



STANDING UP AGAINST HATE

SUBMISSION TO THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY ON
STRENGTHENING VICTORIA'S LAWS ON HATE CONDUCT AND VILIFICATION

17 October 2023

WE NEED YOUR VOICE. [EQUALITYAUSTRALIA.ORG.AU](https://equalityaustralia.org.au)

ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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

INTRODUCTION

Equality Australia welcomes the opportunity to make a submission in respect of the Victorian Government's consultation on strengthening legal protections against vilification and hate conduct. Our submission responds to all three consultation papers released between 6 July 2023 and 8 October 2023.

Everyone deserves to live with dignity and respect, free to be and express who they are without fear.

Unfortunately, LGBTIQ+ people are among those Victorians who remain vulnerable to vilification and harm motivated by bigotry, and evidence suggests that vilification against our communities is on the rise.

A new legal framework is required to hold hate to account, prevent it spreading and ensure addressing vilification is a collective responsibility not an individual burden.

KEY POLICY PRINCIPLES UNDERPINNING OUR RESPONSE

In the following table, we address in detail each consultation question. Our responses can be summarised by the three following policy themes:

- **Extend protections to all those who experience hate.** Laws must protect everyone who experiences hate. In this submission, we offer suggestions on broadening the definitions of who is protected and how, so that legal technicalities do not stand in the way of protecting those who need it most. We suggest definitions for protected attributes, as well as extensions to these definitions, so that all LGBTIQ+ people and other targeted groups, as well as their personal associates and allies are protected from harmful conduct based on hate.
- **Target the protections to capture real experiences of hate.** Laws need to be clear and target harmful conduct which spreads hate or harms people based on who they are, whom they love or what they believe. In this submission, we offer suggestions to simplify the legal thresholds for incitement and harm-based protections, starting with two civil protections that help prevent hate from spreading or causing harm. We also suggest a criminal offence for the most serious forms of hate that involve threatening people or property. By looking at how hate is spread and experienced by our communities, we have suggested ways to stand up against hate while ensuring all people have an equal opportunity to express who they are and what they think without fear.
- **Preventing hate should be a collective responsibility, not an individual burden.** Laws should aim to prevent harm and ensure the burden of doing so does not only fall to individual victims of hate. In this submission, we offer suggestions on implementing a proper civil response to hate which empowers a regulator with a full regulatory toolkit that can prevent and address hate holistically and appropriately. We suggest ways to share the burden currently faced by victims of hate who are expected to enforce their own protections by allowing representative organisations and regulators to also take action. One of our suggestions is to place a positive duty on those who have the power and ability to prevent hate to take positive steps to do so.

THE CASE FOR CHANGE

Underpinning our submission is a deep understanding of the prevalence and types of hate we experience as LGBTIQ+ people and communities. Understanding the frequency and forms of hate endured by the LGBTIQ+ community underlines the urgency of these reforms for our community and ensuring that any reforms respond properly to the kinds of hate we experience.

The prevalence and types of hate LGBTIQ+ experience

A survey of LGBTIQ people in Victoria conducted in 2020 by the Australian Research Centre in Sex, Health and Society (ARCSHS) revealed that more than a third of participants had, in the previous 12 months, experienced

violence and harassment based on their sexual orientation or gender identity.¹ Non-physical forms of violence were the most frequently reported, including verbal abuse (experienced by 32.7% of participants), written threats of abuse (experienced by 21.3% of participants) and harassment, such as being spat at or subject to offensive gestures (experienced by 22.6% of participants). Although experiences of physical violence were less frequent, a high number of participants reported sexual assault (10.3%) and physical attack or assault with a weapon (3.4%) because of their sexual orientation or gender identity. 36.4% of Victorian participants also reported experiencing social exclusion.²

The evidence also suggests that violence and harassment targeting LGBTIQ+ people may be increasing. Between 2012 and 2020, the ARCSHS's national surveys of the LGBTIQ community tracked an increase of 9.1% in reports of verbal abuse (25.5% of survey participants reported experiencing verbal abuse because of their sexual orientation or gender identity in 2012, and 34.6% of participants reported the same in 2020), an 8.9% increase in reports of sexual assault (reported by 2.9% of survey participants in 2012, and 11.8% of participants in 2020) and a doubling of reports of physical attacks or assaults with a weapon (reported by 1.8% of participants in 2012, and 3.9% of participants in 2020).³

