Supplementary submission to Inquiry on Anti-Vilification Protections

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I do not seek confidentiality and give complete permission for the committee to publish my submission online in full (with the obvious exceptions of my phone number and postal address).

I would like to thank the Committee for the opportunity to make submissions to the Inquiry into Anti-Vilification Protections, for the invitation to myself to testify to the Committee, for the courtesy and professionalism of Mr Tak, Ms Suleyman and Mr Southwick during the testimony, and for the invitation to make this second submission.

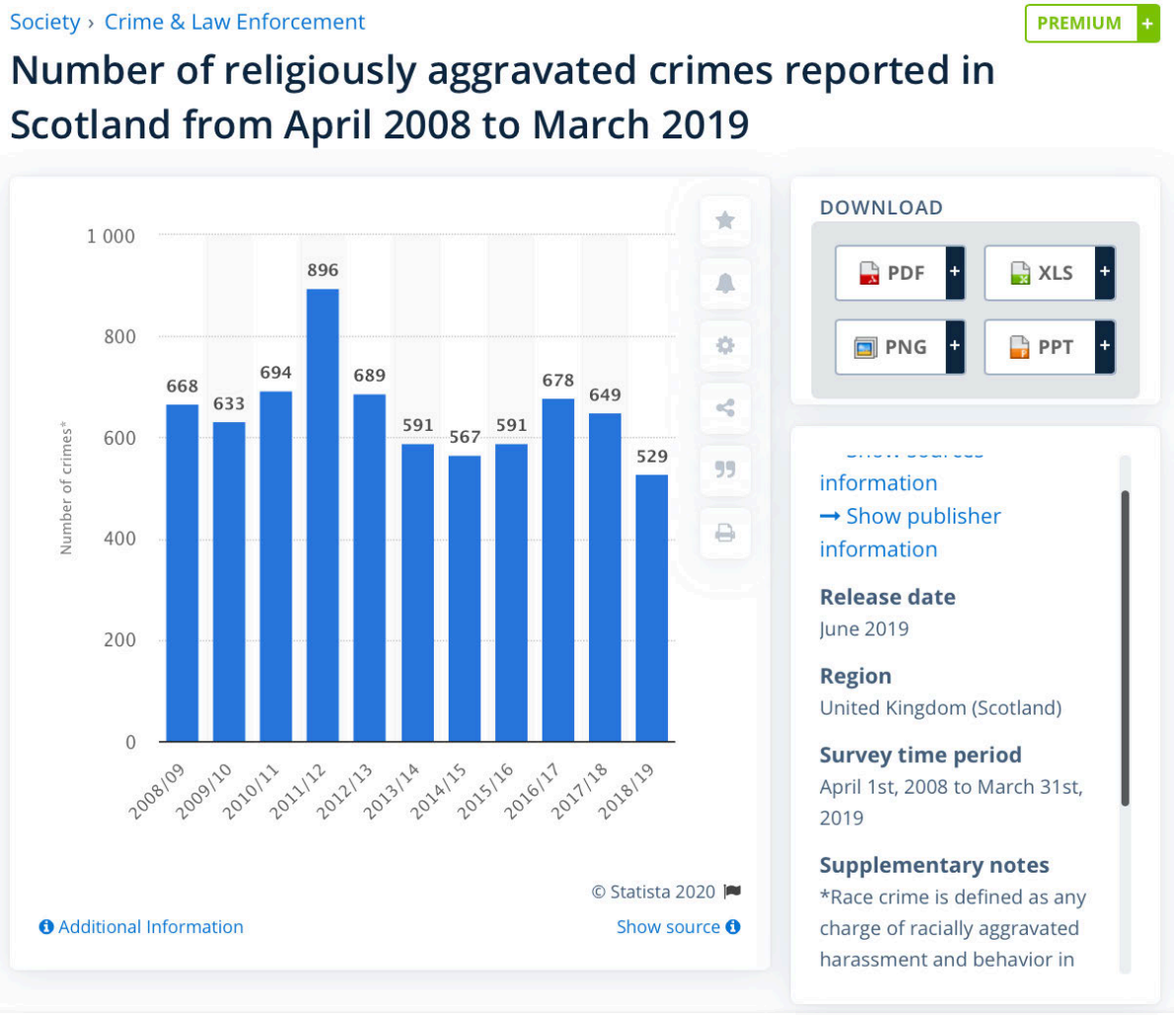
1. Evidence supplemental to my first submission

My first submission discussed, among other things, the inability of overly broad anti-vilification laws to affect the kind of change that does need to be affected. Put another way, the prohibition of things that should *not* be illegal cannot help to decrease the prevalence of things that *should* be illegal. I have since become aware of more evidence to this point.

In Scotland, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 was given royal assent on January 19, 2012. The Act is intended to address the sectarianism that exists in parts of Scottish society, specifically, soccer matches - especially those between the Celtic and Rangers clubs. Celtic is associated with Irish nationalism, Scottish nationalism, and Catholicism, while Rangers is associated with Ulster loyalism, Scottish unionism, and Protestantism. This divide frequently gives rise to sectarian behaviour between fans of the two clubs.

The Act made it illegal at soccer matches to, among other things, express hatred of, or stir up hatred against, a religious, social or cultural group, or a group defined by colour, race, nationality, ethnic or national origin, sexual orientation, transgender identity, or disability, at soccer matches.[1] While I would support evicting fans who do so from stadiums and banning them from future matches, I don't support making such singing a criminal offence.

The following graph details the number of religious hate crimes (which are closely connected to sectarian behaviour) recorded in Scotland over a decade. Each year begins in April and ends the following March.[2]



[1] legislation.gov.uk, *Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012*, s 1, http://www.legislation.gov.uk/asp/2012/1/section/1/enacted

[2] Statista, *Number of religiously aggravated crimes reported in Scotland from April 2008 to March 2019*, June 2019, https://www.statista.com/statistics/626002/religious-hate-crimes-in-scotland/

As can be seen, the year in which it was passed, 2011/12, saw a huge spike in hate crimes, before they returned to roughly pre-Act levels. However, the law was repealed in April of 2018,[3] which in this graph is 2018/19. After having almost a full year (until March 2019) to see the effects of this repeal, we can see that in that year, such hate crimes dropped to their *lowest* level in the decade, to 529. That's right: the *repeal* of a law criminalising sectarian *speech* coincided with a *decrease* in sectarian hate *crimes*. That, of course, doesn't mean that the law caused the decrease. But it does, along with the spike in 2011/12, illustrate that the law didn't help to reduce hate crimes.

