T R A N S C R I P T

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Anti-Vilification Protections

Melbourne—Wednesday, 27 May 2020

MEMBERS

Ms Natalie Suleyman—Chair
Mr James Newbury—Deputy Chair
Ms Christine Couzens
Ms Emma Kealy
Ms Michaela Settle
Mr David Southwick
Mr Meng Heang Tak

WITNESS

Mr Jonathan Meddings, Senior Policy Analyst, Thorne Harbour Health *(via videoconference)*.

The CHAIR: Good morning. Thank you very much for being here today. To the committee members, I declare open the Legislative Assembly Legal and Social Issues Committee public hearing for the Inquiry into Anti-vilification Protections in Victoria. Please ensure that your mobile phones are on silent. I would also like to begin again by respectfully acknowledging the Aboriginal peoples, the traditional custodians of the various lands each of us is gathered on here today, and pay my respects to their ancestors, elders and families. I particularly welcome any elders or community members who may be present here today and also who are watching the broadcast of these proceedings.

I just need to declare that all evidence here today at this hearing is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions the Legislative Assembly standing orders, therefore the information you provide during the hearing is protected by law. However, any comment repeated outside the hearing may not be protected. Any deliberately false evidence or misleading evidence to the committee may be considered a contempt of Parliament. All evidence is being recorded. You will be provided with a proof version of the transcript following the hearing. Transcripts will ultimately be made public and placed on the committee's webpage.

I now welcome from Thorne Harbour Health Jonathan Meddings, the Senior Policy Analyst, to provide a brief —maximum of 10 minutes—presentation followed by questions by the committee members. Thank you.

Mr MEDDINGS: Thank you for inviting me to speak with you on behalf of Thorne Harbour Health today. I would also like to acknowledge the traditional custodians of the lands on which we meet and pay my respects to elders past, present and emerging. As you know, Thorne Harbour Health, previously the Victorian AIDS Council, began as a community-led response to the HIV epidemic in 1983 and is now one of Australia's largest community-controlled health service providers to lesbian, gay, bisexual, trans and gender-diverse and intersex people, and people living with HIV regardless of their LGBTI status. In addition to service provision we see our role as protecting and promoting the health and human rights of LGBTI people and people living with HIV. I will limit my opening remarks to the four key areas that were the focus of our submission.

The first is the expansion of the scope of protected attributes to include people on the basis of their LGBTI status or HIV and AIDS status. The Australian Human Rights Commission found that almost 75 per cent of LGBTI people had experienced some type of bullying, harassment or violence on the basis of their sexual orientation, gender identity or sex characteristics. A 2010 study by the Australian Research Centre in Sex, Health and Society found that 61 per cent of LGBTI young people reported experiencing verbal homophobic abuse, 18 per cent physical homophobic abuse and 9 per cent other types of homophobia, including cyberbullying, graffiti, social exclusion and humiliation. The *End the Hate* report by the Human Rights Law Centre included many examples of hate conduct and crime experienced by LGBTI community members, including during the marriage equality postal survey, and I strongly encourage all members of the committee to read this important report.

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

The second key area is current and suggested new provisions relating to vilification. The first aspect of this is that we support lowering the incitement test for vilification. The RRTA's incitement test for vilification is too high and difficult to prove. We have recommended that the incitement threshold test for unlawful vilification be lowered to include a reasonableness test, namely vilification as conduct that is 'reasonably likely to incite' hatred against serious contempt for or revulsion or severe ridicule of a person or class of persons. We do not believe the bar for qualifying criteria for what constitutes vilification, namely hatred against, serious contempt for, revulsion or severe ridicule of a person or class of persons, should be lowered. We think lowering the threshold test and keeping the high qualifying bar for vilification strikes the right balance between freedom of speech and protecting people from potential harm.

The second aspect of this is that we have recommended a new provision that deals directly with problematic behaviour rather than the incitement or likely incitement of such behaviour. As mentioned, we support the expansion of anti-vilification laws to protect people based on their LGBTI status, among other attributes, and to provide them the same protection afforded to people based on their race or religion. While I personally support the widely held view that there is no inherent incompatibility with being LGBTI and being religious, as indeed the two often overlap, I note there are elements of both communities that strongly disagree and are openly hostile towards one another. While unfortunate, this is to be expected in a pluralistic society, and in a free society it should be tolerated within reasonable limits.