For transgender people in Australia, evidence suggests that rates of hate and violence are even higher and continue to intensify. This year, the Trans Justice Project and Victorian Pride Lobby conducted the largest-ever survey of Australian adults specifically targeted at investigating anti-trans hate. It revealed that over 90% of participants had witnessed online anti-trans hate, while 50% of trans participants had experienced anti-trans hate and 1 in 10 trans people experienced anti-trans violence.⁴ Of all participants in the Trans Justice Project and Victorian Pride Lobby's survey, 34% of participants experienced more or significantly more in-person anti-trans abuse, harassment, or vilification in 2023 than in 2020.⁵ 85% of participants had seen significantly more online anti-trans hate since 2020, and 70% reported an increase in online anti-trans hate that coincided with the tour of an anti-trans lobbyist earlier this year.⁶

The dramatic nature of these statistics is made painfully clear when they are contrasted with national crime rates for all Australians. In the 2019-20 reference interval, the Australian Bureau of Statistics records that 2.3% of the general population experienced physical assault (compared with 3.9% of LGBTIQ+ people) and 0.3% experienced sexual assault (compared with 11.8% of LGBTIQ+ people).⁷

Recent examples of hate in Victoria

As we look to improving laws on hate conduct and speech, two particularly recent examples of anti-LGBTIQ+ hate in Victoria also come to mind.

On 18 March 2023, a prominent anti-trans activist hosted a public rally titled 'Let Women Speak' outside Victoria's Parliament House.⁸ Approximately 400 supporters listened to speeches which were live streamed on YouTube and included remarks describing gender affirming healthcare as mutilation, trans women as male sexual predators and transgender people as a direct threat to the health and safety of children.⁹ The rally coincided with a demonstration by approximately 30 men dressed in black, later identified as being associated with the National Socialist

¹ Hill et al (2021) *Private Lives 3: The Health and Wellbeing of LGBTQ people in Victoria (Victoria Summary Report)*, Melbourne: Australian Research Centre in Sex, Health and Society at 32.

² Ibid.

³ Hill et al (2020) *Private Lives 3: The Health and Wellbeing of LGBTQ people in Australia*, Melbourne: Australian Research Centre in Sex, Health and Society at 41.

⁴ Badge et al (2023) *Fuelling Hate: Abuse, Harassment, Vilification and Violence Against Trans People in Australia*, Melbourne: Trans Justice Project and Victorian Pride Lobby at 5.

⁵ Ibid, at 6.

⁶ Ibid.

⁷ Australian Bureau of Statistics, 'National and State/Territory Crime Rates for Assault, Threat, Robbery, Break-in/Burglary, Theft/Stealing, Property Damage, and Police Reporting Rates', *Crime Victimization, Australia* (Webpage, 18 February 2021).

⁸ Stone the Crone, 'Melbourne Let Women Speak 18/3/23', *YouTube* (Webpage, 18 March 2023) <<https://www.youtube.com/watch?v=xDCd5xBnRFY>>.

⁹ Ibid.

Movement, who performed Nazi salutes and marched in front of Parliament House whilst holding a large banner painted with the words 'destroy paedo freaks'.¹⁰

Less than two months later, Monash Council cancelled a Drag Storytime event planned in celebration of IDAHOBIT Day on advice from Victoria Police, following repeated threats of violence and intimidation against councillors, council staff, the planned performer and families booked to attend the event by fringe groups opposing the event.¹¹ This cancellation has formed part of a trend of LGBTIQ+ events across Victoria being cancelled after being systemically targeted by hate groups.¹²

Laws addressing hate-based conduct and vilification in Victoria must seek to prevent and address these experiences of hate, and our submission is focussed on laws that capture and respond to this reality.

¹⁰ Anthony Anderson and Aisling Brennan, 'Not Welcome: Dan Andrews Slams Neo-Nazi Protesters After Violent Melbourne Clash', *news.com.au* (Webpage, 19 March 2023) <<https://www.news.com.au/national/victoria/news/antitrans-speakers-fans-throw-nazi-salute-amid-counterprotest/news-story/997b16c1c4cbd5a6c72805f78c77a49b>>.