Another set of numbers gives further reason to believe that this is the case: the correlation of hate crimes in England and Wales, and the commencement of another censorious action.

In 2013/14, 44,480 hate crimes were recorded in England and Wales.[4]

- 37,484 (84%) were race hate crimes;
- 4,622 (10%) were sexual orientation hate crimes;
- 2,273 (5%) were religion hate crimes;
- 1,985 (4%) were disability hate crimes; and
- 555 (1%) were transgender hate crimes.

Some were recorded with more than one ground.

In the United Kingdom in 2014, police began recording what are known as non-crime hate incidents. These are incidents perceived by the victim or a witness to be hate-motivated that are not illegal. These can include incidents that are as innocuous as a social media post that any person finds offensive and perceives to be motivated by hate, whatever the poster's actual mind. Nonetheless, they are logged and can be viewed publicly in some instances, for example by employers. In February of this year, the Telegraph reported that almost 120,000 hate incidents have been recorded by UK police since the practice began.[5]

Meanwhile, the most recent hate crime data for 2018/19 shows that 103,879 hate crimes were recorded in England and Wales during that time.[6]

- 78,991 (76%) were race hate crimes;
- 14,491 (14%) were sexual orientation hate crimes;
- 8,566 (9%) were religion hate crimes;
- 8,256 (8%) were disability hate crimes; and
- 2,333 (2%) were transgender hate crimes.

Once again, some have been recorded with more than one ground.

Of course, correlation is not causation. Part of this is that hate crime data is recorded better than it used to be, and reported more often. Furthermore, the debate over Brexit and terrorist attacks during this period have also made things worse. However, those terrorist attacks in the UK did not begin until 2017, and Brexit did not begin until 2016. Yet the rise began in 2013/14. Something else must be at play. I do believe that overzealous recording of hate incidents has made things worse by exacerbating resentment among extremists at being censored.

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[3] The Scottish Parliament - Pàrlamaid na h-Alba, *Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill*, https://beta.parliament.scot/bills/offensive-behaviour-at-football-and-threatening-communications-repeal-scotland-bill

[4] Home Office, *Statistical News Release: Hate Crimes, England and Wales, 2013/14*, October 16, 2014, page 1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/364202/hosb0214snr.pdf

[5] Izzy Lyons, Jack Hardy and Martin Evans, *Police record 120,000 'non-crime' hate incidents that may stop accused getting jobs*, February 15, 2020, https://www.telegraph.co.uk/news/2020/02/14/police-record-120000-non-crime-incidents-may-stop-accused-getting/

[6] Home Office, *Hate Crime, England and Wales, 2018/19*, October 15, 2019, page 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf

Finally, even scholars who are in favour of anti-vilification laws have conceded that they fail to deal with this kind of abuse:

> "Unfortunately, as our research confirms, there has been little to no change in the incidence of vilification in public places – on the street, on trains and buses, or in shopping centres, for example. The only shift that has occurred is in who is targeted, with more recent waves of migrants newly targeted. There has been a shift, for example, towards people of African heritage and from the Middle East.
>
> On this level, anti-vilification laws do not seem to have reduced the overall incidence of hate speech."[7]

2. Racism due to the coronavirus pandemic

I would like to continue on the topic that is of most immediate importance: The impetus of the invitation to make this second submission is the racism that has increased due to the current coronavirus pandemic, especially against people of Asian background. We have some examples of what that has looked like in media reports:

> "A Chinese-Australian family's home has been targeted by vandals for two nights in a row, leaving their garage covered in racist graffiti about the coronavirus pandemic, and one of their windows smashed with a large rock."[8]

> "In the video footage supplied to the ABC, the woman is seen hurling racially charged taunts at Ms Li after she told the woman to stay at home.
>
> "Why don't you f***ing go back to China and keep your disease over there, you f***ing idiot," the woman said. "[You] ate live meat, blood-covered blood, bats. Good on youse, and you f***ing come here. F***ing germ, f*** off."
>
> In the video, a man then walks into view before shoving Ms Li and grabbing the phone from her.
>
> Ms Li said the man told her she should go back to her country, and threatened to smash her windows."[9]

> "Two Chinese students have been bashed and robbed in Melbourne with police now hunting for their attackers.
>
> The two female victims were walking along Elizabeth Street about 5:30pm when a group including two women confronted them on Wednesday, Victoria Police said.
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> They were verbally abused and were told "go back to China", Nine News reported.
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> The two female attackers punched and kicked the victims, and one was dragged to the ground.

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[7] Katharine Gelber and Luke McNamara, *Why Australia's anti-vilification laws matter*, November 30, 2018, https://theconversation.com/why-australias-anti-vilification-laws-matter-106615

[8] Jason Fang, Samuel Yang and Bang Xiao, *Racist coronavirus graffiti sprayed on Chinese-Australian family's home in Melbourne*, April 22, 2020, https://www.abc.net.au/news/2020-04-22/racist-coronavirus-graffiti-sprayed-on-family-home-in-melbourne/12170162

[9] Samuel Yang, *Video shows Chinese woman being racially attacked in Melbourne over coronavirus*, May 6, 2020, https://www.abc.net.au/news/2020-05-06/coronavirus-woman-racist-attack-in-melbourne/12216854?nw=0

> One of the student's AirPod headphones were stolen by a man who was at the scene but not involved in the assault.
>
> The two students were left with minor injuries."[10]

> "A Melbourne doctor has called for kindness during the coronavirus pandemic after claiming he was racially abused while getting coffee.
>
> The respected Geelong practitioner, Dr Ern Chang, says he was subject to a tirade after a minor carpark accident.
>
> Chang was out buying a takeaway coffee when he nudged another car.
>
> What he didn't expect from the owner was a racist rant.
>
> "She walked out of an IGA and said, "You shouldn't be here you, should be home," Chang told 7NEWS.
>
> Chang says the woman told him to "get the f*** out of here"."[11]

> "A Melbourne bus driver has been racially abused by a passenger amid the COVID-19 pandemic.
>
> The female passenger today allegedly accused the bus driver of bringing coronavirus to Australia from China.
>
> "She called me corona, she called me China, she called me bringing the virus to Australia," the bus driver told 9News."[12]

Victorians may be surprised to learn that these incidents are probably not illegal under the Racial and Religious Tolerance Act, Victoria's anti-vilification law, although they may be illegal under other laws. They should be illegal under anti-vilification laws as well: they are disgusting incidents of abuse (or worse), that are directed at specific individuals, in person and to their face. The victims of these attacks have no choice but to be subjected to this abuse, and have no opportunity to avoid it. Had such comments been made on social media, they should not be illegal (though they would still be disgusting), as avoiding exposure to them would have been possible. But when they are made to a person to their face, exposure is unavoidable. No one should have to put up with them. "Sending a message" is not a good enough reason by itself to criminally punish someone, but if such punishment is justified for other reasons, then sending a message - in this case, the message that racial vilification is unacceptable - is a good idea.

