‘WITH OUR HEADS HELD HIGH’:

EQUALITY AUSTRALIA’S SUBMISSION TO THE INQUIRY INTO ANTI-VILIFICATION PROTECTIONS

February 2020

WITH OUR HEADS HELD HIGH

Equality Australia welcomes the opportunity to make a submission to the Victorian Parliament's Inquiry into Anti-Vilification Protections.

Equality Australia is a national LGBTIQ+ legal advocacy and campaigning organisation dedicated to achieving equality for LGBTIQ+ people. We work with LGBTIQ+ people to amplify the voices of our communities and achieve positive legal, policy and social change for LGBTIQ+ people and their families in Australia. Equality Australia has been built from the Equality Campaign, which ran the successful campaign for marriage equality, and was established with support from the Human Rights Law Centre.

OUR GUIDING PRINCIPLE

We start with the guiding principle that every LGBTIQ+ Victorian should be able to walk down any street and participate fully in all aspects of public life with their heads held high. That is, without facing or fearing any vilification or hate-based conduct on the grounds of their sexual orientation, gender identity and expression, or sex characteristics.

These images were taken, yesterday, on 31 January 2020 in a railway underpass near Smith Street, Caulfield in Melbourne:

THE INCIDENCE OF PREJUDICE MOTIVATED ATTACKS AGAINST LGBTIQ+ PEOPLE

Regrettably, harassment, discrimination and violence on the basis of sexual orientation, gender identity and expression, and sex characteristics remains a lived experience for members of our communities.[1] Sometimes that adverse treatment is experienced in laws, but more often than not it finds ugly expression – as seen above – in attacks borne out of prejudice, fear or ignorance which take place in our physical and online neighbourhoods.

This harassment, discrimination and violence does real harm when it occurs, but also while the threat of it remains. Our communities continue to curb the expression of their identities, their lives, and their love in an effort to avoid harassment, discrimination and violence in public.[2]

We include with this submission the Human Rights Law Centre's 2018 report, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, which documents research on the incidence and impact of hate conduct against LGBTIQ+ people, and a number of recent examples of hate-based conduct experienced by LGBTIQ+ people, particularly in the wake of the 2017 marriage postal survey.

Recent research also documents alarming rates of violence and harassment against our communities:

- A 2012 national survey of 5,476 LGBT Australians reported the following experiences of heterosexist violence and harassment in the last year before the survey:
    - 25.5% – verbal abuse (including hateful or obscene phone calls);
    - 15.5% – harassment such as being spat at and offensive gestures;
    - 8.7% – threats of physical violence, physical attack or assault without a weapon (punched, kicked, beaten);
    - 6.6% – receiving written threats of abuse including emails and graffiti;
    - 3.3% and 2.4% respectively – deliberate damage to property or vandalism of a car and/or house; and
    - 1.8% – physical attack or assault with a weapon (knife, bottle, stones).[3]
    - In data from the same 2012 study, LGBT respondents with a disability were also found even more likely to have been subject to verbal abuse than respondents without disability in the previous year (32% versus 24%); more likely to have 'received written threats of abuse including emails and graffiti' (11% versus 5%); more likely to have been subject to harassment (21% vs 14%); and more likely to have been subject to threats of physical violence or physical assault without weapon such as being punched, kicked, or beaten (13% vs 8%).[4]
- A 2018-19 national survey of 528 trans and gender diverse adults found that 71% reported verbal harassment (74% of which occurred in the last 12 months) and 37% reported physical

[1] See, e.g., Leonard et al (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Melbourne: ARCSHS, La Trobe University, at 47-8; Australian Human Rights Commission (2015) *Resilient Individuals: Sexual orientation, gender identity and intersex rights*, Sydney: Australian Human Rights Commission, at 15-16.

[2] Leonard et al (2012) *Private Lives 2*, Melbourne: ARCSHS, La Trobe University, at 45-7; Australian Human Rights Commission (2015) *Resilient Individuals*, Sydney: Australian Human Rights Commission, at 18.

[3] Leonard et al (2012) *Private Lives 2*, Melbourne: ARCSHS, La Trobe University, at 47.

