of the nature and impact of hate crime to support prosecutors to deal with hate crime sensitively.

Targeted education and training for judicial officers will help to ensure that courts and tribunals are equipped with a working knowledge of Victoria's reformed vilification laws and the prejudice-motivated sentencing provision, as well as an understanding of the nature and impact of hate crime for targeted communities in Victoria.

Recommendation 21.

The Victorian Government should fund tailored education and training for:

- police and prosecutors on:
 - Victoria's reformed vilification laws
 - section 5(2)(daaa) of the *Sentencing Act 1991* (Vic)
 - identifying, recording and responding to hate crime
 - the nature and impact of hate crime
- judicial officers on Victoria's reformed vilification laws, section 5(2)(daaa) of the *Sentencing Act 1991* (Vic) and the nature and impact of hate crime.

6.5 Strengthening research, data and reporting

Through our consultations, the Commission understands that there is a need for:

- ongoing research on hate conduct and crime (part 6.5.1)
- more effective data collection, monitoring and reporting (part 6.5.2)

6.5.1 Research

The Commission understands that there are gaps in research related to hate conduct and crime in Australia, including in relation to communities who may be protected by Victoria's reformed vilification laws (such as people with a disability)³⁷⁴ and emerging issues such as online hate.³⁷⁵ Research is a critical way of understanding hate conduct and crime and informing an effective response to hate in the community.

6.5.2 Data collection, monitoring and reporting

In order to develop the most effective response to hate in the Victorian community, it is critical to understand the nature and prevalence of the problem through effective data collection, monitoring and reporting. This includes having the flexibility to identify emerging issues, such as online hate, and designing appropriate responses.

As set out in this submission, there are a number of different agencies and organisations that collect data on hate in the Victorian community. These include:

- the Commission's complaint data under the RRTA (part 2.4.1) and reports under the Community Reporting Tool (part 2.1.2)
- Victoria Police's data on reports of serious vilification, offenders processed under the RRTA and recording of prejudice-motivated crime (part 4.1.1)
- The VCAT's data on matters that are resolved or finalised under the RRTA (part 4.1.1)
- data collected by state and national religious and other communities including the Jewish, Muslim and African communities in Australia (part 6.2).

Further, research as such as the annual Scanlon Foundation report, contributes valuable prevalence data. 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.³⁷⁶

As explained by Matteo Vergani from the Centre for Resilient and Inclusive Societies, there is a need to connect different data collection initiatives in Australia and create

platforms for other communities to collect data.³⁷⁷ For some communities, such as the Jewish community, there is a more systematic approach to collecting data, which means that the data on nature and prevalence is more reliable.³⁷⁸ For other communities, limitations on data collection practices and a lack of resources meant that data is not as reliable.

The Commission also heard that data collected by Victoria Police is not effective because police don't record and define hate crime in a consistent way, and it is not clear when and where hate crime incidents happen – with an inability to identify whether there is more hate crime in some geographic areas.³⁷⁹

Other jurisdictions, such as the United Kingdom, make it mandatory for police to record a crime as a hate crime if the victim believes it is a hate crime³⁸⁰ and enable self-reporting into a joined up national register through an online reporting tool, True Vision. In the United Kingdom, government agencies also produce regulator reports on hate crime data.³⁸¹

Significantly, there is limited monitoring or reporting of hate conduct and crime in Victoria, which limits the ability to understand and respond to hate in the community. The Commission also supports calls from the Australian Human Rights Commission for federal investment in quantitative research on the nature and prevalence of serious harms, including hate conduct and discrimination, which could include the creation of a national data register to be overseen by an independent body, working closely with state and federal agencies and communities.

Recommendation 22.

The Victorian Government should fund ongoing research on hate conduct and crime in Victoria, including emerging issues such as online hate.

Recommendation 23.

The Victorian Government should work in partnership with relevant government agencies in Victoria – including the Victorian Equal Opportunity and Human Rights Commission, Victoria Police, the Crime Statistic Agency and the Victorian Civil and Administrative Tribunal - to develop a comprehensive strategy for collecting, monitoring and reporting government data on hate conduct and crime in Victoria.

Appendix A: Acknowledgment of stakeholders

We acknowledge and thank the many organisations, community members, academics and advocates who helped inform this submission. We particularly acknowledge the generosity and courage of community members who shared with us their personal stories of vilification, and in doing so, have enriched our understanding of hate conduct and its serious impact on individuals and communities.

Organisations

African Australian Community Leadership Forum

Australian Multicultural Foundation

Australian Muslim Women's Centre for Human Rights

Ballarat African Association

Disability Discrimination Legal service

Ethnic Communities Council of Victoria

Federation of Community Legal Centres

Human Rights Law Centre

Intersex Human Rights Australia

Islamic Council of Victoria

Jewish Christian Muslim Association of Australian

Jewish Community Council of Victoria

Law Institute of Victoria

Liberty Victoria

Life Works

Melbourne Employment Forum

Pantjan Society of Victoria

St Kilda Legal Service (LGBTIQ Legal Service)

Thorne Harbour Health

Victorian CASA Forum

Victoria Legal Aid

Victorian Aboriginal Legal Service

Victorian Advocacy League for Intellectual Disability

Victorian Council of Social Service

Victorian Mental Illness Awareness Council

Victorian Multicultural Commission

Women's Health Victoria

Women's Legal Service Victoria

Zoe Belle Gender Collective

¹ *Cottrell v Smith* [2019] VCC 2142, 19.

² Derya Iner, *Islamophobia in Australia Report II (2017-2018)*, (Charles Sturt University and ISRA, 2019); David Graham & Andrew Markus, *GEN17 Australian Jewish Community Survey: Preliminary Findings* (2018) 6 <https://www.monash.edu/_data/assets/pdf_file/0009/1531791/gen17-initial-findings-report-online-version-final-22_3.pdf>; Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2019*, (Report, 24 November 2019).

³ 'White supremacist concert in Melbourne cannot be stopped, Premier says' *ABC News* (online, 8 October 2019) <<https://www.abc.net.au/news/2019-10-08/white-supremacist-neo-nazi-concert-in-melbourne-to-go-ahead/11582120>>

⁴ 'Anti-Semitic bullying at Melbourne school prompts call for more Holocaust education' *SBS News* (online, 4 October 2019) <<https://www.sbs.com.au/news/anti-semitic-bullying-at-melbourne-schools-prompts-call-for-more-holocaust-education>>; Amy Greenbank 'Islamophobic abuse mostly directed at women wearing headscarves while shopping, study finds' *ABC News* (online, 19 December 2019) <<https://www.abc.net.au/news/2019-11-18/muslim-women-enduring-most-islamophobia-in-australia/11708376>>.

⁵ Sean Wales and Leonie Thorne 'Nazi flag take down amid calls to strengthen anti-vilification laws' *ABC News* (online, 16 January 2020) <<https://www.abc.net.au/news/2020-01-14/nazi-flag-flown-in-north-west-victorian-town-of-beulah/11866096>>.