The reason that Victorians would be surprised that such behaviour is probably not illegal under anti-vilification laws is that our laws focus on incitement of hatred, not harassment.

- Section 7(1) of the RRTA reads: "A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."

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[10] SBS, *Two Chinese students assaulted and robbed during apparent racist attack in Melbourne*, April 18, 2020, https://www.sbs.com.au/news/two-chinese-students-assaulted-and-robbed-during-apparent-racist-attack-in-melbourne

[11] Teegan Dolling and Emily Olle, *Melbourne doctor says he was subject racist coronavirus abuse while getting a coffee*, April 20, 2020, https://7news.com.au/lifestyle/health-wellbeing/melbourne-doctor-says-he-was-subject-racist-coronavirus-abuse-while-getting-a-coffee-c-987784

[12] Chanel Zagon, *Coronavirus: Melbourne bus driver racially abused by passenger*, April 3, 2020, https://www.9news.com.au/national/coronavirus-melbourne-bus-driver-racially-abused-by-passenger/c87d83b7-36e0-4171-8409-49dffc31c986

- Section 24(1) of the RRTA reads: "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."

- Section 24(2) of the RRTA reads: "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."

These laws focus on the hatred incited in a third party due to the conduct being prohibited. They do not focus on the effect of the conduct on the person being abused, who had no choice but to suffer the abuse. This has led to the absurd situation where it is not unlawful, to say to a Jewish Victorian, that "Hitler was right about you bastards" because this would not have the effect in an audience that heard such a disgusting comment of inciting hatred against Jews.[13] This should change.

The recent increase in racist incidents prompted me to attempt to draft a law that might address such incidents, while also restoring freedom of speech that has been unduly restricted by existing laws. To that effect, I recommend the repeal of ss 7, 8, 24(1), 24(2), 25(1) and 25(2), and their replacement with the following three sections:

"s 7 - Personal abuse unlawful

(1) A person must not communicate or express a message if:

(a) the message is intended to be seen or heard by another person or other people; and

(b) the intention that the other person or people see or hear the message was formed because of the:

(i) race; or

(ii) religious belief or activity; or

(iii) sex; or

(iv) sexual orientation; or

(v) gender or gender identity; or

(vi) disability status,

of the other person or people; and

(c) the message is intended to humiliate or intimidate the other person or people; and

(d) it is reasonably likely that a reasonable person with the attribute that is relevant under subsection (1)(b) would, because of that attribute, feel humiliated or intimidated by the message; and

(e) the act of directing, communicating or expressing the message takes place in the physical proximity of the person or people.

(2) For the purposes of subsection (1)(b), if a person:

(a) commences the expression or communication of the message; or

(b) increases the visibility or volume of the message;

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[13] Bennett v Dingle (Human Rights) [2013] VCAT 1945 [44]-[45]

after becoming aware that:

(c) there is a person or people in their physical proximity; and

(d) that person has the attribute that is relevant for the purposes of subsection (1)(d);

they shall be presumed to have formed the intention because of the person's relevant attribute, however the presumption can be rebutted.

(3) For the purposes of subsection (1)(e),

(a) "physical proximity" includes the residence of the person or people.

(b) a message is not communicated in a person or group's physical proximity merely because it is communicated in a non-physical forum that is accessible by the person or some or all of the group.

(4) Subsection (1) does not apply to messages expressed or communicated by a person to another person, if the second person had already communicated a message to the first person that was unlawful under subsection (1)."

Each clause is important for the following reasons:

- Clause (1)(a) ensures that offensive comments will not be illegal merely because they are overheard by someone who feels humiliated or intimidated by them. This ensures that only conduct that clearly targets a victim will be made illegal. All of the above examples clearly involved an intent on the part of abusers for their victims to see or hear their comments.

- Clause (1)(b) is the clause that establishes the unlawfulness of vilification on the basis of certain attributes. If a person forms an intention that another person, because of the other person's race, religious belief or activity, sex, sexual orientation, gender identity, or disability status, be exposed to their offensive message, then they are obviously targeting that person for abuse.

- Clause (1)(c) ensures that offensive comments will not be illegal merely because the other person does not like them. It ensures that the commenter won't be punished solely based on the other person's subjective reaction, thus avoiding handing too much power to the other person. All of the above examples clearly involved an intent on the part of abusers for their victims to be humiliated or intimidated by their comments.

- Clause (1)(d) ensures both that a person won't be punished if the other person's reaction to what is said is unreasonable, but also that it is not necessary that humiliation or intimidation be caused, just that it is reasonably likely to be caused. It thus avoids both overreacting and underreacting. All of the above examples clearly involved a reasonable likelihood that someone would be humiliated or intimidated by such public abuse. Who wouldn't be?

- Clause (1)(e) ensures that the comments will be illegal only if the victim has no choice but to endure them. This is necessary to ensure that free speech is not infringed. You should have the legal right to make an offensive comment, as long as you don't force someone to listen to it. All of the above examples involved people that had no choice but to endure abuse.

- Clause (3) clarifies that physical proximity requires more than merely being able to access the message.

- Clause (4) ensures that a person loses this protection against vilification if they vilify someone else.

I believe that this law should be enforced with penalty infringement notices akin to speeding fines, once police are satisfied that a breach has occurred, rather than criminal charges and prosecutions. This would (a) avoid a drawn-out process to the detriment of victims, and (b) avoid disproportionately high penalties to the perpetrator, such as a criminal record. The person fined would have to be allowed to challenge the fine in court.

Incidents of such unlawful abuse should be reported publicly by the police and logged into a publicly accessible database, with the following information:

- the age, sex and ethnicity of the victim;
- the age, sex and ethnicity of the perpetrator;
- the date and time of the incident;
- the suburb (postcode) and local government area in which the incident took place;
- the victim's attribute on the basis of which the abuse took place;
- a description of the incident;
- the amount that the perpetrator was fined.