[4] Leonard and Mann (2018) *The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People Living with Disability*, Melbourne: GLHV@ARCSHS, La Trobe University, at 54.

intimidation and threats (49% of which occurred in the last 12 months). One in five participants had been physically assaulted, with a third of those assaults occurring in the last 12 months.[5]

- A 2016 survey of 272 people with intersex variations (80% of which currently lived in Australia) included data from 77 participants who reporting experiencing bullying while at school, including on the basis of visible physical characteristics associated with a known intersex variation.[6]
- A 2010 national survey of 3,134 same sex attracted and gender questioning young people found that 61% reported verbal abuse and 18% reported physical abuse because of homophobia. School was the most likely place of abuse, accounting for 80% of those who were abused.[7]
- A 2018 national survey of 847 people living with HIV found that more than half of participants (56%) reported experiencing stigma within the last 12 months in relation to their HIV status, including 9% reporting that they 'often' or 'always' experienced stigma.[8] One-third also reported negative treatment by health workers.[9]

THE NEED FOR ANTI-HATE LAWS PROTECTING LGBTIQ+ PEOPLE

We know that laws are not the only answer. We also know that many LGBTIQ+ people who have experienced harassment, discrimination and violence respond to it in creative and inspiring ways without the backing of statutes providing formal remedies. We've marched, we've written, we've performed, and we've spoken out.

But laws do matter. They signal standards below which behaviour becomes socially unacceptable. They also ensure those who breach these minimum standards are held to account, providing survivors with practical remedies such as compensation to support their cost of recovery – but also importantly – an avenue for justice.

That is why we support including the grounds of sexual orientation, gender identity and expression, and sex characteristics in expanded Victorian anti-hate laws. As members of our communities are also members of other communities, we also support the Human Right Law Centre's (and their joint submitters') call for gender, HIV/AIDS status and disability to be added to the existing grounds of 'race' and 'religious belief or activity'.[10]

We believe all these grounds should be included in one single Act, as vilification is equally unacceptable whatever its basis, and people who are vilified can, and often do, experience it on multiple fronts – for example, because they are both gay *and* HIV positive, queer *and* gender diverse, or Muslim *and* Arab *and* a woman.

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[5] Kerr et al (2019) *TRANScending Discrimination in Health & Cancer Care: A Study of Trans & Gender Diverse Australians*, Bundoora: ARCSHS, La Trobe University, at 32-33.

[6] Jones (2016) 'The needs of students with intersex variations', *Sex Education*, at 13-14.

[7] Hillier et al (2010) *Writing Themselves In 3*, Melbourne: ARCSHS, La Trobe University, at 39.

[8] Centre for Social Research in Health (2019) *Stigma Indicators Monitoring Project: People living with HIV*, Sydney: CSRH, UNSW, at 1.

[9] Ibid, at 2.

[10] Human Rights Law Centre, Anti Defamation Commission, Asylum Seeker Resource Centre, Victorian Trades Hall Council and Get Up (2020) *Stopping hate in its tracks: Joint submission to the Victorian Government's Anti-Vilification Protections Inquiry* (**Joint Submission**).

THE WAY FORWARD

Changing laws

We endorse and adopt the following recommendations and reasons set out in the Human Rights Law Centre-led joint submission (the **Joint Submission**) calling for 'expanded, best-practice anti-hate laws that extend beyond vilification'.

RECOMMENDATIONS

1. Expand the list of protected attributes in anti-vilification and anti-hate laws to include sexual orientation, gender, gender identity and gender expression, sex characteristics, HIV/AIDS status and disability alongside the existing grounds of race and religious belief or activity (as set out in paragraphs 41-53 and 56 of the Joint Submission). We believe this should be done in one single Act, whether as part of the *Equal Opportunity Act 2010* (Vic) or a renamed and expanded *Racial and Religious Tolerance Act 2001* (Vic).
2. Improve protections against vilification based on a better civil test (as set out in paragraphs 63-66 and 76-77 of the Joint Submission).
3. Enact new protections against hate-based conduct based on a harm-based civil test (as set out in paragraphs 67-73 and 76-77 of the Joint Submission), which is similar (although not necessarily identical) to provisions like section 18C of the *Racial Discrimination Act* and in other state laws. The key would be a provision which provides practical relief to a person who experiences conduct on the basis of a protected attributed that humiliates or intimidates them, or has profound and serious effects on their dignity or sense of safety in public, and which is not done reasonably and in good faith for a legitimate purpose.
4. Enact a better criminal test for serious vilification (as set out in paragraphs 78-89 of the Joint Submission).
5. Expand the definition of 'conduct' captured by anti-vilification and anti-hate laws (as set out in paragraphs 74, 75 and 85 of the Joint Submission).