I am concerned that should the qualifying bar for vilification be lowered too much we might create a rod for the backs of members from both of these communities. I understand some wish to lower the qualifying bar in an effort to see the law more widely used. However, I think there are other, in my view, more important reasons that we have seen so few complaints under the RRTA, namely its high threshold test, its limited scope in only protecting people on the basis of race or religion, the fact that many in the community are not aware of their ability to seek recourse under the legislation and its costly and drawn out complaints process.

Another significant reason is that the law deals with incitement of vilification and not vilifying behaviour in and of itself. For this reason we have recommended a new provision be enacted that makes it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous or reviling or severely ridiculing of a person or class of persons. This would retain the high bar that currently exists for limiting public expression and speech while also dealing directly with particular problematic behaviour.

The third key area is prejudice-motivated crime. The Human Rights Law Centre's *End the Hate* report detailed the lived experiences of LGBTI people who have been victims of hate and suggested legislative reforms to combat hate conduct. The report found gaps in legislative protection and regulatory responses, including issues of under-reporting of crimes as hate crimes by police, a reluctance by prosecutors to raise the provision, and the high threshold of proving prejudice motivation in court.

We support signal standalone and sentence enhancement provisions for prejudice-motivated crime. Currently, however, the motivation test for prejudice-motivated crime under section 5(2)(daaa) of the *Sentencing Act* is too high and difficult to prove. We support a reasonableness test for determining whether a crime was prejudice motivated. For example, if someone shouts a homophobic or transphobic slur while assaulting someone, then it can reasonably be assumed that their motivation was prejudice motivated. As for criminal laws relating specifically to vilification, there has only been one successful prosecution of serious vilification by Victoria Police in the 17-odd years that the RRTA has been in operation. The criminal law is ineffective at dealing with vilification. We do not support criminal penalties for vilification, and while we are not opposed to retaining existing offences for serious vilification, we do not support lowering the bar or test for the offence of serious vilification.

The fourth key area is improved ability to investigate and report hate conduct. The rolling back of the Victorian Equal Opportunity and Human Rights Commission's powers in 2011 has hindered its role and diminished its ability to protect LGBTI Victorians and Victorians generally. The *Equal Opportunity Act* should be amended to reinstate the powers of the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries, issue compliance notices and enter into enforceable undertakings. As for reporting, the *End the Hate* report noted that in reference to hate crimes, speech and conduct against LGBTI people:

> … the majority of prejudice motivated conduct is not reported to police (and therefore not recorded as a prejudice motivated crime or incident), the exact prevalence of this type of behaviour remains unclear.

We have recommended the funding of third-party online reporting mechanisms to cover vilification based on sexual orientation, gender identity, intersex status and HIV and AIDS status and to provide reports to appropriate authorities where consent is given. This is particularly important in relation to prejudice-motivated crime, whether serious vilification or another type of prejudice-motivated crime, as many community members do not trust police to appropriately handle their complaint.

As for online hate conduct, this is probably the most difficult area under consideration by this committee due to jurisdictional limitations and the complexities of technology, and our thoughts on this are very much in their infancy. That said, one could imagine having a positive duty for online platforms to take all reasonable steps to ensure communications on those platforms comply with anti-vilification laws and to have complaints

procedures, as many do already, but more importantly to require that action be taken to resolve complaints within a certain reasonable time frame. Government could consider requiring social media platforms to forward any relevant hate conduct complaints to the Victorian Equal Opportunity and Human Rights Commission, and this could be done automatically by ensuring the complaint process includes necessary questions to enable relevant forwarding. This could separate out general complaints that might breach community standards and policies imposed by online platforms from complaints about hate conduct specifically in a way that simplifies reporting to the Victorian Equal Opportunity and Human Rights Commission. Anyone can click and fill out a short form on Facebook to report what they think is hate conduct online, which they may simply have witnessed rather than experienced or been on the receiving end of, but few are going to know how to report or lodge a complaint through other avenues.