I believe that the demographics of victims should be recorded to get an idea of who is targeted by racist abuse. I believe that the demographics of perpetrators should be recorded so that monitoring may be done on enforcement of the law, to ensure that enforcement is not turning into racial profiling. There are concerns that enforcement of the coronavirus lockdown has turned in this direction.[14]

Conduct that is more serious than the conduct described above, specifically, making threats and advocating violence (as distinct from inciting hatred) should be criminalised, with prosecutions and the prospect of criminal records.

The problem with the existing provisions of the RRTA is that it is not sufficient to threaten someone, or advocate violence against someone, to be captured by the provisions of s 24(1) or s 25(1). Under those provisions, it is necessary to incite hatred of the person **and** threaten them or incite others to do so before one can be prosecuted.

The upshot of this is that threats that do not incite hatred are legal under the provision (though may not be under other provisions). However, I do not agree with the suggestions that have been made that "and" be changed to "or". I already believe that trying to assess "incitement of hatred" is a problematic enough concept for the civil law. Putting it into the **criminal** law would be hugely disproportionate. (To this effect, sections 24(2) and 25(2), which criminalise incitement of hatred in some circumstances, should be repealed.)

To lower the bar in the way that is necessary to criminalise vilifying threats, I recommend that the requirement of inciting hatred for a threat or incitement to a threat to be illegal be removed.

I recommend that the following amendment be adopted:

"s 8 - Offence of threatening vilification

(1) A person must not communicate or express a message if:

(a) the message is intended to be seen or heard by another person or other people; and

(b) a reasonable person would conclude, due to the message communicated to the person or people referred to in subsection (1)(a), that the person expressing the message intends to:

(i) physically harm the person or people referred to in subsection (1)(a); or

(iii) physically harm an associate of theirs; or

(iv) physically damage their property; and

(c) the message was expressed because of the:

(i) race; or

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[14] Michael McGowan, Andy Ball and Josh Taylor, *Covid-19 lockdown: Victoria police data sparks fears disadvantaged unfairly targeted*, June 6, 2020, https://www.theguardian.com/world/2020/jun/06/covid-19-lockdown-victoria-police-data-sparks-fears-disadvantaged-unfairly-targeted

(ii) religious belief or activity; or

(iii) sex; or

(iv) sexual orientation; or

(v) gender or gender identity; or

(vi) disability status,

of the other person or people referred to in subsection (1).

(2) For the purposes of subsection (1)(a), if a person:

(a) commences the expression or communication of the message; or

(b) increases the visibility or volume of the message;

after becoming aware that:

(c) there is a person or people in their physical proximity; and

(d) that person has the attribute that is relevant for the purposes of subsection (1)(d);

they shall be presumed to have formed the intention because of the person's relevant attribute, however the presumption can be rebutted.

(3) For the purposes of subsection (1)(a), if a person:

(a) communicates the message in a text message sent to the other person or people; or

(b) communicates the message in a phone call to the other person or people; or

(c) communicates the message in a physical form placed in the residential mailbox of the other person or group of people; or

(d) communicates the message in an email sent to an email address belonging to the other person or group of people; or

(e) communicates the message to a social media account belonging to the other person or group;

they shall be presumed to have formed the intention because of the person's relevant attribute, and the presumption cannot be rebutted, even if it could have been rebutted had only subsection (2) been applicable.

(3) For a breach of this section to occur, it is not necessary that a message is not communicated in a person or group's physical proximity."

However, more should be done to crack down on serious vilification. There is another aspect to it: advocating or encouraging violence against another person. This differs from threats: threats are about warning the other person that you plan to commit violence against them. Advocating or encouraging violence is about trying to spur on a third party to attack the other person. Legislating against threats does not necessarily cover this second form, and it should be illegal too.

To this effect, I recommend that the following amendment be adopted:

“s 9 - Offence of vilification that encourages violence

(1) A person must not communicate or express a message if:

(a) the message is intended to be seen or heard by another person or other people; and

(b) the message explicitly refers to physical violence; and

(c) a reasonable person would conclude that the message, encourages the person or people referred to in subsection (1) to:

(i) physically harm a third person or group of people; or

(ii) physically harm an associate of the third person or group of people; or

(iii) physically damage the property of the third person or group of people; and

(d) the message was expressed because of the:

(i) race; or

(ii) religious belief or activity; or

(iii) sex; or

(iv) sexual orientation; or

(v) gender or gender identity; or

(vi) disability status,

of the other person or people referred to in subsection (1)(b).”

If adopted, these two sections could take the place of section 24 and 25 of the Act.

3. Proposed powers of enforcement

My first submission and testimony was primarily concerned with explaining the arguments against overly broad anti-vilification laws (in essence, laws that go further than my proposals outlined earlier in this submission). Since then, I have had the benefit of reading and watching more submissions and testimonies from other stakeholders, and it is clear that the powers suggested to be given to the EOHRC and VCAT are highly important.

The proposed amendment to the RRTA includes the following section:

“**(22A) Tribunal order compelling production of information**

(1) The Commission may apply to the Tribunal for an order requiring a person to provide information to the Commission for the purpose of dispute resolution under this Act.

(2) The Tribunal may make an order referred to in subsection (1) if it is satisfied that—

(a) a person is in possession of information that is relevant to the dispute resolution; and

(b) the information is necessary for the conduct of the dispute resolution.”

The proposal is popular in some sections of the community: the submission of the Human Rights Law Centre, GetUp!, the Anti Defamation Commission, the Victorian Trades Hall Council and the Asylum Seeker Resource Centre says at paragraph 111:

> "The Victorian Equal Opportunity and Human Rights Commission (the Commission) should be given broader enforcement powers. The law should be amended so that the Commission is empowered with a range of regulatory functions and powers to address hateful conduct in the Victorian community. This should include reinstating the Commission's full range of regulatory powers and functions, including powers to undertake own motion public inquiries and investigate serious matters than indicate a possible contravention of anti-hate laws."[15]

And at page 114 it says:

> "The Patten Bill seeks to grant new powers to the Commission to apply to VCAT for orders so that they are able to request information from any relevant person or business (such as Facebook or Twitter) to identify online 'trolls' after a vilification complaint has been made. Such requests could require, for instance, social media companies to hand over information on individuals who engage in online abuse through 'anonymous' accounts. We support this."[16]

I testified before the Legal and Social Affairs Committee on this topic on March 12, 2020. This was the last day of normal life before the coronavirus started to seriously affect us. At the time, very few Victorians had ever known life under any type of authoritarian governance. Between that time and the time of writing, that number has increased to 100%, in the form of the coronavirus lockdown; specifically, Victoria's Stage 3 restrictions.

