LA LSIC - AVP INQUIRY
SUBMISSION NO. 18
RECEIVED 19 DECEMBER 2019

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Institute of Public Affairs

19 December 2019

The Committee Manager
Legislative Assembly Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

Dear Committee Manager,

IPA RESEARCH INTO ANTI-VILIFICATION PROTECTIONS IN VICTORIA

The Institute of Public Affairs ("the IPA") is committed to undertaking research to promote the human dignity of all Australians. At the heart of human dignity is individual freedom. This is why a key focus of the IPA's research is on freedom of speech, legal rights, and the rule of law which are at the core of Australia's liberal democratic traditions.

This current inquiry has been launched in response to the introduction of the *Racial and Religious Tolerance Amendment Bill 2019* ("the RRTA Bill") in August 2019. The RRTA Bill is designed to amend the state's *Racial and Religious Tolerance Act 2001* ("the RRT Act") by vastly expanding the anti-vilification framework by expanding the number of protected classes and will attempt for the first time in Australia to target so-called hate speech and trolling on social media. This submission addresses the relationship between Victoria's vilification laws and the fundamental right to freedom of speech, and the impact that the RRTA Bill will have on this relationship.

Currently, sections 8 and 9 of the RRT Act make it unlawful for a person to engage in conduct that 'incites hatred against, serious contempt for, or revulsion or severe ridicule' of another person because of their race or religious belief or activity. Sections 24 and 25 make it a criminal offence to engage in 'serious vilification'. The RRTA Bill would add gender, disability, and sexual orientation as new 'protected attributes' and lower the threshold for serious vilification offences.

IPA research identifies three fundamental flaws in Victoria's current anti-vilification framework: firstly, Victorian vilification laws are illiberal and undemocratic restrictions on freedom of speech which damage social cohesion and individual human dignity; secondly, Victorian vilification laws are based on vague and subjective standards that require judges to make arbitrary determinations about lawful and unlawful speech, which is inconsistent with the rule of law; thirdly, Victoria's "serious" vilification provisions are poorly defined and set a threshold that is too low for imposing criminal penalties. Each of these flaws would be amplified by the RRTA Bill.

1) Victoria's vilification laws are illiberal, undemocratic, will damage social cohesion, and consequently are an assault on human dignity

The chilling effect of vilification laws

The operation of anti-vilification laws punish defendants at a procedural level by imposing costs (both financial costs and time costs) in defending themselves against any complaint, even those which are ultimately dismissed in the defendant's favour. Knowledge of the existence of a nebulous law which operates to restrict speech leads to overdeterrence, where individuals tend to silence themselves even in situations where to speak would not be in breach of the law. This is also known as the law's chilling effect on speech.

The lack of transparency of the process also contributes to the chilling effect of vilification laws. The uncertainty it creates deters not only the acts within its scope, but any acts that potential actors fear will come under its purview. This was understood when section 18C was introduced into the Racial Discrimination Act in 1995. In 1995 the Australian Press Council and others argued in submissions to the Senate Legal and Constitutional Legislation Committee inquiry into the *Racial Hatred Bill 1994* that section 18C would have a chilling effect on free speech as publishers and the media would suppress certain points of view for fear of attracting discrimination complaints, even when those complaints are unfounded and eventually dismissed. The submitters argued that the fact that a person cannot claim costs in relation to proceedings before the Commission means that the risk of a complaint is sufficient inducement to avoid all discussion of racial issues, even when hatred or offence are not intended.[1] While the argument then was in relation to racial anti-vilification laws, the principle applies to vilification laws more generally.

Vilification laws are anti-democratic and undermine individual dignity

A common argument from proponents of vilification laws is that such laws are required so that people from historically marginalised demographic groups can more fully participate in society. This is presented as a zero-sum trade-off between free speech rights for some groups, and a conferral of dignity on other groups. This vision of freedom of speech is unrealistic and represents a narrow vision of dignity and what it means to participate in society.

Indeed, freedom of speech is fundamental to securing the dignity of the individual. The IPA noted the connection of autonomy and dignity in a major report into freedom of speech, *The case for the repeal of section 18C*, published in 2014:

> Individual autonomy and dignity are inseparable; the latter can only be realised where the former is constrained only by universal, reciprocal, coherent rules. The argument that dignity requires that some people sacrifice their autonomy for the benefit of others satisfies none of these conditions; the loss of autonomy is itself a loss of dignity.[2]

Anti-vilification laws based on protected attributes are inconsistent with formal equality. This formal equality not only precedes individual dignity, but is a necessity for a functioning democracy. The ability of all citizens to participate in our democratic institutions on an equal basis means having the ability to participate in civil society and having the freedom to communicate political preferences. As the IPA elaborated in 2014:

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[1] Senate Legal and Constitutional Legislation Committee, The Parliament of the Commonwealth of Australia, *Racial Hatred Bill 1994* (1995) 8.

