

Mr. Bill Swannie
Lecturer in Law
College of Law and Justice
Victoria University
295 Queen Street
MELBOURNE VIC 8001

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

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Submission to Inquiry into Victorian Anti-Vilification Protections

Dear Committee,

Thank you for the opportunity to provide a submission to the Inquiry into Anti-Vilification Protections. I am a legal academic with expertise in human rights law, and anti-vilification laws. I have ten years' experience as a lawyer, including working in community legal centres, with clients from diverse racial backgrounds. I have a Masters degree in human rights law and I am currently completing a PhD focusing on Australian racial vilification laws. I have had articles published in academic journals in the areas of human rights, international law, and equal opportunity law. I made a submission to the Parliamentary Joint Committee Inquiry into Freedom of Speech in Australia (concerning s 18C of the *Racial Discrimination Act 1975* (Cth)). I gave evidence to the Freedom of Speech Inquiry, which was referred to in the Committee's report. I make this submission in my individual capacity.

Executive summary

This submission makes the follow **recommendations**:

1. Victorian anti-vilification law should be amended to move from a model that requires incitement to a model based on protecting human dignity;
2. Government should commit to funding for education programs to increase awareness of legislative protections against vilification, particularly amongst communities impacted by such conduct;
3. Victorian anti-vilification law should be extended to provide protection from vilification on the grounds of disability, sex, and sexual orientation;
4. Legislative protections against vilification should be included in the *Equal Opportunity Act 2010* (Vic);
5. The term 'sex' should be included in the listed grounds on which vilification is prohibited.

This submission addresses terms of reference 1 -4 and 8. It does not address terms of reference 5 -7.

1. The effectiveness of the operation of the *Racial and Religious Tolerance Act 2001 (Vic)* (RRTA) in delivering upon its purposes.

The purposes of the RRTA¹ are:

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

The Preamble to the RRTA states that 'vilifying conduct is contrary to democratic values' as it 'diminishes the[] dignity, sense of self-worth and belonging', particularly of people from diverse ethnic and Indigenous backgrounds, and those who practice 'different religious beliefs and practices'. The Preamble indicates that the RRTA specifically seeks to protect and promote multiculturalism in Victoria.

The concept of human dignity underpins the current protections in the RRTA, and is also a central principle in human rights law. Human dignity refers to the equal worth of every person. As the Preamble indicates, the protections in the RRTA are also underpinned by principles of democracy and equality. Racial and religious equality are central principles in the *International Covenant on Civil and Political Rights* (ICCPR), a key human rights treaty to which Australia is a party. The ICCPR specifically prohibits racial and religious discrimination,² and prohibitions on racial and religious vilification are part of the broader prohibition on discrimination.³ Like prohibitions on discrimination, prohibitions on vilification seek to ensure that all citizens are able to participate equally in society.⁴ This fundamental democratic value can be considered as a purpose for the RRTA, due to these references in the Preamble.

Vilification is sometimes described as 'group defamation', in that the harms of vilification are similar to those of defamation.⁵ Defamation concerns public statements made by one person that are likely to lower the standing of another person in the community.⁶ Defamation law recognises that such public statements can have the effect of causing other people to shun or avoid the person defamed. The Preamble to the RRTA notes that vilification can prevent members of targeted communities from contributing to, and participating in social, political, economic and cultural aspects of society as equals. Preventing these harms can also be regarded as one of the purposes of the RRTA.

In relation to the effectiveness of the RRTA in delivering on its purposes, the civil provisions of the RRTA (ss 7 and 8) only apply to conduct that 'incites hatred against, serious contempt for, or revulsion or severe ridicule' of a person or class of person, on the ground of race,⁷ or religious belief or activity.⁸ The RRTA

¹ RRTA s 1.

² ICCPR arts 2 & 26.

³ See Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Inquiry report, Commonwealth of Australia, February 2017. At [2.127] the report noted the 'serious, profound and lasting impacts of racially discriminatory forms of speech, including on the mental and physical health of those affected.'

⁴ RRTA s 4 (1)(a).

⁵ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) chapter 3.

⁶ Patrick George, *Defamation Law in Australia* 3rd ed (LexisNexis, 2017).

⁷ RRTA s 7.

⁸ RRTA s 8.

therefore adopts an *incitement* model in terms of defining vilification in Victoria.⁹ This model focuses on the likely response of those who *witness* the relevant conduct, rather than those who experience it directly.¹⁰ In this context, to ‘witness’ particular conduct means to observe it, but not be a member of a racial or religious group targeted by it. The incitement model adopted by ss 7 and 8 of the RRTA therefore requires one or more witnesses, who are not part of the target group.