⁶ Luke Henriques-Gomes 'South Sudanese -Australians report racial abuse intensified after "African gangs" claims' *The Guardian* (online, 4 November 2018) <<https://www.theguardian.com/world/2018/nov/04/south-sudanese-australians-report-abuse-intensified-after-african-gangs-claims>>.

⁷ Due to the inability for stakeholders to attend focus groups at a busy time of the year, the Commission cancelled scheduled focus groups with Aboriginal and Torres Strait Islander stakeholders and stakeholders from the gender equality and violence against women sectors. We instead undertook interviews with these stakeholders.

⁸ Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law: 2nd Edition* (Victorian Equal Opportunity and Human Rights Commission, 2019) <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/victorian-discrimination-law>>.

⁹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35, Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, 13.

¹⁰ Explanatory Memorandum, Racial and Religious Tolerance Bill 2001, 6.

¹¹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35, Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, 25.

¹² Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill (2006), 13.

¹³ *Cottrell v Smith* [2019] VCC 2142, 95-98.

¹⁴ Explanatory Memorandum, Racial and Religious Tolerance Bill (2001), cl 24.

¹⁵ *Racial and Religious Tolerance Act 2001* (Vic), ss 24(4) and 25(4).

¹⁶ *Racial and Religious Tolerance Act 2001* (Vic), s 26.

¹⁷ *Cottrell v Smith* [2019] VCC 2142, 64, 19.

¹⁸ *Cottrell v Smith* [2019] VCC 2142, 64.

¹⁹ Judicial College of Victoria, *Victorian Sentencing Manual*, Part 5.2.5 (Hate crimes), 81 <<https://resources.judicialcollege.vic.edu.au/article/669236>>.

²⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3358 (Rob Hull, Attorney-General).

²¹ *Racial Discrimination Act 1975* (Cth), s 18C.

²² See Commonwealth Attorney-General, 'Religious Freedom Bills – Second Exposure Drafts' (2020) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>> (accessed 10 January 2020).

²³ Victorian Equal Opportunity and Human Rights Commission, Submission to Commonwealth Attorney-General, (*Religious Freedom Bills Exposure Draft*, 2 October 2019) <<https://www.humanrightscommission.vic.gov.au/policy-submissions/item/1840-submission-on-the-draft-religious-discrimination-bill-oct-19>>.

²⁴ Religious Discrimination Bill Second Exposure Draft 2019 (Cth)

²⁵ Religious Discrimination Bill Second Exposure Draft 2019 (Cth) cl 42(2).

²⁶ *Racial and Religious Tolerance Act 2001* (Vic), s 19(1).

²⁷ *Racial and Religious Tolerance Act 2001* (Vic), s 20.

²⁸ See *Racial and Religious Tolerance Act 2001* (Vic), s 21 and s 3 (definition of ‘person’) read in conjunction with section 38 of the Interpretation of Legislation Act 1984 (Vic) (definition of ‘person’). However, for clarity, it should be made clear in the explanatory memorandum to the legislation that the law is intended to extend beyond natural persons and unincorporated associations, including to bodies politic and corporations.

²⁹ *Racial and Religious Tolerance Act 2001* (Vic), s 23.

³⁰ *Racial and Religious Tolerance Act 2001* (Vic), s 23C.

³¹ Data provided by the Victorian Civil and Administrative Tribunal on 18 December 2019 in response to a data request by VEOHRC.

³² *Khalil v Sturgess* [2005] VCAT 2446; and *Ordo Templi Orientis v Legg* [2007] VCAT 1484.

³³ *Khalil v Sturgess* [2005] VCAT 2446, 58.

³⁴ *Ordo Templi Orientis v Legg* [2007] VCAT 1484.

³⁵ See Victoria Police, ‘Prejudice and racial and religious vilification’, (webpage, <https://www.police.vic.gov.au/prejudice-and-racial-and-religious-vilification> (accessed 9 January 2020)).

³⁶ *Racial Discrimination Act 1975* (Cth).

³⁷ *Racial and Religious Tolerance Act 2001* (Vic), ss 7, 8, 24 and 25.

³⁸ *Racial and Religious Tolerance Act 2001* (Vic) s 15.

³⁹ Australian Human Rights Commission, *Federal Discrimination Law Resource* (2016), 385.

⁴⁰ eSafety, ‘Key Issues’ (eSafety Commission, 28 January 2020) <<https://www.esafety.gov.au/key-issues>>; eSafety, ‘Women’ (eSafety Commission, 28 January 2020) <https://www.esafety.gov.au/women>.

⁴¹ Department of Communications and the Arts, *Online Safety Legislative Reform: Discussion Paper*, (December 2019), 32-33.

⁴² *Enhancing Online Safety Act 2015* (Cth), s 5(1)(b).

⁴³ eSafety, ‘Our legislative functions’ (eSafety Commission, 28 January 2020) <<https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions>>

⁴⁴ Douglas, Michael. “‘Their Evil Lies in the Grapevine Effect’: Assessment of Damages in Defamation by Social Media.” (2015) 20(4) *Media and Arts Law Review* 20, 367.

⁴⁵ See, for example, New Zealand’s scheme arising from the *Harmful Digital Communications Act 2015* (NZ), the *Netzwerkdurchsetzungsgesetz* (NetzDG) law, in Germany, and the Online Harms white paper, proposing a statutory duty of care in the United Kingdom: HM Government, *Online Harms White Paper*, (April 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf>; William Erickson and Olivia Knodt ‘Germany’s NetzDG: A key test for combatting online hate’ (2018) 2018/9, *CEPS Policy Insight*, 1.

⁴⁶ For example, see Sean Wales and Leonie Thorne, above n 5.

⁴⁷ Andrew Markus, *Mapping Social Cohesion: 2019* (Scanlon Foundation, 2019) 60 <<https://scanloninstitute.org.au/sites/default/files/2019-11/Mapping%20Social%20Cohesion%202019.pdf>>.

⁴⁸ *Id.*

⁴⁹ Tanya D’Souza, Laura Griffin, Nicole Shackelton, and Danielle Walt, ‘Harming women with words: The failure of Australian law to prohibit gendered hate speech’, (2018) 41(3) *UNSW Law Journal*, 939.

⁵⁰ Australia Institute (2019), Trolls and polls – the economic costs of online harassment and cyberhate’ <https://www.tai.org.au/sites/default/files/P530%20Trolls%20and%20polls%20-%20surveying%20economic%20costs%20of%20cyberhate%20%255bWEB%255d_1.pdf>; Amnesty International, Australia: Poll Reveals Alarming Impact of Online Abuse Against Women (7 February 2018), available at <https://www.amnesty.org.au/australia-poll-reveals-alarming-impact-online-abuse-women/>.

⁵¹ Advisory Committee, *Report into Racial Vilification in Victoria*, (Report of the Committee to advise the Attorney-General on racism in Victoria, March 1992).

⁵² Interview with the Islamic Council of Victoria, (Victorian Equal Opportunity and Human Rights Commission staff, Teleconference, 10 December 2019).