We are grateful to the Human Rights Law Centre for including us in the conversation which led to developing that submission. We adopt the paragraphs set out above as our own.

We also endorse and adopt the comments at paragraphs 109-111 of the Joint Submission regarding the need for better enforcement provisions and processes. Our experience of anti-vilification protections across the country is that they have rarely been utilised, and where they have been utilised, individuals who have brought them have not always understood the legal, financial and other costs involved in bringing such claims. This is partly because the procedure for bringing such complaints relies principally on individuals who are not always legally represented or well-funded, and who may not have had the benefit of legal advice regarding the extent of protections these laws provide and the costs implications of losing their claim. Processes must be streamlined, simplified and made fairer to ensure genuine claims with good prospects are given the support necessary to either be resolved or adjudicated. Complaint mechanisms can also provide sites where change is possible, in appropriate cases.

Changing attitudes

Removing the threat of vilification and hate-based conduct requires changing attitudes, not merely redressing it through legislation when it occurs. To that end, we adopt the recommendations from the 2018 *End the Hate* report, which include the following.

FURTHER RECOMMENDATIONS

6. Fund a broader public awareness campaigns and strategies to change deep-seated negative attitudes towards LGBTIQ+ people (see *End the Hate* recommendation 1.1).
7. Fund more research into, and reporting mechanisms to capture the incidence of, prejudice-motivated conduct towards LGBTIQ+ people, including through a public reporting app or website (see, e.g., recommendations 1.2-1.6).
8. Fund more support and resources for LGBTIQ+ people affected by prejudice-motivated conduct (see, e.g., recommendations 2.2, 2.4).
9. Strengthen the relationship between Victoria Police and our communities, including through more training and better data collection to support law enforcement efforts (see, e.g. recommendations, 3.1-3.6).

Recent research reiterates, in particular, the need for ongoing work to ensure the relationship and mutual understanding and respect between LGBTIQ+ communities and Victoria Police continues to develop.[11]

Other possible measures

We also support considering the enactment of a new criminal offence prohibiting conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property (as set out in paragraphs 97-100 of the Joint Submission). Our support for such an offence ultimately depends on its drafting and whether it would improve existing criminal laws.

Recognising paragraphs 90-96 of the Joint Submission calls for a functional ban on the swastika, we acknowledge that symbols such as the swastika carry significant and ongoing pain and trauma for Jews and also for same-sex attracted people and others who perished in the Holocaust. Equally, we deplore the resurgence of the swastika, and find its contemporary use and distribution for promoting hateful causes, deeply offensive.

The public display of vilifying and intimidating materials which contain the swastika and other symbols of hate may fall under existing anti-vilification prohibitions more broadly, depending on how they are used in offending conduct. We remain open to seeing how a criminal offence could be framed which prohibits the public display of vilifying and intimidating materials, such as the swastika. However, we are concerned that prohibiting a particular symbol of hate may unintentionally give that symbol more currency and power as a recruiting tool. We encourage the Committee to explore the potential consequences of such a proposal, including researching the experience of overseas jurisdictions.

Any laws proceeding along these lines would need to carefully consider:

- How the banned material should be defined and any exceptions to the prohibition (particularly given the meaning of symbols can change and have different meanings in different contexts, such as satire, performance, news reporting or historical criticism);

[11] A study, focused on the experiences of young LGBTQ+ people with police from two regional towns in Victoria, found a large proportion had distrust in police and had experienced negative interactions, although there were also positive interactions and views expressed. Some participants recounted experiences of harassment and discrimination by police, especially among trans youth, where this related either to them being young or their sexuality or gender identity: see Fileborn (2019) 'Policing youth and queerness: the experiences and perceptions of young LGBTQ+ people from regional Victoria', *Current Issues in Criminal Justice* 31(3), 433–451.

- If such symbols are to be prescribed by way of regulation, how that prescription will avoid becoming prone to politicisation or falling out of date; and
- The possibility of otherwise ordinary symbols being adopted and imbued with a hateful double meaning such that they difficult to proscribe.

FURTHER INFORMATION ABOUT OUR SUBMISSION

Equality Australia has no objection to its submission being made public and is prepared to give further evidence at a public hearing.

Further questions regarding our submissions can be addressed to:

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.