There are two problems with the incitement model. First, incitement is a complex requirement for a complainant to prove.¹¹ It is a term borrowed from the criminal law and it requires a very high, or quasi-criminal, standard of conduct.¹² On a practical level, there can be no incitement if there are no witnesses to the relevant conduct – no matter how harmful the conduct, or how many members of the targeted group are present.¹³ Second, incitement primarily seeks to maintain public order, rather than protecting human dignity.¹⁴ In other words, the incitement requirement in the RRTA is not consistent with the stated purpose of protecting human dignity.

In contrast, s 18C of the *Racial Discrimination Act 1975* (Cth) applies to conduct that is ‘reasonably likely in all the circumstances to offend, insult, humiliate and intimidate another person or group of people’ because of their race or ethnicity. This provision focuses on the likely response of a reasonable member of the target group,¹⁵ rather than the likely response of those who *witness* the relevant conduct. The test set out in s 18C of the RDA is therefore explicitly victim-focused.¹⁶ Whereas s 18C is ‘concerned with the... response of the victim group ...the incitement model is concerned with the...response to members of the victim group by people who witness the conduct.’¹⁷

Under the incitement model, the likely effect of particular conduct is assessed from the perspective of those who witness the conduct. Under s 18C however the likely effect of the relevant conduct is assessed from the perspective of a reasonable member of the target group. Therefore, despite its stated purpose of protecting people’s dignity, self-worth and belonging, the RRTA is currently focused on maintaining public order (for example, by preventing potential violence between particular racial and ethnic groups). Maintaining public order is of course an important public purpose. However, this should be done by the criminal law, rather than by civil provisions such as ss 7 & 8 of the RRTA.

The practical and conceptual difficulties with ss 7 and 8 are illustrated by *Catch the Fire Ministries Inc v Islamic Council of Victoria*.¹⁸ This involved alleged vilification by a Christian minister of people of the Islamic faith.¹⁹ The Islamic Council of Victoria made the complaint, as the vilifying speech targeted

⁹ See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* 3rd edition (Federation Press, 2018) 682.

¹⁰ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VLR 207.

¹¹ *Ibid.* See also Eric Barendt, *Freedom of Speech* 2nd ed (Oxford University Press, 2005) 179.

¹² See *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207 per Nettle JA (‘extreme’ [34]) and Neave JA (‘extreme’ [174]).

¹³ This was highlighted by the Attorney-General when the Racial Hatred Bill 1994 (which contained Part IIA of the RDA) was introduced into Parliament. See Commonwealth, *Parliamentary Debate*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch, Attorney-General).

¹⁴ Waldron (n 5).

¹⁵ *Eatock v Bolt* (2011) 197 FCR 261, [241] (Bromberg J).

¹⁶ Rees, Rice and Allen (n 9) 683.

¹⁷ *Ibid.*

¹⁸ (2006) 15 VR 207.

¹⁹ The complaint was made under the *Racial and Religious Tolerance Act 2001* (Vic) s 8.

members of that faith. However, to establish the complaint, the Council needed to prove that the respondent's conduct was likely to incite members of the public who heard the relevant words to experience hatred, serious contempt or severe ridicule towards members of the Islamic faith.²⁰

Section 18C of the RDA, on the other hand, seeks to protect the inherent dignity of those targeted by racial vilification.²¹ By focusing on the effect of particular conduct on members of the target group, s 18C recognises the direct and immediate harms of vilification. The RRTA, on the other hand, focuses on possible consequential harms of such conduct, such as acts of violence towards members of target groups).²² It should be noted that although s 18C focuses on the effect of certain conduct on members of the target group, liability does not depend on the subjective response of groups members. Rather, the likely response is determined objectively, by determining the likely response of a reasonable member of that group.²³

Recommendation 1: For the RRTA to more effectively deliver on its purposes, it is recommended that the current incitement model be replaced by a victim-focused model (similar to s 18C of the RDA). This would also be consistent with the RRTA's stated purpose of protecting the human dignity of persons targeted by racial and religious vilification.

2. The success or otherwise of enforcement of the Act, and the appropriateness of sanctions in delivering upon the Act's purposes;

The enforcement of the civil provisions in the RRTA (ss 7 & 8) currently rely entirely on a complaint being initiated and continued by an individual or group. Therefore, enforcement depends on complainants having the knowledge, time and resources to make a complaint and to enforce their rights.²⁴ Currently the civil provisions of the RRTA are under-enforced, due largely to members of targeted communities not being aware of their rights under the RRTA, or being unaware of how to enforce them.²⁵

A recent inquiry into the operation of similar Commonwealth laws highlighted the critical role of education in relation to effective enforcement anti-vilification legislation.²⁶ Education can assist the purposes of such legislation in two main ways. First, education directed at the general public can assist in eliminating prejudiced attitudes and in preventing vilification from occurring. Second, education focused on

²⁰ The complaint was successful at the Victorian Civil and Administrative Tribunal: *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510 (Unreported, Victorian Civil and Administrative Tribunal, Judge Higgins, 22 December 2004). However, the VCAT decision was overturned on appeal: *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207.