¹¹ City of Monash, 'IDAHOBIT Event Cancelled Due to Threats of Violence', *News* (Webpage, 4 May 2023) <<https://www.monash.vic.gov.au/About-Us/News/IDAHOBIT-event-cancelled-due-to-threats-of-violence>>.

¹² Cait Kelly, 'Victorian Government Urged to Act as More Drag Events Cancelled in Wake of Threats from Far-Right', *The Guardian* (Webpage, 6 May 2023) <<https://www.theguardian.com/world/2023/may/06/victorian-government-urged-to-act-as-more-drag-events-cancelled-in-wake-of-threats-from-far-right>>.


OUR DETAILED RESPONSE

Our responses to each question from each consultation paper is below.

CONSULTATION PAPER 1: PROTECTING MORE VICTORIANS FROM VILIFICATION	
Consultation question	Equality Australia response
1.1a Do you have any views on the current protections for race and religion?	<p>In terms of defining the protected attributes of 'race' and 'religious belief and activity', we support retaining the existing definitions which are also consistent with definitions in the <i>Equal Opportunity Act 2010</i> (Vic) (EOA).</p> <p>In particular, regarding the protected attribute of 'religious belief or activity', we support the limitation on protecting religious beliefs and activities that are lawful.</p>
1.1b The Government proposes to extend current protections beyond race and religion. What do you think this should look like?	<p>We support the Victorian Legislative Assembly Legal and Social Issues Committee's recommendation to expand protections to LGBTIQ+ people, women, people with disability, people living with HIV/AIDS, and people who are targeted based on their association with these groups.¹³</p> <p>Where possible, and subject to further comments made in this submission, we recommend using the existing attributes of 'sex', 'sexual orientation', 'gender identity', 'sex characteristics', 'disability' and 'personal association' in the EOA as the starting point for defining these protections.</p> <p>However, we also make the following observations:</p> <ul style="list-style-type: none"> • Similar to ss 7(2)(a) and 7(2)(d) of the EOA, every attribute must have its protections extended to individuals who have had, will have in future, or are presumed to have or have had that attribute. This protects targets of hate who may not personally have the protected attributes themselves, or who may not have the attribute at the time of being targeted. For example, this might protect a person who is not trans but who is targeted because their gender appearance causes a person to think they are, or an Arab person who is not Muslim who is targeted because the person assumes all Arabs are Muslims. • Similar to ss 7(2)(b) and 7(2)(c) of the EOA, every attribute must have its protections extended to characteristics that a person with that attribute generally has or is imputed to have. This protects targets of hate based on stereotypes or characteristics associated with an attribute, such as slurs that wrongly associate LGBTIQ+ people with paedophilia, or certain religious minorities with being terrorists, or that target people with a disability based on ways that the disability manifests itself (such as a particular behaviour or appearance). • As discussed in response to question 1.6, the attribute of 'personal association' may be too narrow to address hate-based conduct currently experienced by people who are very loosely connected with LGBTIQ+ people. We suggest including the attribute of 'personal association' alongside further extensions of protection to people who are targeted for expressing support for a person or group with a protected attribute. For example, this might protect a librarian who is attacked because a library is

¹³ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 58.

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		<p>holding a Drag Storytime event, or a local councillor who is attacked because a local council is supporting an LGBTIQ+ pride initiative.</p> <ul style="list-style-type: none"> As discussed in response to question 1.5, the attribute of ‘sex’ is not defined by the EOA, and there is currently some uncertainty over how it applies to transgender people. As proposed in response to question 1.5, we suggest some remedial changes to the EOA to clarify that transgender people are intended to be treated in accordance with their identified sex for the purposes of the EOA. As discussed in response to question 1.3, the HIV/AIDS sector have requested a standalone protection for people with HIV/AIDS to recognise the unique experience of stigmatisation of HIV/AIDS. <p>These protection extensions need to be in place for both the civil and criminal protections, subject to the limitations we discuss in each relevant response below.</p>
1.2	Do you have any views on how the anti-vilification protections should apply to people with disability?	Subject to our response to questions 1.1b and 1.3, we support extending protections based on the existing attribute of ‘disability’.
1.3	Do you have any views on how the anti-vilification protections should apply to people living with HIV/AIDS?	<p>Consistent with the recommendations of the Victorian Legislative Assembly Legal and Social Issues Committee¹⁴ and laws in NSW, the ACT and NT, the HIV/AIDS sector has requested standalone protections for people with HIV or AIDS to recognise their unique experience of stigmatisation.</p> <p>For example, this image was taken on 31 January 2020 in a railway underpass near Smith Street, Caulfield in Melbourne:</p>  <p>We see no legal issue with a specific protection for people with HIV or AIDS alongside a disability protection, so long as it is clarified that:</p> <ul style="list-style-type: none"> the definition of ‘disability’ in the EOA still covers people living with HIV/AIDS; and