⁵³ *Id.*

⁵⁴ Australian Communications and Media Authority, *Communications Report 2017-18* (Report, 2019), 5 <<https://www.acma.gov.au/sites/default/files/2019-08/Communications%20report%202017-18.pdf>>.

⁵⁵ For example, *Clarke v Nationwide News Pty Ltd trading as the Sunday Times* (No 2) FCA 990.

⁵⁶ For example, see Amnesty International Australia above n 50.

⁵⁷ Australia Institute above n 50. Gorman unpacks the gendered elements of online hate speech: Ginger Gorman, *Troll Hunting: Inside the world of online hate and its human fallout*. (Hardie Grant Publishing, 2019).

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- ⁵⁸ Sharing intimate images without consent is unlawful under section 44B the *Enhancing Online Safety Act 2015* (Cth) and under section 41DA of the *Summary Offences Act 1966* (Vic). Research by the eSafety Commissioner revealed that 1 in 10 Australian adults had experienced image-based abuse: eSafety Commissioner, *Image-based abuse: National survey – Summary Report* (eSafety Commissioner, October 2017) 2 < <https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf>>; Nicola Henry, Anastasia Powell and Asher Flynn, *Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse. A Summary Report*. (Report, Melbourne: RMIT University, 2017).
- ⁵⁹ David Douglas, ‘Doxing: a conceptual analysis.’ (2016) 18(3) *Ethics and information technology*: 199-210.
- ⁶⁰ James Phillips and Leon Mann, ‘Suicide baiting in the internet era.’ (2019) 92, 29.
- ⁶¹ For example, see Christopher Mims, ‘It’s Hard to Spot the Terrorists Among the Trolls’ *The Wall Street Journal* (online, 15 March 2019) < <https://www.wsj.com/articles/its-hard-to-spot-the-terrorists-among-the-trolls-11552685615>>
- ⁶² Tommi Grondahl, Luca Pajola, Mika Juuti, Mauro Conti and N Asokan, ‘All you need is ‘love’’: Evading hate speech detection’ (Proceedings of the 11th ACM Workshop on Artificial Intelligence and Security, January 2018).
- ⁶³ Focus group with LGBTIQ stakeholders (Victorian Equal Opportunity and Human Rights Commission, 3 December 2019).
- ⁶⁴ Focus group with multicultural and multifaith Victorians (Victorian Equal Opportunity and Human Rights Commission, 26 November 2019).
- ⁶⁵ Ginger Gorman, *Troll Hunting: Inside the world of online hate and its human fallout*. (Hardie Grant Publishing, 2019). See also, a 6-week study by the Pew Research Centre found that approximately two-thirds of all tweets with URL links were likely posted by fake accounts (“bots”): Pew Research Center, *5 things to know about bots on Twitter*. (Report, 9 April 2018) <<http://www.pewresearch.org/fact-tank/2018/04/09/5-things-to-know-about-bots-on-twitter/>>. This has been further raised in the Commission’s consultations with legal and academic stakeholders. A comprehensive metanalysis on cyberracism found that sophisticated strategies included the use of reframing issues to reinforce white oppression, using humour to mainstream racism, the use of power and privilege in debates, the trivialisation and denial of racism, the denigration of outgroups, the reframing the meaning of news stories, and creating moral panic about an outgroup: Ana-Maria Bliuc, Nicholas Faulkner, Andrew Jakubowicz, and Craig McGarty, ‘Online networks of racial hate: A systematic review of 10 years of research on cyber-racism’ (2018) 87 *Computers in Human Behavior*, 75, 76-77.
- ⁶⁶ Interview with Professor Andrew Jakubowicz, (Victorian Equal Opportunity and Human Rights Commission staff, Teleconference, 10 December 2019).
- ⁶⁷ eSafety Commissioner & the Department of Education and Training, *Online hate, bullying and violence*, 2016 (Report, 2016) <<https://www.esafety.gov.au/about-us/research/young-people-social-cohesion/online-hate-bullying-violence>>.
- ⁶⁸ Victorian Equal Opportunity and Human Rights Commission, *Multicultural and Multifaith Engagement and Action Plan 2018-2022* (2018) < https://www.humanrightscommission.vic.gov.au/home/about-us/action-plans/item/download/9045_6f472685b931abd99794f22200055bdd>.
- ⁶⁹ Alison Markwick, Zahid Ansari, Darren Clinch, John McNeil, ‘Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria: a cross-sectional population-based study’ (2019) 19(1) *BMC public health*, 309.
- ⁷⁰ Angeline Ferdinand, Yin Paradies, Margaret Kelaher, *Mental health impacts of racial discrimination in Victorian Aboriginal communities*. (Report, Lowitja Institute, 2013) 9-10.
- ⁷¹ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014-15*, (2017) Table 14, <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4714.02014-15?OpenDocument>>.
- ⁷² Katherine Gelber and Luke Mcnamara, ‘Anti-vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided’ (2016) 39 *UNSWLJ*, 501.
- ⁷³ Ibid.
- ⁷⁴ Jormey Temple, Margaret Kelaher, and Yin Paradies, ‘Prevalence and context of racism experienced by older Aboriginal and Torres Strait Islanders.’ (2019) 38(1) *Australasian Journal on Ageing*, 39.
- ⁷⁵ Information provided by the Victorian Aboriginal Legal Service on 9 December 2019.
- ⁷⁶ Human Rights and Equal Opportunities Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991).

⁷⁷ On 11 and 27 June 2019, the Commission and the Australian Human Rights Commission held two roundtables in Sydney and Melbourne with religious leaders on serious harms experienced by religious communities. Leaders representing a wide variety of religious organisations, as well as academic researchers with relevant expertise, participated in these roundtables. A position paper based on these roundtables will be published in early 2020.

⁷⁸ Derya Iner, *Islamophobia in Australia Report II (2017-2018)*, (Charles Sturt University and ISRA, 2019) 14.

⁷⁹ *Ibid* 14.

⁸⁰ *Ibid* 5.

⁸¹ *Id.*

⁸² *Ibid* 4.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Ibid* 6.

⁸⁷ *Ibid* 5.

⁸⁸ *Ibid* 6.

⁸⁹ *Ibid* 9.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Andrew Oboler, *Spotlight on Anti-Muslim Internet Hate - Interim Report*. (Online Hate Prevention Institute Report, 2015) <<http://ohpi.org.au/anti-muslim-hate-interim-report/>>

⁹⁵ Executive Council of Australian Jewry, above n 2 7.

⁹⁶ *Ibid* 26.

⁹⁷ *Ibid* 7.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ David Graham & Andrew Markus, *GEN17 Australian Jewish Community Survey: Preliminary Findings* (2018) 6 < https://www.monash.edu/_data/assets/pdf_file/0009/1531791/gen17-initial-findings-report-online-version-final-22_3.pdf>

¹⁰¹ Executive Council of Australian Jewry above n 2 33-64.

¹⁰² Centre for Multicultural Youth, 'Don't drag me into this', *Growing up South Sudanese in Victoria* (Report, October 2018), 4 < <https://www.cmy.net.au/sites/default/files/publication-documents/Don%27t%20Drag%20Me%20Into%20This%20-%20Research%20Report%20Oct%202018%20FINAL.pdf>>

¹⁰³ *Id.*

¹⁰⁴ Interview with the Ballarat African Association (Victorian Equal Opportunity and Human Rights staff, Teleconference, 29 November 2019).