²¹ *Eatock v Bolt* (2011) 197 FCR 261, [241] (Bromberg J).

²² Waldron (n 5).

²³ *Eatock v Bolt* (2011) 197 FCR 261, [241] (Bromberg J).

²⁴ Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, Sydney 2002) 304-5.

²⁵ Currently, there is widespread lack of awareness, particularly amongst groups targeted by discrimination and vilification, of how to make a complaint, and how relevant laws operate. See Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Act 1986 (Cth)*, Inquiry report (Commonwealth of Australia, 2017) [2.110] – [2.113].

²⁶ *Ibid.*

increasing awareness of rights and how to enforce them can specifically assist groups targeted by vilification to enforce the laws.²⁷

Education cannot be considered a substitute for legislative protection from vilification. Rather, both education and legislation are required in order to eliminate prejudice and bigotry, and to redress its harms. The harms of vilification are serious and long-term and therefore education alone is not an appropriate alternative to the forms of redress available to individuals under legislation.

The enforcement process in the RRTA places a 'heavy...burden on the victim or target group to initiate and pursue enforcement proceedings'.²⁸ The enforcement of the civil provisions in the RRTA could be improved by government promoting awareness of the operation of these laws, particularly in communities targeted by racial and religious vilification. For example, government should commit to providing funding to organisations such as the Victorian Human Rights and Equal Opportunity Commission, Legal Aid Victoria, community legal centres and other community organisations to conduct information sessions to promote awareness of the RRTA in relevant communities and groups.

Recommendation 2: Government should commit to providing funding for education programs to increase awareness of legislative protections against vilification, particularly amongst communities impacted by such conduct.

3. Interaction between the Act and other state and Commonwealth legislation

The anti-vilification provisions in the RRTA interact strongly with:

- *Charter of Human Rights and Responsibilities 2006 (Vic) ('Charter')*. The Charter seeks to protect specified civil and political rights, including freedom for discrimination on grounds of race and religion.²⁹ The Charter also requires that all Victorian legislation (including the RRTA) be interpreted consistently with the human rights in the Charter.³⁰
- *Equal Opportunity Act 2010 (Vic) ('EOA')*. The EOA, like the RRTA, makes unlawful certain types of conduct and it provides civil remedies for victims of such conduct. Like the RRTA, the EOA allows victims of unlawful conduct to make a complaint in respect of such conduct.
- *Racial Discrimination Act 1975 (Cth)*. Part IIA of the RDA makes unlawful racial vilification (as defined by s 18C) and it allows victims of such conduct to make a complaint and to seek legal remedies in respect of such conduct.

4. Comparisons in the operation of the Victorian Act with legislation in other jurisdictions

The most significant difference between the operation of the RRTA and similar legislation in other jurisdictions is noted in point 1 above. That is, the incitement model (on which the RRTA is currently based), and the victim-focused model, on which s 18C of the RDA is based. For the reasons given in point

²⁷ Increasing awareness of relevant laws amongst members of target groups also makes it more likely that any complaints made will be meritorious and well-founded: *Ibid*, [2.211]. This protects the interests of respondents and also benefits the general public.

²⁸ *McNamara* (n 24) 305.

²⁹ See *Charter* s 3, which picks up the list of attributes in respect of which discrimination is prohibited by the *Equal Opportunity Act 1995 (Vic)*.

³⁰ *Charter* s 32.

1 above, the victim-focused model specifically seeks to protect human dignity, whereas the incitement model does not.

This submission acknowledges the argument that the standard set by s 18C (conduct that is ‘reasonably likely to offend, insult, humiliate or intimidate’) may be considered too low, particularly in comparison to the standard set by the RRTA. That is, there is concern that this standard allows trivial and vexatious complaints to be made, which limits the freedoms of others. However, it should be noted that the RRTA contains exemptions to liability.³¹ Also, s 18C has been interpreted as applying only to conduct having ‘serious and profound effects- not to be likened to mere slights’.³² The provision does not apply merely to ‘personal hurts unaccompanied by some public consequence against which the Act protects’.³³

8. Possible extension of protections or expansion of protection to classes of people not currently protected under the existing Act

This submission supports the extension of Victorian anti-vilification law to confer protection on other groups targeted by harmful vilification. Specifically, this submission supports legislative protection from vilification on the grounds of disability, sex, and sexual orientation. This is consistent with the purpose of protecting individual’s human dignity and protecting people from social, political and economic exclusion from society. This would also be consistent with legislative protection in other Australian States and Territories.