I do not use the term "authoritarian governance" to describe the lockdown out of a desire to be hyperbolic, or to disparage the lockdown. This is just an objective description. Victoria's lockdown consisted of significant financial penalties simply for the act of leaving your house without a good enough reason, even if you did not gather with anyone else, or attend a business operating unlawfully. The direction setting out such rules was signed by the Deputy Chief Health Officer, who is not an elected official. While Parliament had given the executive branch the power to make such directions, there was no scrutiny by Parliament of the directions. On at least one occasion, police fined Victorians for lawful activity.[17] This is authoritarian governance by any reasonable objective measure. I don't mean to suggest that it's in the same category as what is typically thought of as authoritarian governance: governments hauling people off to jail for criticising them. We obviously, thankfully, never approached this level of authoritarianism. And reasonable people can say that measures that harsh were necessary to bring the spread of coronavirus under control (though I disagree). It cannot, however, be logically said that this means it was not authoritarianism. Reasonable people can support capital punishment as well (though I don't), but they can't say that it doesn't kill people.

What does the law enforcement response, as part of an epidemiological response to a massive public health emergency, have to do with a proposal to expand Victoria's anti-vilification laws? Well, thanks to the lockdown, we now have a taste of what this proposal would look like in practice. Every time I left my house for those six weeks and one day of lockdown, whether to visit a shop or go for a walk, I was acutely fearful that I would be fined. In my local government area of Boroondara, 54 fines had been issued at the end of May 17.[18] [19] I do not know if the proposed powers to be given to the EOHRC, to allow it to initiate its own investigations and to allow it to force social media companies to divulge information about their users, would be effective in stopping online vilification. What I do know is that the only way to do so is to make the type of fear of law enforcement that existed during the Stage 3 restrictions permanent.

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[15] Human Rights Law Centre, GetUp!, Anti Defamation Commission, Victorian Trades Hall Council and Asylum Seeker Resource Centre, *Stopping hate in its tracks: Joint submission to the Victorian Government's Anti-Vilification Protection Inquiry*, January 31, 2020, https://parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_Anti-Vilification_Protections_/Submissions/047_2020.01.31_-_Human_Rights_Law_Centre_et_al_Redacted.pdf

[16] Ibid.

[17] Paul Sakkal and Rachel Eddie, *No fines for people in shops, as car wash penalty revoked*, April 10, 2020, https://www.theage.com.au/national/victoria/no-fines-for-people-in-shops-as-car-wash-penalty-revoked-20200410-p54ix7 html?js-chunk-not-found-refresh=true

[18] Josh Taylor, June 4, 2020, https://twitter.com/joshgnosis/status/1268429764219383808

[19] Josh Taylor, June 4, 2020, https://twitter.com/joshgnosis/status/1268448548544110592

This is what that necessary fear would look like: Every time someone expressed an opinion on social media, they would have to second-guess themselves. They would have to take the risk that someone seeking to shut them down could complain to the Equal Opportunity and Human Rights Commission, which would adopt the role that Victoria Police had during the lockdown. Just as every time you left your house, being sighted by a police officer could lead to a substantial fine, every post on social media that is sighted by the EOHRC may very well lead to a protracted period of legal trouble, should it get these new powers.

And it is astonishingly naive to assume that under such a legal regime, Victorians would only have something to fear, or would only have to second-guess themselves, if they actually expressed a genuine form of hate speech or vilification. Even if a complaint is baseless, significant legal trouble could be created merely by the person expressing the opinion having to comply with demands from the EOHRC, such as demands for mediation, a statement of defence, etc. Thus, it would not be necessary for the law to be breached, or for a person to be found guilty of a breach, for them to be seriously harassed by the legal system. Thus, those seeking to compel a person to self-censor could file a baseless complaint to do so, knowing that the powers of the EOHRC will likely see it investigated, even if they know they will not get a legal judgement in their favour.

Basically, cracking down on online vilification means we have to choose between inefficacy and totalitarianism.

4. Religious education

The testimony of Maxine Piekarski, the mother of a Jewish high school student in Victoria who was viciously bullied for his Jewish heritage over the course of many months, to the Committee on May 28 was extremely painful to listen to, and a confronting reminder of where some schools are failing to protect students from bullying. Her testimony leads me to make two broad recommendations:

- further enforcement of the principle that schools are responsible to take action to prevent bullying of their students by other students of theirs, even if the bullying takes place off school grounds, and out of school hours.
- stricter mandatory obligations for school principals to address such bullying, including disciplinary sanctions if they do not.

However, in her testimony the removal of religion education from class time in Victorian public schools was criticised as having made the problem of anti-semitic and other forms of prejudiced bullying worse. I would like to respond to this criticism.

World religions/comparative religions is a good and educational subject. It should not, however, be used as the subject to inculcate ethics and values of tolerance and respect into students. The reason it is inappropriate for that purpose is because it suggests that tolerance and respect should be dependent on the religion of the other person, when in fact it should be *in*dependent of such beliefs.

The reasoning behind world religions/comparative religions supporting an ethics education is that religious hatred and prejudice stems from misconceptions about what other religious groups believe, and that if those misconceptions are cleared up by education, those with prejudiced opinions would see that the religions are actually quite benign, and abandon their prejudices.

There are significant problems with this approach. Firstly, it depends on an incomplete teaching of many religions in order to establish tolerance. For example, it just cannot be said of Abrahamic religions that they are always peaceful and loving. Both the Old Testament, the New Testament (though to a lesser degree than the other two) and the Qur'an contain passages endorsing violence, murder and genocide against groups of people disfavoured by the authors of those texts. While it is true that Jews, Christians and Muslims rarely buy into such hate and violence, the hate and violence is nonetheless still present in the scriptures. If the aim of teaching students about religions is to convince students that those religious adherents follow peaceful, non-threatening religions, then a complete and accurate teaching of those religions is not going to help. But we cannot lie to students about what's in religious texts to achieve this outcome. Not only is this unethical, should they discover violent passages in these texts later on, there is a real risk of a descent into religious hatred, because not only do the religious texts have violent passages, the students were lied to about those passages.