¹⁰⁵ Focus group with multicultural and multifaith Victorians above n 64.

¹⁰⁶ Interview with African Ambassador Barry Berih (Victorian Equal Opportunity and Human Rights Commission, in-person interview, 3 December 2019).

¹⁰⁷ Victorian Equal Opportunity and Human Rights Commission, *Reporting Racism: What you say matters* (2013)

<https://www.humanrightscommission.vic.gov.au/media/k2/attachments/Reporting_Racism_Web_low_res.pdf>

¹⁰⁸ Participants were able to give more than one answer, indicating they could have personally experienced or witnessed racism, or seen or received racist materials.

¹⁰⁹ *Anti-Discrimination Act 1977* (NSW), s 49ZT; *Discrimination Act 1991* (ACT), s 67A(1); *Anti-Discrimination Act 1991* (Qld), s 124A(1); and *Anti-Discrimination Act 1998* (Tas), ss 17(1) and 19.

¹¹⁰ *Anti-Discrimination Act 1977* (NSW), s 38S; *Discrimination Act 1991* (ACT), s 67A(1); *Anti-Discrimination Act 1991* (Qld), s 124A(1); and *Anti-Discrimination Act 1998* (Tas), ss 17(1) and 19.

¹¹¹ *Discrimination Act 1991* (ACT), s 67A(1); and *Anti-Discrimination Act 1998* (Tas), ss 17 and 19.

¹¹² *Anti-Discrimination Act 1998* (Tas), s 17(1).

¹¹³ *Discrimination Act 1991* (ACT), s 67A(1); *Anti-Discrimination Act 1998* (Tas), ss 17 and 19.

¹¹⁴ *Discrimination Act 1991* (ACT), ss 67A(1)(c) and *Anti-Discrimination Act 1977* (NSW) ss 49ZXA-49ZXB.

¹¹⁵ *Anti-Discrimination Act 1998* (Tas), s 17(1).

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- ¹¹⁶ Racial Discrimination Act 1975 (Cth) s 18C; *Discrimination Act 1991* (ACT) s 67A(1); *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld), s 124A(1); *Anti-Discrimination Act 1998* (Tas), ss 17(1) and 19; *Anti-Discrimination Act 1991* (Qld), s 124A(1); *Equal Opportunity Act 1984* (WA) ss 49A-49C.
- ¹¹⁷ *Discrimination Act 1991* (ACT) s 67A(1); *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1998* (Tas), ss 17(1) and 19.
- ¹¹⁸ Human Rights Law Centre, *End the Hate: Responding to hate speech and violence against the LGBTI community*, (Report, 13 December 2018).
- ¹¹⁹ William Leonard & Bianca Fileborn, *Policing for Same Sex Attracted and Sex and Gender Diverse Young Victorians* (Report, Australian Research Centre in Sex, Health and Society, 2018), v.
- ¹²⁰ Bianca Fileborn, Australian Research Centre in Sex, Health and Society, *LGBTIQ+ experiences of public harassment* (Report, 2016) (cited in Human Rights Law Centre, *End the Hate, Responding to prejudice motivated speech and violence against the LGBTI community* (Report, 2018) 8).
- ¹²¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights: National Consultation Report* (Report, 2015), 16.
- ¹²² Kerry Robinson, Peter Bansel, Nida Denson, Georgia Ovenden, and Cristyn Davies, *Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexually Diverse* (Young and Well Research Cooperative, 2014), 49.
- ¹²³ Australian Human Rights Commission, 'Face the Facts, Lesbian, Gay, Bisexual, Trans and Intersex People', <<https://www.humanrights.gov.au/our-work/education/face-facts-lesbian-gay-bisexual-trans-and-intersex-people>>.
- ¹²⁴ Interview with Tony Briffa from Intersex Human Rights Australia, (Victorian Equal Opportunity and Human Rights Commission, teleconference, 9 December 2019).
- ¹²⁵ *Equal Opportunity Act 2010* (Vic), part 6.
- ¹²⁶ Interview with Dr Laura Griffin and Nicole Shackleton, (Victorian Equal Opportunity and Human Rights Commission staff, Teleconference, 4 December 2019). D'Souza et al, above n 49.
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- ¹²⁹ *Ibid* 19.
- ¹³⁰ *Ibid* 20.
- ¹³¹ *Ibid* 21.
- ¹³² Interview with the Women's Legal Service Victoria, (Victorian Equal Opportunity and Human Rights Commission staff, in-person interview, 10 December 2019).
- ¹³³ *Id.*
- ¹³⁴ *Id.*
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- ¹⁴⁰ Focus group with the disability sector (Victorian Equal Opportunity and Human Rights Commission, 2 December 2019).
- ¹⁴¹ *Id.*
- ¹⁴² *Id.*

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- ¹⁴³ Interview with VALID (Victorian Equal Opportunity Human Rights Commission, teleconference, 16 December 2019).
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- ¹⁴⁶ Ibid 31.
- ¹⁴⁷ Ibid 13.
- ¹⁴⁸ Equal Opportunity Tasmania, *Annual Report 2018-2019* (Report, 2019) 23-24.
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- ¹⁵⁰ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2018-2019*, (October, 2019) 13.
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- ¹⁵⁸ Griffin and Shackleton above n 126; Tanya D'Souza et al, above n 49.
- ¹⁵⁹ Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' in Mari J Matsuda (ed), *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendments* (New York: Routledge, 2018) 89, 92–3.
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- ¹⁶¹ Yin Paradies, A systematic review of empirical research on self-reported racism and health, *International Journal Of Epidemiology*, 35(4), 888-901.
- ¹⁶² Angeline Ferdinand, Paradies and Kehaler, above n 70, 1.
- ¹⁶³ Id.
- ¹⁶⁴ Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, 2014-15, Summary Results for States and Territories.
- ¹⁶⁵ Angeline Ferdinand, Paradies and Kehaler, above n 70, 2.
- ¹⁶⁶ Amanuel Elias and Yin Paradies, 'Estimating the mental health costs of racial discrimination,' (2016) 16(1)*BMC Public Health*, 7.
- ¹⁶⁷ Gelber and McNamara above n 72.
- ¹⁶⁸ Id.
- ¹⁶⁹ Focus group with multicultural and multifaith Victorians above n 64.
- ¹⁷⁰ Centre for Multicultural Youth above n 102.
- ¹⁷¹ Berih above n 106.
- ¹⁷² Human Rights Law Centre above n 118, 14.
- ¹⁷³ Id.
- ¹⁷⁴ Beyond Blue, *In my shoes: Experiences of discrimination, depression and anxiety among gay, lesbian, bisexual, trans and intersex people* (Report, 2012).
- ¹⁷⁵ Sarah Swannell, Graham Martin, and Andrew Page, 'Suicidal ideation, suicide attempts and non-suicidal self-injury among lesbian, gay, bisexual and heterosexual adults: Findings from an Australian national study' (2016) 50(2) *Australian & New Zealand Journal of Psychiatry*, 145.
- ¹⁷⁶ William Leonard, Marian Pitts, Anne Mitchell, Anthony Lyons, Anthony Smith, Sunil Patel, Murray Couch, and Anna Barrett, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians* (Report, 2012) VIII.
- ¹⁷⁷ Id.
- ¹⁷⁸ Strauss, Cook, Winter, Watson, Toussaint and Lin, Telethon Kids Institute, *Trans Pathways: The mental health experiences and care pathways of trans young people* (2017) (cited in Human Rights Law Centre, above n 118, 14).