Table of comparable legislation

Sexuality vilification	<i>Anti-Discrimination Act 1977</i> (NSW) s 49ZT
	<i>Anti-Discrimination Act 1991</i> (Qld) s 124A
	<i>Discrimination Act 1991</i> (ACT) s 67A(1)(g)
	<i>Anti-Discrimination Act 1998</i> (Tas) s 19C
Gender vilification	<i>Anti-Discrimination Act 1977</i> (NSW) ss 38S and 38T
	<i>Anti-Discrimination Act 1991</i> (Qld) s 124A(1)
	<i>Discrimination Act 1991</i> (ACT) s 67AB
Disability vilification	<i>Discrimination Act 1991</i> (ACT) s 67A
	<i>Anti-Discrimination Act 1998</i> (Tas) s 19(b)

However, two points will be noted in relation to the proposed extension of the RRTA to include these new grounds of vilification. First, as noted above, the RRTA was enacted specifically to promote multiculturalism in Victoria. This is reflected strongly in the Preamble, which refers explicitly to the need to protect ‘people from diverse ethnic and Indigenous backgrounds, and those who practice ‘different religious beliefs and practices’. Adding new grounds of vilification to the RRTA may undermine the specific purpose of the RRTA in promoting multiculturalism in Victoria.³⁴

In place of adding new grounds of vilification to the RRTA, this submissions recommends:

- repealing the RRTA; and

³¹ RRTA ss 11 and 12.

³² *Eatock v Bolt* (2011) 197 FCR 261 [268] (Bromberg J), citing *Creek v Cairns Post Pty Ltd* [2001] FCA 1150 [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR [70] (French J); *Jones v Scully* [2002] FCA 1080 [102] (Hely J).

³³ *Eatock v Bolt* (2011) 197 FCR 261 [267].

³⁴ It is noted that the amending bill renames the RRTA the ‘Elimination of Vilification Act’.

- inserting provisions prohibiting racial and religious vilification (currently covered by the RRTA), and the new grounds of vilification, into the *Equal Opportunity Act 2010* (Vic).

This would be consistent with the approach taken in other Australian jurisdictions, such as New South Wales,³⁵ Queensland,³⁶ Australian Capital Territory³⁷ and Tasmania.³⁸ In all these jurisdictions, anti-vilification provisions are contained in the jurisdiction's respective anti-discrimination legislation, rather than being contained in stand-alone anti-vilification legislation (as in Victoria). Including anti-vilification provisions in the EOA may also promote greater public awareness of the protections available.

Recommendation 3: Victorian anti-vilification law should be extended to provide protection from vilification on the grounds of disability, sex, and sexual orientation.

Recommendation 4: Legislative protections against vilification should be included in the *Equal Opportunity Act 2010* (Vic).

Second, when the amending bill³⁹ was introduced into Parliament, one of its stated purposes was to protect women from misogynist speech.⁴⁰ However, the bill does not include 'sex' as a prohibited ground for vilification. Rather the bill refers only to 'gender', 'gender identify' and 'sex characteristics'. 'Sex' is the ground on which discrimination is prohibited in the *ICCPR*,⁴¹ the *EOA*⁴² and the *Charter*.⁴³ Arguably, 'sex' has a meaning that is different from the terms 'gender', 'gender identify' and 'sex characteristics'.⁴⁴ Therefore, for the sake of consistency and completeness, the term 'sex' should also be included in the 'attributes' listed in anti-vilification laws.⁴⁵

Recommendation 5: The term 'sex' should be included in the grounds on which vilification is prohibited.

I thank you for this opportunity to provide a submission on these important topics, and I am available to clarify or expand on any part of this submission.

Yours sincerely,



Mr. Bill Swannie
College of Law and Justice

³⁵ *Anti-Discrimination Act 1977* (NSW).

³⁶ *Anti-Discrimination Act 1991* (Qld).

³⁷ *Discrimination Act 1991* (ACT).

³⁸ *Anti-Discrimination Act 1998* (Tas).

³⁹ Racial and Religious Tolerance Amendment Bill 2019 (Vic).

⁴⁰ Victorian Parliament, Legislative Council, 28 August 2019, 2725-7 (Fiona Patten, Northern Metropolitan).

⁴¹ ICCPR art 26.

⁴² EOA s 6(o).

⁴³ The *Charter* picks up the list of attributes in respect of which discrimination is prohibited by the *Equal Opportunity Act 1995* (Vic): *Charter* s 3(1).

⁴⁴ Holly Lawford-Smith 'Misgivings about RRTA amendment bill' (The Age, 21 September 2019)

<https://www.theage.com.au/national/victoria/misgivings-about-racial-and-religious-tolerance-amendment-bill-20190919-p52syb.html>

⁴⁵ The Bill adopts the term 'attributes', which is also used in the EOA. This is another reason for ensuring consistency between the Bill and the EOA (which lists 'sex' and 'gender' as protected attributes).

APPENDIX:
COMPARING THE OPERATION OF THE RRTA TO S 18C OF THE RDA