Secondly, the effect of teaching religions objectively as a means to the end of encouraging tolerance runs a very real risk of intimidating students who are critical of religion and falsely branding them as bigots for their criticism. If it is taught that for religious hatred to be defeated, it is necessary to think of religions - not religious people, but religions - as good and positive, then those who are critical of religion will be branded as contributing to religious hatred for their criticism. This is an unfair assumption that the school curriculum should not make. An LGBTI student, for example, should not be accused of antisemitism for being disgusted by Leviticus 20:13, or of anti-Christian prejudice for being disgusted by Romans 1:26-32, or of anti-Muslim prejudice for being disgusted by Qur'an 4:16.

Thirdly, there is a risk of this approach causing some students with prejudice against people of other religions to feel justified in their prejudice. If it is taught that you should respect people of other religions because their religious beliefs are peaceful and tolerant, then it doesn't take a massive leap of logic to conclude that you should not respect them if their religious beliefs are not peaceful and tolerant. And if the student continues to believe that the religions their classmates follow are not peaceful and tolerant, then they are not going to respect their classmates.

The teaching of tolerance and respect for other students, and indeed, the community at large, irrespective of religion (and irrespective of the other attributes included in the Patten bill) should not be dependant on values. Unless someone's a Nazi or something similar, they should be respected despite their values, religious or otherwise. The problem of immoral religious doctrines should be resolved by reiterating that religious texts were written at a time where social values were extremely regressive, but times have changed, and religious people do not follow commands of violence and hate anymore.

5. Banning offensive symbols at residential properties

In my testimony on March 12, I confirmed that I believed there should be laws to prevent someone flying a Nazi flag in their backyard. I would like to elaborate on how such bans should work:

Firstly, I believe that the display of offensive material on someone's house has more scope to be legitimately prohibited or restricted than it does in other places, such as on social media, or at a protest rally. Because the price of being able to continue to live at your house might be to see such material eternally, it is an example of forcing someone to be exposed to such material, which there is no right to do. However, if a law is to be made for such prohibitions, the material that is prohibited would need to be prohibited at all houses within the jurisdiction making the law. If a council makes the law, all houses within the LGA should be subject to the same restrictions. If this Parliament makes the law, all houses within the state should be subject to the same restrictions. This is because we should not create a situation where the same jurisdiction is granting different degrees of free speech rights to its constituents, depending on where they live in the jurisdiction.

Secondly, there should be two legal instruments involved in the ban: the law declaring material that fulfils certain criteria to be prohibited or restricted from display at a residential property: a general, proactive, prohibition; and orders declaring a specific item to be prohibited or restricted: a specific, reactive, prohibition. The first law should set out principles that make certain materials prohibited or restricted, and the orders should declare that material is a breach of the first law, for the criteria specified in the first law.

Thirdly, I believe that enforcement of these laws should be carried out with these steps in order:

- Firstly, police and residents can apply to a court for a declaration that the material cannot be displayed on the property, or can only be displayed in certain ways. This can also include an application for an interlocutory injunction seeking the material to be provisionally prohibited or restricted from being displayed, pending consideration of a permanent injunction. If the resident displays the material in violation of an injunction, they should be liable to fines. However, if they display the material in violation of an interlocutory injunction that is later overturned, those fines should be rescinded.

- If this method proves ineffective, then we should shift to a system where police can make an order of prohibition or restriction unilaterally. If the resident wishes to have the material displayed, they would themselves need to go to a court to have the order overturned. If they display the material in violation of the order, they would be liable to fines. However, if the court overturns the police order, those fines should be rescinded.

- If this method proves ineffective, then, and only then, should we switch to a system where police can issue fines to the resident as soon as the material is displayed, on the basis that it breaches the law (as opposed to an order made under the law).

We should enforce the ban in the least punitive way possible.

6. Banning offensive symbols generally

I do not believe it is a good idea to ban the display of offensive symbols whatever the context. Contexts such as protest rallies and social media are not the same as display at a residential property. Neither involves forcing people to be exposed to the symbols: you don't have to go seek them out on social media or at a protest.

A ban on offensive symbols in general has forced the consideration of two different approaches in how to do so: whether specific symbols should be banned, or whether a set of principles should be developed that then informs decisions about which symbols are banned are which are not.

The former approach would be absurd. Singling out specific symbols without having any reasoning behind it would open the door to innumerable demands to ban more symbols, and the government would have no leg to stand on when refusing.

The latter approach would be better but still cannot make such bans a good idea. Apart from the moral problem of restricting freedom of speech without sufficient justification, it would still be far too subjective to be workable.

If a symbol is deemed to be covered by certain principles that allow it to be banned, then people who are offended by other symbols will do their best to argue that those principles also cover the symbols that offend them, so that they might be banned. I might find their reasoning utterly ridiculous, but the fact is, there is inherently some degree of subjectivity in whatever principle is ultimately adopted. I don't think the government would lack the wisdom necessary to not ban a symbol just because it is "offensive" to some people, but even more objective criteria would not solve the problem.

Suppose, for a moment, that "symbols of oppression and persecution" were to be banned. This is more objective than "symbols are offensive", but it is not objective enough, and it never will be. Take the LGBTI rainbow flag, for example. Some Christians think of this as a symbol of oppression and prosecution. Far-right US website Breitbart described it in these terms:

> "Under the banner of what is dishonestly called a gay pride or gay "rights" flag, hate, fascism, and intolerance has festered for years, specifically against Christians and conservatives. Under the auspices of a "rights and equality" symbol, Leftists have been on a rampage to take way the rights of others through bullying, lies, and online terrorism.
>
> The list of misdeeds and victims resulting from an increasingly emboldened Big Gay Hate Machine continues to grow.
>
> Under this banner of hate, people are outed against their will, terrorized out of business merely for being Christian, bullied and harassed for thoughtcrimes; moreover, "hate crimes" are being manufactured to keep us divided, Christians are refused service, death threats are hurled, and Christianity is regularly smeared as hate speech."[20]

Despite being an LGBTI person myself, I do believe that there have been some instances of LGBTI activism being unjustifiably intolerant of people I disagree with. But I'd obviously have a massive problem if the rainbow flag was banned. How consistently, however, can I argue against its banning if I think that "symbols of oppression and persecution" be banned? I don't believe that the instances of unjustifiable intolerance cited by Breitbart amount to "oppression and persecution", but some people do. That is the inherent subjectivity of principles like this. And again, it ultimately doesn't matter what I think: if the people in charge of deciding

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[20] John Nolte, *Take Down the Fascist, Anti-Christian Gay-Pride Flag*, June 23, 2015, https://www.breitbart.com/politics/2015/06/23/take-down-the-fascist-anti-christian-gay-pride-flag/

what symbols should and should not be banned side with fundamentalist Christians, then I will lose the freedom to display that flag.