¹⁷⁹ Human Rights Law Centre above n 118.

¹⁸⁰ Sally Rugg, 'The campaign against Safe Schools was never about concern for kids' the Sydney Morning Herald (online, 17 April 2017) <<https://www.smh.com.au/opinion/the-campaign-against-safe-schools-was-never-about-concern-for-kids-20170417-gvm9lm.html>>

¹⁸¹ For overview of debates around reforms, see: Bianca Fileborn, Hannah McCann, Matthew Mitchell, Priya Kunjan 'Victorian changes to gender on birth certificate will not increase sexual violence. Here's why' The Conversation (online, 22 August 2019) <<https://theconversation.com/victorian-changes-to-gender-on-birth-certificate-will-not-increase-sexual-violence-heres-why-122125>>

¹⁸² See: Equality Australia 'Civil Society Condemns Draft Religious Discrimination Act' (Media Release 28 August 2019) <<https://equalityaustralia.org.au/civil-society-condemns-draft-religious-discrimination-act/>>.

¹⁸³ Australia Institute above n 50, 6.

¹⁸⁴ Ibid 9.

¹⁸⁵ Ibid 11.

¹⁸⁶ Amnesty International above n 50.

¹⁸⁷ Id.

¹⁸⁸ GenVic, *Don't read the comments: Enhancing online safety for women working in the media* (Report, 2019) <https://www.genvic.org.au/wp-content/uploads/2019/10/GV_MEA_PolicyDoc_V5_WEB.pdf>.

¹⁸⁹ Amnesty International above n 50; Australia Institute above n 50.

¹⁹⁰ Gorman above n 57; Amnesty International above n 50.

¹⁹¹ Ann John, Alexander Charles Glendenning, Amanda Marchant, Paul Montgomery, Anne Stewart, Sophie Wood, Keith Lloyd, Keith Hawton, 'Self-Harm, Suicidal Behaviours, and Cyberbullying in Children and Young People: Systematic Review' (2018) 20(4) *Journal of Medical Internet Research*, 129.

¹⁹² *Khalil v Sturgess* [2005] VCAT 2446; and *Ordo Templi Orientis v Legg* [2007] VCAT 1484.

¹⁹³ Data provided to VEOHRC by the Crimes Statistic Agency on 13 December 2019.

¹⁹⁴ For example, one participant in the Commission's Reporting Racism project downplayed their own experience of vilification in explaining why they did not report: 'Don't think police would be interested anyway because it was mainly verbal abuse. And it is too much trouble and a waste of time to report it because there is little that the police will do and [they are] are too busy with crimes:' Above n 107, 34.

¹⁹⁵ Ballarat African Association above n 104. This was also reflected in our Reporting Racism Project above n 107, 33.

¹⁹⁶ Focus group with multicultural and multifaith Victorians above n 64.

¹⁹⁷ Information provided by the Victorian Aboriginal Legal Service on 9 December 2019.

¹⁹⁸ Focus group with multicultural and multifaith Victorians above n 64.

¹⁹⁹ Focus group with multicultural and multifaith Victorians above n 64.

²⁰⁰ Data provided to the Commission on 10 December 2019: Islamic Council of Victoria, *Understanding How Victorian Muslims Respond to Islamophobia* (Survey, December 2018 – January 2019).

²⁰¹ For example, Settlement Council of Australia, *Access to Justice for People from Refugee and Migrant Background in Australia*, (Report, 2019), 6.

²⁰² Law Council of Australia, *The Justice Project Final Report – Recent Arrivals to Australia*, (Report, August 2018), 30.

²⁰³ Settlement Council of Australia above n 201, 5.

²⁰⁴ Focus group with multicultural and multifaith Victorians above n 64.

²⁰⁵ Harkins, *Bridging Two Worlds: Aboriginal English and Multi-cultural Understanding* (University of Queensland Press, 1994); D Morgan, M Slade, C Morgan, 'Aboriginal Philosophy and its Impact on Health Care Outcomes' (1997) 21(6) *Australian and New Zealand Journal of Public Health* 597.

²⁰⁶ Harkins, 'Shame add Shyness in the Aboriginal Classroom' (14 August 2008) 10(2) *Australian Journal of Linguistics* 293; D Morgan, M Slade, C Morgan, 'Aboriginal Philosophy and its Impact on Health Care Outcomes' (1997) 21(6) *Australian and New Zealand Journal of Public Health* 597.

²⁰⁷ Law Council of Australia above n 202, 30.

²⁰⁸ Focus group with multicultural and multifaith Victorians above n 64.

²⁰⁹ Gail Mason, JaneMaree Maher, Jude McCulloch, Sharon Pickering, Rebecca Wickes, Carolyn McKay, *Policing Hate Crime: Understanding Communities and Prejudice*, (Routledge, 2017), 112.

²¹⁰ Id.

²¹¹ Id.

²¹² *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 19 (Nettle JA and Neave JA agreeing at 159).