I note that the Australian Discrimination Law Experts Group suggested an organisation like Victoria Legal Aid could also be funded to engage in strategic litigation in this area and represent individuals. This is something they could be funded to do for vilification complaints whether or not they involve an online component, and I personally think this is an excellent suggestion. Adequate resourcing of organisations like the Victorian Equal Opportunity and Human Rights Commission and Victoria Legal Aid is, I think, an essential part of reform in this area. I am mindful that policing what people say online has authoritarian connotations and that social media companies will probably err on the side of censorship if a positive duty, as described, is imposed on them, so here again I think it is essential to emphasise that although there is a need for the law to clearly apply to public conduct online as it does public conduct in general, laws governing what behaviour or speech constitutes hate conduct must set a high bar, whether that conduct is or is not on a virtual forum. And with that I might hand things back to the Chair for questions. Thank you.

The CHAIR: Thank you, Jonathan, for that presentation.

Mr TAK: Thank you, everyone. Thank you, Jonathan. Just a quick question—and I know it is very broad—in terms of vilification online: how can Victoria effectively regulate online vilification given the complexities of what you said before?

Mr MEDDINGS: That is a very complicated question and I am afraid I do not have the answer. There are much better legal minds out there that would be better able to answer that question. It is tricky, and I think in practice with things that are reported online, Victoria has jurisdictional limitations and we will not be able to really action complaints effectively unless the parties involved are located in the state.

Mr TAK: That is fine, thank you.

Ms SETTLE: Hello, and thank you for that presentation, Jonathan. You talk about having the anti-vilification protections moved into the *Equality Opportunity Act,* they should not be confined to certain areas of public life. I was just interested if you could explain a bit. What constitutes public and private conduct in terms of vilification?

Mr MEDDINGS: Sure. I note that others have also recommended that the RRTA be merged with the *Equal Opportunity Act* because it is preferred due to its accessible and well-established complaints model as well as the flexibility that it affords VCAT to order remedies to unlawful conduct. We support this view. But as we noted, it is essential that if the RRTA is combined with the *Equal Opportunity Act*, anti-vilification protections are contained in a separate part of the *Equal Opportunity Act* and not limited to certain areas of public life. That said, I personally would not want an inability to merge the RRTA with the *Equality Opportunity Act*, should that present itself as a political reality, to prevent us from making progress on this issue. Does that answer your question?

Ms SETTLE: My question was more around the private and public conduct that you talk about. I am just interested in what the differences there are and how that is impacted by going into the EOA.

Mr MEDDINGS: My understanding of the *Equal Opportunity Act* is that it covers specific areas in relation to discrimination, such as the workplace or education. Of course it has exceptions as well, some that are problematic for our communities, like the exceptions made for religious bodies. But there are no such limitations under the *Racial and Religious Tolerance Act* in terms of where the law applies, and I think that is a real benefit of anti-vilification laws. What I would not want to see, if the two are merged, is that there are suddenly boundaries imposed upon where that law applies.

Mr SOUTHWICK: Thanks, Jonathan. Just a couple of things. Firstly, could you expand a bit further on recommendations 7 and 8, especially around the point of not having criminal penalties for vilification, what your thoughts are there and what the consequences might be in terms of some of the penalties that you think should be in place?

Mr MEDDINGS: Certainly. With regard to not supporting criminal penalties for vilification, just for clarity, that is specifically related to vilification and not serious vilification, for which there is an offence. As I noted in my statement, we support retaining the offence of serious vilification. As for why we would not support criminal penalties for vilification, simply I think that it is too low a bar to warrant criminal penalties for such actions. That is why we have the distinction between vilification and serious vilification. In my mind it is serious vilification that warrants the criminal offence. Also, more of a pragmatic argument, the criminal law has proven to be ineffective at dealing with vilification more broadly, so I think that going down that path of criminalisation will not really help. It is much better to focus on education when it comes to this sort of thing.