Another problem relating to subjectivity, even if the "oppression and persecution" is cut and dry, such as Nazi persecution of Jews, is how closely connected to the symbol the oppression and persecution must be before the symbol can be banned. For example, very few people would dispute that the British government did not persecute many indigenous peoples during its administration of the British Empire. But should the Union Jack therefore be banned? Apart from the problem of banning Victorian and Australian flags, is the persecution by the British government closely connected enough to the Union Jack? Is the Union Jack a benign symbol that was hijacked by a terrible colonial project, or is it a symbol of a terrible colonial project?

There is no clear-cut right and wrong answer to this question. Trying to answer such questions with the force of law is dangerous, because it drastically raises the stakes of the debate. If someone who embraces a symbol, and someone who is offended by the symbol, are discussing it, they might get heated and emotional, but they will have a better chance of keeping their discussion reasonable because nothing actually depends on it. But if the discussion could decide whether or not the symbol would be made illegal, then the discussion takes on a whole new dimension. While understanding, and being understood, might have been the original goal of the discussion, now the discussion is about winning and losing, because parties have irreconcilable goals. Accordingly, they are more likely to get adversarial in the discussion, because they are trying to win by any means necessary. They are more likely to use rhetorical devices that degrade the quality of debate, damage relationships, and potentially escalate their argument to a dangerous flashpoint.

There is also the question of the exacerbation of sectarian divisions by such bans that leave the government in a lose-lose situation. Currently, the symbol most likely to be banned is the Nazi swastika. It seems almost certain that if the swastika is banned, some members of other minority groups will similarly demand bans on symbols that they find offensive. This puts the government in a lose-lose situation.

If the government refuses to ban other symbols, then I truly fear for Jewish Victorians. I am concerned that if the swastika is banned, but other symbols are not, then Jewish Victorians will be perceived by some in the community as getting special treatment, causing antisemitic resentment. I was horrified when I read the submission of the Union for Progressive Judaism, and the statistics they provided that show that as a group of people get younger, they get more tolerant of minorities - with the exception of Jews.[21] While I am not in favour of a general ban on the Nazi swastika, I do not believe that this would be special treatment, for two reasons: 1) it is a symbol with a uniquely close connection to an evil regime, and 2) while Jews were obviously the prime target of the Nazis, they were not the only target. So while the swastika is especially a symbol of genocidal antisemitism, it's also a symbol of genocidal hatred of people are different in general. But given the terrible nature of antisemitic conspiracy theories, I am pessimistic that this understanding will be embraced by enough people to prevent antisemitism from being exacerbated.

On the other hand, if the government does decide to ban other symbols as well, this will almost certainly amplify or exacerbate hatreds and sectarian divisions in Victoria. A symbol that may be highly offensive to one ethnic group may be idolised by another. If banning offensive symbols is taking place, not banning the symbol will be interpreted by some in the group offended by it as an attack on them, as a signal from their government that their pain does not matter while the pain of other groups does. But if the symbol is banned, that will be interpreted by some in the group as an attack on them, because they have lost some freedom of speech.

I noticed a relevant example of how this debate could flare up back in January when I was watching the ATP Cup, a tennis tournament of similar format to the Davis Cup that commenced this year. At a match played by Novak Djokovic, there were many fans of Serbian descent in the crowd. After Djokovic won a point, a shot of the cheering Serbian fans showed one mans waving around a cardboard cutout of an ambiguous shape. After looking at it a bit more closely, I realised that it was a three-finger salute, a Serb nationalist symbol. To that man it was probably nothing more than an expression of culture and celebration of his heritage. But to some Croats and Bosnians, owing to the actions of Serbian forces in the Yugoslav Wars, that symbol is as offensive as the swastika would be to some Jewish people. Yet if you ban the symbol, you will cause a

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[21] Union for Progressive Judaism, *Submission to legal and social issues committee of the Legislative Assembly Inquiry into Anti-vilification Protections*, March 12, 2020, https://parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_Anti-Vilification_Protections_/Submissions/057_2020.03.12_-_Union_for_Progressive_Judaism_Redacted.pdf

resurgence in sectarianism between the three groups. In 2007[22] and 2009[23], some Serbian, Croatian and Bosnian fans clashed in violent scenes at the Australian Open, with the 2009 events aptly described as a race riot.[24] Giving such fans more grievances would not help this situation.

We already know that sacred symbols merely coming under rhetorical attack can be enough to trigger an outbreak of ethnic violence due to a ridiculous sequence of events late last year in Melbourne. On December 9, 2019, then-Mayor of Whittlesea Emilia Sterjova attended a graduation ceremony for students who had just completed an academic course of the North Macedonian language, which she has also studied. During the ceremony, she posed with a Star of Vergina flag. Because it was displayed at a North Macedonian cultural event, many Greek Victorians were offended, as they see the flag as a Greek symbol, not a North Macedonian symbol, and believe that its usage or display in a North Macedonian context is cultural theft.[25]

I am completely indifferent to that question. I'm neither Greek nor North Macedonian, and even if I was, it would be too trivial to annoy me. I am not, however, indifferent to the backlash that Sterjova faced, which she described as follows:

> "I was surprised by the negative response to my posting which included death threats against me, threats to remove me from the office of Mayor, threats to have me expelled from the political party I am a member of, and stalking threats necessitating the engagement of security services and police for my protection when attending certain future events."[26]

North Macedonian Victorians noticed the response and were not happy about it. At the next meeting of the Whittlesea Council on December 17, protests were planned, prompting the need for extra security. Both Greek Australians and North Macedonian Australians attended the meeting. Shortly after the meeting, most attendees went their separate ways. But a few attendees - a Greek man and a group of North Macedonian men - ran into each other at a restaurant at about 7:30 pm. The group bashed the Greek man, who thankfully was only slightly injured.[27]

I would suggest that the response to, for example, the banning of that flag's display in North Macedonian contexts would have produced an even stronger reaction. Immoral as the backlash against Sterjova was, it was at least a) applied to only one person, and b) was initiated by people whom Australians of North Macedonian descent can ignore. But a prohibition on the symbol would apply to all Victorians, and such a message from the government would be a lot harder to ignore than such a message from a small number of Greek Victorians.