[2] Chris Berg et al, *The case for the repeal of section 18C* (Research report, 2014) 9.

> It has been argued that freedom of speech is inherent in the concept of democracy itself. If democracy is a mechanism by which preferences are aggregated, it follows that individuals must have the ability to express their preferences, and to access the ideas of others so as to form their preferences. By this reasoning, political speech should be protected by any democratic state. That is, that the costs of restricting freedom of speech are very high because doing so harms the practice of democracy.[3]

Vilification laws undermine social cohesion by moving sectarian disputes into the secular courts

Sectarianism usually refers to religious sects, but in a colloquial sense can refer to any group of people based on a discrete ideological identity which operates in a dogmatic way. A society that is open to many cultural sects will inevitably see debate and dispute about claims to truth or what people in that society should believe. It is inappropriate for a court system to make adjudications about what amounts to a difference of opinions. This is true even when those opinions are strongly put, or hurtful, but falling short of threats or incitement of violence.

The long-running Catch the Fires Ministries (CFM) case is instructive on this point. In 2002, shortly after the Victorian anti-vilification laws were introduced, the Islamic Council of Victoria made a complaint against CFM on the basis that they objected to a CFM newsletter, an article uploaded to the CFM website, and the content of statements made at a seminar hosted by CFM in March 2002. The complaint was first decided in the Victorian Civil and Administrative Tribunal in 2005, which in turn was appealed to the Supreme Court of Victoria where the complaint was finally upheld in the Supreme Court's December 2006 decision.

The CFM case did not involve threats of violence or the incitement of any criminal offence: instead, in a disagreement between religious groups, one of the religious groups utilised a law to silence the other. It is inappropriate for government to be involved in disputes of this nature, and sets a dangerous precedent that other disputes can be settled in a similar way. Indeed, other mundane kinds of disputes have been the subject of complaints under Victoria's vilification laws, illustrating that while the CFM case is the most significant case, it is not necessarily unique. They include:

- a complaint by a convicted paedophile against Corrections Victoria, the Salvation Army, and CMC Australasia for showing a video which disparaged witches and the occult, which the prisoner claimed as his religion
- a complaint by an occultist organisation against a child sexual psychologist who had quoted the religious text of the organisations as a part of linking them to satanic ritual abuse; and
- a complaint by an Arab Palestinian group regarding an advertisement featuring a map of Israel which failed to properly distinguish the Palestinian territory.[4]

[3] Berg et al (2014) 22.
[4] See 'Making martyrs and mischief', *The Age*, 22 June 2005.

Using anti-vilification laws to resolve religious disputes is particularly dangerous. Requiring secular courts to make assessments about when a person has been vilified on the basis of their religious beliefs, and to resolve disputes between different faith groups as in the Catch the Fires case, represent a reversal of the separation of church and state. As the IPA stated in a 2019 report into proposed religious anti-discrimination laws, 'This is an inevitable consequence of the secular law intruding into the religious sphere.'[5]

2) Victoria's vilification laws are vague and subjective which enables the arbitrary judgement of courts and undermines the rule of law

The concept of 'vilification' is characteristically vague and ambiguous. There is no objective test for determining whether a person has been vilified. The inherent uncertainty makes it an inappropriate term for use in legislative provisions without *specific* guidance as to its meaning. This was the point that was identified in the legal advice from Susan Reye, a former senior general counsel from the Australian Government Solicitor agency when the term was being considered for inclusion in the *Disability Discrimination Act 1992* in 2004. Reye said 'In our view, the ordinary meaning of the word "vilification" is not sufficiently clear to be relied on in a legislative provision, especially one that imposes liabilities or penalties.'[6]

Currently, there has been relatively little judicial consideration of the term "vilify" in Australian courts.[7] The ambiguity leaves room for bureaucrats, lawyers and judges to make arbitrary decisions about when and how to apply the law.

While the Victorian RRT Act does provide a definition for what vilification means, the definition fails to provide meaningful specificity as to what it means in practice. A restriction on conduct which is likely to incite hatred or severe ridicule for instance fails to establish an objective standard for unlawful speech. In practice there is no meaningful distinction between an act that is likely to incite hatred, vilify, or even offend or insult because the standard is based on an emotional response. In each case, a judge or government official is required to import their values into a determination about whether an expression is likely to elicit an emotional reaction in another person.