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- ²¹³ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 159.
- ²¹⁴ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 255.
- ²¹⁵ *Bennett v Dingle* [2013] VCAT 1945, 46.
- ²¹⁶ *Bennett v Dingle* [2013] VCAT 1945, 45.
- ²¹⁷ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 34 and 173.
- ²¹⁸ *Fletcher v Salvation Army* [2005] VCAT 1523, 5-6.
- ²¹⁹ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 14.
- ²²⁰ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 14, 159 (Neave JA).
- ²²¹ *Sisalem v The Herald & Weekly Times Ltd* [2016] VCAT 1197, 5.
- ²²² *Sisalem v The Herald & Weekly Times Ltd* [2016] VCAT 1197, 58.
- ²²³ *Sisalem v The Herald & Weekly Times Ltd* [2016] VCAT 1197, 62.
- ²²⁴ *Eatock v Bolt* (2011) 197 FCR 261
- ²²⁵ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 67.
- ²²⁶ Explanatory Memorandum, Racial and Religious Tolerance Bill 2001 (Vic), 5-6.
- ²²⁷ *Fletcher v Salvation Army* [2005] VCAT 1523, 7.
- ²²⁸ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 90.
- ²²⁹ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 91.
- ²³⁰ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 91.
- ²³¹ See *Charter of Human Rights and Responsibilities Act 2001* (Vic) s 14(1)(b).
- ²³² *Criminal Code Act 1995* (Cth) s 80.2A; *Crimes Act 1900* (NSW) s 93Z; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1991* (Qld) s 131A(1); *Criminal Code Act Compilation Act 1913* (WA) ss 77, 78, 79, 80.
- ²³³ Information provided by the Victorian Aboriginal Legal Service on 9 December 2019.
- ²³⁴ Women's Legal Service Above n 132.
- ²³⁵ *Australian Human Rights Commission Act 1986* (Cth), s 46PI; *Human Rights Commission Act 2005* (ACT), s 73; *Anti-Discrimination Act 1977* (NSW), s 90B; *Anti-Discrimination Act 1998* (Tas), s 97; *Anti-Discrimination Act 1991* (Qld), s 156; and *Equal Opportunity Act 1984* (WA), s 86.
- ²³⁶ Interview with the Prosecutions Court Unit, Legal Services Department and the Research and Training Unit, Police Prosecutions Unit, (Victorian Equal Opportunity and Human Rights Commission, in-person interview, 29 November 2019).
- ²³⁷ *Summary Offences Act 1966* (Vic) s 23 and 27.
- ²³⁸ Joe Hinchliffe, 'Shocking video emerges after two women and child "racially abused" on Melbourne train' *the Age* (online, 13 January 2019) <<https://www.theage.com.au/national/victoria/shocking-video-emerges-after-two-women-and-child-racially-abused-on-melbourne-train-20190113-p50r56.html>>
- ²³⁹ Adam Cooper, 'Man jailed for racist bus rant' *the Age* (online, 17 January 2014) <<https://www.theage.com.au/national/victoria/man-jailed-for-racist-bus-rant-20140117-30zyx.html#ixzz3swMOnTcc>>.
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- ²⁴¹ Interview with the Prosecutions Court Unit above n 236.
- ²⁴² *Id.*
- ²⁴³ Professor Simon Rice and Professor Neil Rees, Submission no 36 to the Standing Committee on Law and Justice, *Racial vilification law in NSW* (19 March 2013) <<https://www.parliament.nsw.gov.au/lcdocs/submissions/36180/0036%20Prof%20Rice%20and%20Prof%20Rees.pdf>>, 6.
- ²⁴⁴ Interview with the Prosecutions Court Unit above n 236.
- ²⁴⁵ Standing Committee on Law and Justice, *Racial vilification law in New South Wales*, (Fina3 December 2013, 73.
- ²⁴⁶ *Id.*
- ²⁴⁷ *Crimes Act 1900* (NSW) s 93Z.
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- ²⁴⁹ *Criminal Code Act Compilation Act 1913* (WA) s 77.
- ²⁵⁰ *Criminal Code Act Compilation Act 1913* (WA) s 78.
- ²⁵¹ *Anti-Discrimination Act 1991* (Qld) s 131A(1).
- ²⁵² *Criminal Code Act 1995* (Cth), 80.2A.
- ²⁵³ *Criminal Code Act 1995* (Cth), 80.2B.
- ²⁵⁴ *Summary Offences Act 1966* (Vic) s 23.
- ²⁵⁵ *Summary Offences Act 1966* (Vic) s 24.
- ²⁵⁶ *Summary Offences Act 1966* (Vic) s 31.
- ²⁵⁷ *Summary Offences Act 1966* (Vic) s 9.

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- ²⁵⁸ *Summary Offences Act 1966* (Vic) s 17.
- ²⁵⁹ *Crimes Act 1958* (Vic) s 21.
- ²⁶⁰ *Crimes Act 1958* (Vic) s 20.
- ²⁶¹ *Crimes Act 1958* (Vic) s 198.
- ²⁶² *Crimes Act 1958* (Vic) s 195H.
- ²⁶³ *Crimes Act 1958* (Vic) s 197.
- ²⁶⁴ *Crimes Act 1958* (Vic) s 16.
- ²⁶⁵ *Crimes Act 1958* (Vic) s 17.
- ²⁶⁶ *Crimes Act 1958* (Vic) s 195I.
- ²⁶⁷ *Criminal Code Act 1995* (Cth), Div 474.17.
- ²⁶⁸ *Crimes Act 1958* (Vic) ss 321G, 321I.
- ²⁶⁹ *Crimes Act 1958* (Vic) s 31.
- ²⁷⁰ *R v Gouros* [2009] VCC 1731 (racial prejudice); *Senior Constable Emma Kerry v Bilal Ali* (unreported, Magistrates' Court of Victoria, 17 October 2011 (homosexual prejudice)); *Senior Constable Emma, Kerry v Hussain El Halabi* (Unreported, Magistrates' Court of Victoria, 19 December 2011 (homosexual prejudice)); *R v O'Brien* [2012] VSC 592 (racial prejudice).
- ²⁷¹ Judicial College of Victoria above n 19 part 5.2.5., citing *R v O'Brien* [2012] VSC 592, 37.
- ²⁷² LGBTIQ Focus Group above n 63.
- ²⁷³ Human Rights Law Centre above n 118, 22.
- ²⁷⁴ Data provided to VEOHRC by the Crimes Statistic Agency on 13 December 2019.
- ²⁷⁵ Gail Mason and Andrew Dyer, A negation of Australia's fundamental values: Sentencing Prejudice-Motivated Crime, *Monash University Law Review*, Vol 36:871, 891.
- ²⁷⁶ Gail Mason and Andrew Dyer, A negation of Australia's fundamental values: Sentencing Prejudice-Motivated Crime, *Monash University Law Review*, Vol 36:871, 891.
- ²⁷⁷ *R v Rintoull* [2009] VSC 617, 74-76.
- ²⁷⁸ *R v Rintoull* [2009] VSC 617, 106.
- ²⁷⁹ *R v Rintoull* [2009] VSC 617, 108.
- ²⁸⁰ Focus group with the legal and academic sectors (Victorian Equal Opportunity and Human Rights Commission, 5 December 2019).
- ²⁸¹ LGBTIQ Focus Group above n 63.
- ²⁸² Ballarat African Association above n 104.
- ²⁸³ The definition of sexual orientation should be defined consistently with the definition in the Sex Discrimination Act 1984 (Cth).
- ²⁸⁴ The definition of gender identity should be consistent with the definition in the Sex Discrimination Act 1984 (Cth) to ensure people who are gender diverse, non-binary or gender non-conforming are also protected.
- ²⁸⁵ The definition of sex characteristics should define intersex people as people born with physical sex characteristics that do not fit medical or social norms for male and female bodies, and should accord with the Yogyakarta Principles Plus 10, as being "a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty": International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, 6.
- ²⁸⁶ The definition of gender should expressly state that it is inclusive of sex to reflect the intended protection.
- ²⁸⁷ The definition of 'disability' should include HIV/AIDs status as indicated by caselaw on anti-discrimination provisions in Victoria and other Australian jurisdictions.
- ²⁸⁸ The Commission made similar recommendations in our Gender Equality Bill Exposure Draft submission: Victorian Equal Opportunity and Human Rights Commission, Submission on Gender Equality Bill Exposure Draft, (October, 2018) 9
<https://www.humanrightscommission.vic.gov.au/policy-submissions/item/1763-submission_on_the_gender_equality_bill_exposure_draft>.
- ²⁸⁹ Women's Legal Service Victoria above n 132; Interview with the CASA Forum (Victorian Equal Opportunity and Human Rights Commission staff, in-person interview, 28 November 2019).
- ²⁹⁰ Shackelton and Griffin above n 126.
- ²⁹¹ Women's Legal Service Victoria above n 132; D'Souza et al above n 49.
- ²⁹² Racial and Religious Tolerance Amendment Bill 2019, clause 10(2).
- ²⁹³ Explanatory Memorandum, Racial and Religious Tolerance Amendment Bill 2019, 2.
- ²⁹⁴ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 255.