Finally, there's one very specific way that a ban on the swastika could go wrong. The Nazi swastika was, of course, appropriated from the Indian swastika, an entirely peaceful and benign symbol. Some Indian Victorians display it. But it is possible that display of the Indian swastika would be made illegal, if not in theory, then at least in practice, by a ban on the Nazi swastika. Even if the law is explicitly written to exclude the Indian swastika, the two have been mistaken for each other. In October last year, a delivery man in

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[22] Ben Doherty and Scott Spits, *Violence mars first day of Open*, January 16, 2007, https://www.theage.com.au/national/violence-mars-first-day-of-open-20070116-ge3zt7.html?js-chunk-not-found-refresh=true

[23] The Sydney Morning Herald, *Charges after Australian Open violence*, January 24, 2009, https://www.smh.com.au/national/charges-after-australian-open-violence-20090123-7omv html?js-chunk-not-found-refresh=true

[24] Associated Press, *Fans Brawl After Match at Australian Open*, January 23, 2009, https://www.youtube.com/watch?v=TQD-3r-TMsk

[25] Neos Kosmos, *Whittlesea Mayor removes controversial post following "death threats"*, December 16, 2019, https://neoskosmos.com/en/154248/whittlesea-mayor-removes-controversial-post-following-death-threats/

[26] Ibid.

[27] Simone Fox Koob and Cameron Houston, *Man attacked after Whittlesea mayor's flag-waving stokes up Balkan tensions*, December 26, 2019, https://www.theage.com.au/national/victoria/man-attacked-after-whittlesea-mayor-s-flag-waving-stokes-up-balkan-tensions-20191218-p53l7x html

Adelaide defaced an Indian swastika at a home he delivered to, believing it to be a Nazi one.[28] Had he been a bureaucrat, or had filed a complaint under the proposed ban, the family displaying it could have faced a protracted period of legal trouble.

7. Encouraging bad-faith debate

Since my first submission I have become aware of another problem with anti-vilification laws: they encourage bad faith debate by giving people an incentive to interpret statements by other people in the worst possible, least charitable, way. Such interpretations are often necessary in order to make an argument that a particular statement breaches an anti-vilification law. Such interpretations, however, may be completely and utterly unreasonable and unfounded, and more than one case under the RRTA demonstrates this.

In the case of *Judeh v Jewish National Fund of Australia Inc*, a Palestinian Victorian claimed to have been racially vilified by an advertisement in a Jewish community newspaper, because it contained a drawing of Israel and the Palestinian territories, yet referred to only Israel.[29] His claims was thus:

> "The map inaccurately omits reference to Palestine or to those areas occupied or controlled by Arab Palestinians. It does so in the context of an advertisement seeking donations to the JNF. JNF is, according to Mr Judeh (the complainant), an organisation committed to the acquisition of land to be held in perpetuity for the Jewish people, land which is not permitted to be alienated to, or occupied by, those who are not Jewish. The inclusion of such a map in such a context in this advertisement, Mr Judeh says, incites hatred, serious contempt, revulsion or severe ridicule of Palestine and Palestinian Arabs. He says that, effectively, it denies the existence of the entity which he calls Palestine and of the Palestinian people."[30]

Maybe. Or maybe the ad reflects the fact that Jews are indigenous to the whole area referred to in the map, and appreciates that Jews might feel a connection to all of the land. The assumption that if you express this idea, you are automatically expressing support for the Israeli government to mistreat non-Jews living there, and can have such an interpretation imputed to you by a court, is absurd.

In the case of *National Italian Australian Foundation v Herald and Weekly Times and Andrew Bolt*, an Italian organisation sought a declaration that the RRTA had been contravened by a column from Herald Sun columnist Andrew Bolt. Bolt had written about the efforts of the Italian government, shortly after the Iraq War started, to rescue an Italian journalist taken captive in Iraq, by payment of ransom money. Noting the fact that this action took place after a massive anti-war protest in Italy, he commented:

> "The Italian Government did what we imagined Italians do and panicked[.]"[31]

Racial vilification? Or maybe just a comment about the inclination to panic and anxiety in Italian culture (which, as a person of Italian descent, I can confirm absolutely exists, and to a highly amusing degree)?

In the case of *Sisalem v The Herald & Weekly Times Ltd*, a Muslim Victorian sued the Herald Sun for declaring that "Islam must change".[32] The impugned headline was published less than a month after the Islamic terrorist attacks in Paris in November 2015. Is that an accusation that all Muslims support terrorism? Or is it an acknowledgement of the basic reality that a situation in which some of those who read a religious text respond by murdering 130 people is not an acceptable situation, and yes, "must change"?

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[28] Emily Olle, *Hindu symbol defaced by delivery man after being mistaken for Nazi swastika*, October 29, 2019, https://7news.com.au/news/religion-and-belief/hindu-symbol-defaced-by-delivery-man-after-being-mistaken-for-nazi-swastika-c-529084

[29] Judeh v Jewish National Fund of Australia Inc [2003] VCAT 1254 (13 March 2003) [8]-[9].

[30] Ibid [13].

[31] National Italian Australian Foundation v Herald and Weekly Times and Andrew Bolt (Anti Discrimination) [2005] VCAT 2704 (16 December 2005) [10].

[32] Sisalem v The Herald & Weekly Times Ltd (Human Rights) [2016] VCAT 1197 (19 July 2016) [1].

In the case of *Francis v YWCA Australia*, a Catholic Victorian complained that the pro-choice slogan "Get your rosaries off my ovaries" "suggests that Catholics physically place rosaries on the internal organs of women."[33] This is, to put it mildly, utterly laughable.

Questions of interpretation of these kinds of messages should only be settled by community debate, by people explaining their views to each other, and learning from each other. Indeed, they can't be solved by a court. A court may have the power to declare a certain message unlawful after giving it a certain interpretation, but they cannot force the community to accept that interpretation.

Conclusion

Victoria's anti-vilification laws are in need of some strengthening, but not the sort that the proposed Bill would achieve.

[33] Francis v YWCA Australia (Anti Discrimination) [2006] VCAT 2456 (1 December 2006) [3], [7].