Requiring a judge to make a decision under these circumstances will fail to lead to predictable decisions. Subjective laws mean an individual can never be sure when one will be deemed to be breaking the law since you can't anticipate how the law will be applied. This represents a clear failure to uphold the rule of law, which requires the law to be known and for people subject to the law to be capable of understanding their legal obligations. This is a poor basis for designing any law and an exceptionally poor basis on which the parliament would restrict freedom of speech.

The IPA recommends that the racial and religious vilification provisions be repealed. Consequently, the amendments contained in the RRTA Bill to expand the number of protected attributes should not proceed.

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[5] Morgan Begg and Daniel Wild, 'Religious Liberty and its Challenges in Australia Today' (Institute of Public Affairs Research Report, 2019).

[6] Susan Reye, Legal Advice to the Productivity Commission, *Review of the Disability Discrimination Act 1992*, 1 March 2004, 2-6.

[7] RP Handley, *Mundzic and Minister for Immigration and Citizenship* [2010] AATA 399 [53]; *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443 at [96].

3) The "serious" vilification provisions are poorly defined and set a low threshold for imposing criminal penalties

Sections 24 and 25 of the RRT Act define and prohibit serious vilification" in Victoria which applies to serious racial vilification (section 24) and serious religious vilification (section 25). Both provisions contain two separate and distinct kinds of serious vilification which refer to two different kinds of harm and are accordingly considered separately. The RRTA Bill seeks to amend section 24 and 25 by retaining and lowering the threshold for committing an offence and to expand the number of personal attributes which are covered under the serious vilification provisions.

The first kind of serious vilification

Section 24(1) and 25(1) impose criminal penalties to a person who, on the ground of the race or religious belief or activity of another person or class of persons, intentionally engages in conduct that the offender knows is likely to incite hatred against that other person or class of persons and 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.

The use of the criminal law is appropriate when it is directed towards violent or physically destructive acts against another person or their property. In this respect, the attempt to prohibit acts which threaten or incite others to threaten physical harm are justified. Indeed, the common law and other public order statutes prohibit violent or intimidatory behaviour, as well as conduct which incites the commission of criminal offences.[8]

The IPA has suggested previously in the context of New South Wales serious vilification laws that, because this refers to a criminal offence, the provision should be moved to the *Crimes Act*.[9] A side of effect of such a change would be that threats of violence would be investigated by the police, who are more attuned to community expectations of the kinds of conduct that should be investigated than special-purpose government agencies tend to be, such as human rights commissions, who are devoted to a narrow mission.

The IPA recommends that the existing laws could adequately deal with the threats and incitement of harm. Alternatively, if this provision is retained, it should be moved to the *Crimes Act 1958* (Vic) and be administered solely by Victoria Police.

The second kind of serious vilification

The second kind of serious vilification is defined in section 24(2) and 25(2), which prohibits a person from, on the ground of the race or religious belief or activity of another person or class of persons, intentionally engaging 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.

As it currently stands, section 24(2) and 25(2) are an unjustified prohibition on freedom of speech. As explained above, the criminal law can only be justified to silence speech in very select circumstances, such as those involving threats of violence. Contempt, revulsion, or ridicule are not objective measures which can be predictably applied and are a precarious basis for imposing criminal penalties for unlawful speech.

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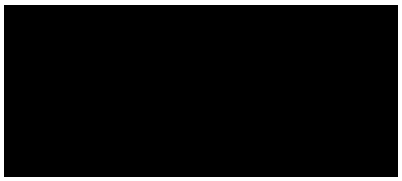
[8] Section 321G of the *Crimes Act 1958*.
[9] Standing Committee on Law and Justice, New South Wales, *Racial vilification law in New South Wales* (2013) 5.89.

The requirement to prove that the defendant intentionally engaged in this conduct, and had knowledge that it would be likely to occur is an appropriate *mens rea*—or mental element—of a criminal offence. However, the RRTA Bill seeks to remove the words "the offender knows" from the definition of serious vilification under section 24(2) and 25(2). This would reduce the threshold further by weakening the mental element of the offence.

The IPA recommends that section 24(2) and 25(2) are an inappropriate restriction on freedom of speech and should be repealed. Consequently, the amendments to the second kind of serious vilification proposed in the RRTA Bill should not proceed.

I thank the Committee for the opportunity to make this submission. The IPA would be happy to assist further in any way that the Committee considers appropriate as it deliberates on this topic.

Yours sincerely,



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