¹⁴ Ibid.

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		<ul style="list-style-type: none"> the standalone HIV/AIDS protection is not intended to limit the definition of ‘disability’ more generally.
1.4	Do you have any views on how the anti-vilification protections should apply to LGBTIQ+ communities?	Subject to our response to question 1.1b, we support extending protections based on the existing attributes of ‘sexual orientation’, ‘gender identity’ and ‘sex characteristics’.
1.5	Do you have any views on how the anti-vilification protections should apply to protect people based on sex?	<p>Subject to our response to question 1.1b and the following comments, we support extending protections based on the existing attribute of ‘sex’.</p> <p>Current debate on the legal meaning of ‘sex’</p> <p>The EOA currently does not define the protected attribute of ‘sex’, leaving it to the ordinary meaning of the term. This means it may not be always clear how this protection applies to transgender and gender diverse persons, particularly when it comes to sex-specific exceptions under the EOA.</p> <p>There is at least one case currently considering the legal definition of ‘sex’ and its application to transgender women for the purposes of Commonwealth anti-discrimination law.¹⁵ Like the EOA, the <i>Sex Discrimination Act 1984</i> (Cth) does not explicitly define the attribute of ‘sex’.</p> <p>Some have argued that the definition of ‘sex’ for the purposes of anti-discrimination law should be understood by reference only to biological attributes or a person’s sex assigned at birth.¹⁶ On this view, a transgender woman is apparently to be treated as a man for the purposes of sex discrimination protections and as a woman (or perhaps as a trans woman) for the purposes of gender identity discrimination, if she is to be recognised as a woman at all.¹⁷ While this proposition is yet to be tested by the courts, given how courts have approached similar tasks of statutory construction in other contexts,¹⁸ we doubt that this can be correct given the beneficial intention of anti-discrimination laws and their statutory purpose in addressing all forms of sex discrimination, including discrimination based on sex-based roles and stereotypes (i.e. assuming certain social roles for people based on sex).</p> <p>Nevertheless, whether a person’s sex under the EOA will be limited to their sex assigned at birth or defined by biological characteristics alone, is yet to be decided. While the introduction of a ‘gender identity’ attribute alongside a ‘sex’ attribute adds complexity to this argument, many attributes are designed to overlap (consider for example, sex, and pregnancy/breastfeeding/sex characteristics) and the addition of ‘gender identity’ (which extends to gender related expression) should not necessarily be seen as narrowing or changing the</p>

¹⁵ *Roxanne Tickle v Giggle for Girls Pty Ltd*, Federal Court of Australia, NSW Registry (NSD1148/2022).

¹⁶ See e.g., *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 at [13]-[19].

¹⁷ See e.g., *Roxanne Tickle v Giggle for Girls Pty Ltd*, Federal Court of Australia, NSW Registry (NSD1148/2022); Amended Statement of Claim dated 14 April 2023 at [9]-[10]; Defence dated 6 April 2023 at [9]-[10].

¹⁸ See *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at 531 [4]; *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404 at 475 [329] (Chisholm J), affirmed on appeal in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300; *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 304-305 (Black CJ, Heerey J agreeing), 325-326 (Lockhart J, Heerey J agreeing); *R v Harris* (1988) 17 NSWLR 158 at 193-194 (Mathews J, Street CJ agreeing). See also *Attorney-General for NSW v FJG* [2023] NSWCA 34 at [71] (Beech-Jones JA, Bell CJ and Ward P agreeing).