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- ²⁹⁵ ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)*, recommendation 17.1, 97.
- ²⁹⁶ ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)*, recommendation 17.1, 92.
- ²⁹⁷ Interview with Jennifer Huppert, (Victorian Equal Opportunity and Human Rights Commission staff, teleconference, 2 December 2019).
- ²⁹⁸ Ballarat African Association above n 104.
- ²⁹⁹ Berih above n 106.
- ³⁰⁰ Interview with Professor Luke McNamara, (Victorian Equal Opportunity and Human Rights Commission staff, teleconference, 4 December 2019).
- ³⁰¹ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights* (9 December 2016), 23.
- ³⁰² *Ibid* 22.
- ³⁰³ *Ibid* 24.
- ³⁰⁴ *Ibid* 24.
- ³⁰⁵ Australian Human Rights Commission, *2017-2018 Complaints Statistics*, 2018.
- ³⁰⁶ Australian Human Rights Commission, *2018-2019 Complaints Statistics*, 2019.
- ³⁰⁷ Equal Opportunity Tasmania above n 148, 22.
- ³⁰⁸ *Id.*
- ³⁰⁹ *Equal Opportunity Act 2010 (Vic)*, s 92(1).
- ³¹⁰ *Creek v Cairns Post* (2001) 112 FCR 352, 356 (Kiefel J).
- ³¹¹ *Eatock v Bolt* (2011) 197 FCR 261, 265.
- ³¹² *Eatock v Bolt* (2011) 197 FCR 261, 263.
- ³¹³ *Eatock v Bolt* (2011) 197 FCR 261, 263-264.
- ³¹⁴ *Eatock v Bolt* (2011) 197 FCR 261, 267.
- ³¹⁵ *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.
- ³¹⁶ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355.
- ³¹⁷ *Eatock v Bolt* (2011) 197 FCR 261, 251.
- ³¹⁸ Human Rights Law Centre, *Submission to Senate Standing Committee on Legal and Constitutional Affairs: Why the objective test in section 18C should be a reasonable member of the relevant racial, ethnic or national group*, 1 (quoting *Creek v Cairns Post* (2001) 112 FCR 352, 253).
- ³¹⁹ For example, see ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, (Final Report, 18 March 2015) 96.
- ³²⁰ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 95-96 (Justice Nettle).
- ³²¹ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 98 (Justice Nettle).
- ³²² New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, the Hon J.P Hannaford.
- ³²³ Australian Human Rights Commission above n 29, 39-40. See also *King-Ansell v Police* [1979] 2 NZLR 531; *Mandla v Dowell Lee* [1983] 2 AC 548; *Macabenta v Minister for Immigration and Multicultural Affairs* [1983] 2 AC 548-562; *Miller v Wertheim* [2002] FCAFC 156.
- ³²⁴ Expert Panel, *Report of the Expert Panel*, (Religious Freedom Review, 18 May 2018) 84.
- ³²⁵ For example, Online Hate Prevention Institute, Submission 36 to Freedom of Speech in Australia Review (2018); Victorian Multicultural, Faith and Community Organisations, Submission 125 to Freedom of Speech in Australia Review (2018) 1; Ethnic Communities' Council of Victoria, Submission 198 to Freedom of Speech in Australia Review (2018) 4; Cyber Racism and Community Resilience Research group, Submission 54 to Freedom of Speech in Australia Review (2018) 2.
- ³²⁶ Rice and Reece above n 243, 6.
- ³²⁷ *Anti-Discrimination Act 1998 (Tas)*, s 22.
- ³²⁸ United Nations Human Rights Committee, *General Comment No. 22, Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C.21.Rev.1/Add 4 (1993), 8. Paragraph 3 states that 'Article 18 distinguishes freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice.
- ³²⁹ *Ibid*, 4 (summarised by the Human Rights Law Centre, *Submission to the Expert Panel on the Religious Freedom Review*, (14 February 2018), 7.
- ³³⁰ Victoria Police above n 236.
- ³³¹ Standing Committee on Law and Justice, *Racial vilification law in NSW*, (Final Report, 3 December 2013), recommendation 2 <

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2260/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>>.

³³² Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018.

³³³ Human Rights Law Centre, 'New South Wales introduces broader protections from hate crime' (Media Release, 7 June 2018) < <https://www.hrlc.org.au/news/2018/6/7/new-south-wales-introduces-broader-protections-from-hate-crime> >; Public Interest Advocacy Centre, 'NSW Reforms Vilification Offences' (Media Release, 22 June 2018) < <https://piac.asn.au/2018/06/22/nsw-reforms-vilification-offences/>>; New South Wales Gay and Lesbian Rights Lobby, 'NSW Government Signals Reforms to State's Vilification Laws to Protect all LGBTI People' (Media Release, 21 June 2018) < <https://glrl.org.au/2018/06/21/nsw-government-signals-reforms-to-states-vilification-laws-to-protect-all-lgbti-people/>>; New South Wales Council for Civil Liberties, 'NSWCCL PUBLIC STATEMENT OF SUPPORT – Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018' (Media Release, 18 June 2018) < https://d3n8a8pro7vnm.cloudfront.net/nswccl/pages/5283/attachments/original/1529392856/NSWCCL_statement_NSW_Vilification_Bill_2018.pdf?1529392856>; Redfern Legal Centre, 'New NSW laws to prevent incitement of violence' (Media Release, No Date) < <https://rlc.org.au/article/new-nsw-laws-prevent-incitement-violence>>; Meredith Griffiths, 'Strengthened hate speech laws pass NSW Parliament in "great day" for Australia' ABC (online, 21 June 2018) < <https://www.abc.net.au/news/2018-06-21/race-hate-laws-pass-nsw-parliament/9893172>>.

³³⁴ The Public Interest Advocacy Centre provided 'An interesting omission from the list of protected attributes in the new offence of 'publicly threatening or inciting violence' is sex. While vilification on the basis of sex is not currently prohibited under the Anti-Discrimination Act, it could be considered a missed opportunity that it has not been added in the Crimes Act.' Public Interest Advocacy Centre, 'NSW Reforms Vilification Offences' (Media Release, 22 June 2018) < <https://piac.asn.au/2018/06/22/nsw-reforms-vilification-offences/>>.

³³⁵ *Criminal Code Act Compilation Act 1913* (WA), s 79.

³³⁶ *Criminal Code Act Compilation Act 1913* (WA), s 80.