As for the prosecutorial guidelines for prejudice-motivated crime, I think that will certainly help prosecutors, but again it is secondary to fixing the motivation tests for prejudice-motivated crime under the *Sentencing Act.* It is simply too high a bar, too difficult to prove. So a reasonableness test there instead I think would greatly help matters, and prosecutorial guidelines that inform prosecutors about that change, if and when it is made, would be needed.

Mr SOUTHWICK: Jonathan, in terms of serious vilification and vilification, the definitional change there, how would you define it?

Mr MEDDINGS: We support retaining the current definition for serious vilification as it is provided for under the Act. What we have recommended in terms of changes to wording is only for vilification, and that is where we have recommended lowering the incitement test to add the words 'reasonably likely to incite', which from memory I think there is similar wording. It says 'likely to incite' for the offence of serious vilification. That wording is not actually there for the provision on vilification, so it is really just bringing that in line with the offence of serious vilification.

Mr SOUTHWICK: Just one last one. You did make mention in your presentation about the mistrust of police in handling some of the complaints. What changes are you recommending that need to take place to ensure that there is a better level of trust?

Mr MEDDINGS: That is an ongoing issue for some members of our community. I do want to note, however, that Victoria Police has done a lot of great work to build trust over the years with members of our community. It is an ongoing process. I happen to sit on the Victoria Police LGBTI reference group, so I have an insight into all of the great work that they are doing, and it continues.

I do, however, think that third-party online recording will be key here. We have massive issues of underreporting. There will always be some members of the community who are not willing to go to the police with this sort of thing, and if we want to get a handle on accurate numbers for these kinds of incidents occurring in our community, I think third-party reporting will really fit into that. Organisations like ours, for example, we could easily take this kind of reporting mechanism and push that data up the line to Victoria Police, where consent is given, if we believe a crime has been committed.

Ms COUZENS: Thanks, Jonathan, for your time today. We really appreciate it, and I know your service does some operations here in Geelong, which we really appreciate. One of the things I am interested in is whether you see a difference between rural communities and metropolitan communities and whether the complaints are more or less or whether there is some data that indicates the differences between regional and metropolitan?

Mr MEDDINGS: I do not have access to that data; I am not sure if anyone does. One of the issues that we have is data collection even at the most basic level of being represented. You know, knowing whether a person is lesbian, gay, bisexual, trans or gender diverse and intersex. A lot of forms do not really accommodate our different communities—because we are many different communities—and we tend to get lumped into one broader LGBTI label if even that is recorded, so I am afraid I do not have that for you.

Ms COUZENS: That is fine. How would you see that data being collected? Have you got any views about how that could be done?

Mr MEDDINGS: I know that the Crime Statistics Agency went through a very thorough consultation process and we fed into that, and I was very happy with their model of questions that they produced. I thought it was very informed and comprehensive. So I suppose if I wanted to point to a gold standard or a good model, it would be what the Crime Statistics Agency has put out.

Ms COUZENS: Can you just elaborate on your comments about the introduction of a civil harassment model or a harm-based civil test?

Mr MEDDINGS: Sure. What we have proposed instead of that is that there be a provision that makes it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous or reviling or severely ridiculing of a person or class of persons. There are I think two reasons for this. The first is that there is an element of risk in pursuing a harassment model in that the bar might be lowered too far, whereas what we have proposed maintains that high bar. The other is that my understanding of harassment under the *Equal Opportunity Act* is that it is limited to sexual harassment, and again it is limited to certain areas and I would not want, as I have mentioned already, the merging or adoption of, say, a harassment model as opposed to vilification under the *Equal Opportunity Act* to limit where this applies. There would be those two main reasons why we thought it best to pursue a different provision.

The CHAIR: On behalf of the committee, Jonathan, thank you so much for presenting here today on behalf of Thorne Harbour Health. Your submission today will be incorporated into our deliberations. We have a number of other public hearings and stakeholders to hear from before we conclude this inquiry. As I said, members will deliberate on all the submissions and put forward a report to government with some serious recommendations. Again, on behalf of the committee, thank you for taking the time out from your busy schedule to be here today.

Mr MEDDINGS: Thank you, all.

Witness withdrew.