³³⁷ *Criminal Code Act Compilation Act 1913* (WA), s 80A.

³³⁸ *Criminal Code Act Compilation Act 1913* (WA), s 80B.

³³⁹ Rice and Reese above n 243, 2.

³⁴⁰ *Ibid*, 12.

³⁴¹ *Anti-Discrimination Act 1991* (QLD), s 156(3)-(4). In Tasmania, if a person fails to provide information or documents, the commission must submit a report to the Tribunal, who may make an order requiring a person to provide the specified information or documents: *Anti-Discrimination Act 1998* (Tas), s 97(5)-(8).

³⁴² Victoria Police above n 236.

³⁴³ McNamara above n 300.

³⁴⁴ See *Equal Opportunity Act 2010* (Vic), s 156(1)(c)(education function); Racial and Religious Tolerance Act 2001 (Vic), s 19(dispute resolution function); *Equal Opportunity Act 2010* (Vic), s 158 and 156(1)(c)(reporting) and *Equal Opportunity Act 2010* (Vic), s 179 and 156(1)(c)(annual reporting).

³⁴⁵ *Equal Opportunity Act 2010* (Vic), 148.

³⁴⁶ *Equal Opportunity Act 2010* (Vic), s 157.

³⁴⁷ *Equal Opportunity Act 2010* (Vic), ss 159 and 160.

³⁴⁸ *Equal Opportunity Act 2010* (Vic), s 151.

³⁴⁹ *Equal Opportunity Act 2010* (Vic), s 152(2).

³⁵⁰ *Equal Opportunity Act 2010* (Vic), s 127.

³⁵¹ These are the principles within the regulatory pyramid in Responsive Regulation theories, see: Ian Ayres and John Braithwaite, *Responsive regulation: Transcending the deregulation debate* (Oxford University Press, 1992).

³⁵² Julian Gardner, *An equality act for a fairer Victoria: Equal opportunity review final report* (State of Victoria, 2008), 1.97.

³⁵³ *Equal Opportunity Act 2010* (Vic) s 15.

³⁵⁴ *Equal Opportunity Amendment Bill 2011* (Vic).

³⁵⁵ See the Commission's submission to the national inquiry into sexual harassment in Australian workplaces (February 2019) for a detailed discussion and recommendations related to the Commission's regulatory functions and powers: Victorian Equal Opportunity and Human Rights Commission, *Submission to the national inquiry into sexual harassment in Australian workplaces*, (Submission to the national inquiry into sexual harassment in Australian workplaces, April 2019) < https://humanrightscsmission.vic.gov.au/policy-submissions/item/download/9099_a82ab29e3b37f02adae5f375729d10f6>.

³⁵⁶ Victorian Equal Opportunity and Human Rights Commission, *Fair-minded cover: Investigation into discrimination in the travel insurance industry*, (Report, June 2019).

³⁵⁷ Note: In many cases, police officers do not provide 'services' within the meaning of the *Equal Opportunity Act 2010* (Vic). For example, when they are investigating alleged offences, questioning and arresting alleged offenders, making decisions to lay or prosecute charges or executing warrants. However, police may provide services if it relates to the protection of, and assistance to, members of the public and victims of crime.

³⁵⁸ Berih above n 106.

³⁵⁹ Id.

³⁶⁰ Id.

³⁶¹ Ballarat African Association above n 104.

³⁶² For example, the Community Security Group (CSG) is a largely volunteer based organisation that is tasked with security for the Jewish community. The CSG collects data on reports on anti-Semitism, which feeds into national data collection on anti-Semitism.

³⁶³ Ballarat African Association above n 104.

³⁶⁴ Id.

³⁶⁵ Victoria Police, 'Prejudice and racial and religious vilification' (19 March 2019) <<https://www.police.vic.gov.au/prejudice-and-racial-and-religious-vilification>>; Mason et al above n 197, 19-20.

³⁶⁶ Ibid 29-33.

³⁶⁷ Id.

³⁶⁸ Centre for Multicultural Youth above n 102; Focus group with multicultural and multifaith Victorians above n 64.

³⁶⁹ Human Rights Law Centre above n 118; William Leonard and Bianca Fileborn, *Policing for SSASGD young Victorians* (Report, La Trobe University, 2018). The Commission also released a report highlighting continued LGBTI discrimination within the force: Victorian Equal Opportunity and Human Rights Commission, *Proud, visible, safe: Responding to workplace harm experienced by LGBTI employees in Victoria Police*, (2018) <

https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/download/9104_4a3369277ca0434000600ad8bfe81b4a>.

³⁷⁰ Victorian Equal Opportunity and Human Rights Commission, Inquest into the Death of Tanya Day, (Submission to the Coroners Court of Victoria, 17 April 2019) <

https://www.humanrightscommission.vic.gov.au/human-rights/charter-submissions/item/download/9123_42363ccc03abdf8e5e3497d873787c27>.

³⁷¹ Information provided by the Victorian Aboriginal Legal Service on 9 December 2019.

³⁷² Mason et al above n 209, 166-177.

³⁷³ Human Rights Law Centre above n 118. Some limited research has indicated that very few cases of hate crimes against gay or lesbian victims, or people with a disability, are reaching courts: Gail Mason et al above n 200, 144.

³⁷⁴ For example, there is limited research into hate and vilification against the disability community, despite reports from our consultations with the disability community that this is widespread: Disability focus group, above n 140.

³⁷⁵ We note that research is emerging: Ana-Maria Bliuc, Nicholas Faulkner, Andrew Jakubowicz, and Craig McGarty. "Online networks of racial hate: A systematic review of 10 years of research on cyber-racism." *Computers in Human Behavior* (2018) 87, 75.

³⁷⁶ The Centre for Resilient and Inclusive Societies has convened a Practitioners Working Group on Tackling Hate (<https://www.crisconsortium.org/stream-2-updates>) to address the need for a shared definition of hate in Victoria. The group agreed on the following definition: "a prejudice-motivated incident is any incident in which any person believes that a person, a property or group is targeted because of their race, religion, ethnicity, gender, sexual orientation, trans status, intersex status, disability, age or homelessness". The Victorian Government has also funded a project through the CVE grants to create an online training course for Victorian practitioners to create a common culture and discourse around data collection of hate and extremist incidents. The project is led by Dr Vergani at Deakin University. Interview with Matteo Vergani, Centre for Resilient and Inclusive Societies (Victorian Equal Opportunity and Human Rights Commission, teleconference, 28 November 2019).

³⁷⁷ Id.

³⁷⁸ Id.

³⁷⁹ Id.

³⁸⁰ Gail Mason & Rachael Stanic (2019) Reporting and recording bias crime in New South Wales, 31(2), *Current Issues in Criminal Justice* 164, 166.

³⁸¹ Home Office, *Hate crime, England and Wales, 2018-2019* (Home Office Statistical Bulletin, 15 October 2019). The United Kingdom also reports to the Office for Democratic and Human Rights: Office for Democratic and Human Rights. Hate crime data (2018) < <http://hatecrime.osce.org/united-kingdom?year=2018>>.



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