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		<p>definition of the 'sex' attribute to something that ignores the social realities of gender diversity.</p> <p>How to address the issue</p> <p>One way to address the issue is for transgender and gender diverse people to simply rely instead on the protected attributes of 'gender identity' and 'sex characteristics' in lieu of the attribute of 'sex'. However, this approach is less satisfactory where binary language is used in the EOA (such as in ss 68 and 69) and/or exceptions are framed to permit discrimination based on sex (such as in ss 26, 39, 61 and 72).</p> <p>An example of this is section 39 of the EOA which is drafted as a permission ('An educational authority ... may exclude... people who are not of the particular sex'), even though it is intended to function only as an <i>exception</i> to the prohibition on discrimination in education. Nothing in the provision clearly states that a trans person who identifies as a particular sex cannot be excluded under such provisions from institutions established for that same sex. While this may be implied with the absence of a reference to 'gender identity' in the exception, this statutory silence now stands in contrast to provisions such as ss 82A(3), 82B(2) and 83(3), which were introduced in 2021 and 2022 in other provisions. These sections make clear that a permission to discriminate based on one attribute does not permit discrimination based on another attribute, unless that attribute is explicitly mentioned in the provision.</p> <p>Given anti-vilification reforms are likely to result in changes to the EOA, now is a good time to ensure transgender and gender diverse people are properly protected from sex-based discrimination in the same way as other people.</p> <p>While this could be achieved through more extensive reform to the protected attributes themselves, some simpler steps could be taken towards this aim, such as:</p> <ul style="list-style-type: none">• removing binary gendered language (such as 'men and women', 'persons of the opposite sex') from ss 68 and 69 of the EOA, and replacing it with 'persons of a particular sex' or 'persons with a different sex', which implies that the concept of 'sex' may be non-binary under the EOA. This is consistent with language used elsewhere in the EOA and reflects similar changes which have been made to laws in the ACT;¹⁹ and• inserting provisions similar to ss 82A(3), 82B(2) and 83(3) into the exceptions in ss 26, 39, 61 and 72, which allow discrimination based on sex, to clarify that these exceptions only apply to the attributes listed in the exception and not to other protected attributes, such as gender identity or sex characteristics. For example, s 39 of the EOA currently allows single-sex schools to exclude students who are of a 'different sex'. The better view is that this exception does not allow a single-sex school to exclude a transgender student whose gender identity is consistent with the school's students, but we are aware of at least one school in Victoria who has read s 39 as permitting the exclusion of transgender girls from a girls' school. This confusion could be addressed by inserting a subsection into s 39 which
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¹⁹ Discrimination Amendment Act 2023 (ACT).

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		<p>states: “This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).”</p>
<p>1.6</p>	<p>Do you have any views on how the anti-vilification protections should apply to protect people who are associated with targeted groups?</p>	<p>As discussed in our response to questions 1.1b, 3.3 and in the following comments, we support extending protections based on the existing attribute of ‘personal association’. However, this alone will not be sufficient to protect people who are targeted because of their support or perceived support of people with protected attributes.</p> <p>Protections based on ‘personal association’ are not sufficient</p> <p>Examples of recent attacks have included:</p> <ul style="list-style-type: none"> • librarians who have been attacked at Drag Storytime events;²⁰ and • councillors who have received threats of violence and intimidation for seeking to support Drag Storytime events.²¹ <p>The phrase ‘personal association’ is not defined by the EOA and there is little case law on how far it extends, although subsection 6(q) of the EOA recognises that it does not necessarily require a familial relationship.²²</p> <p>It may be difficult for a person who is targeted because of their support or perceived support for a person or group with a protected attribute to establish that they were targeted because of their personal association with that person or group, as that term may be understood for the purposes of the EOA. This is because the term ‘personal association’ implies a degree of connection or proximity to a person with the protected attribute that is more direct or closer in relation than a general member of the community who is attacked for being an ally or being seen to be an ally.</p> <p>These protections would be particularly relevant to people who are attacked merely because they are in a place associated with a particular protected group (such as a gay bar, women’s shelter, mosque or synagogue) regardless of their personal attributes or personal association with a person who is a member of the group. Examples of this would be security guards, librarians and public officials.</p> <p>The way forward</p> <p>We therefore recommend:</p> <ul style="list-style-type: none"> • extending protections based on the attribute of ‘personal association’; and • extending protections to people based on their support or perceived support for people or groups with one or more protected attribute (i.e. active allies, supportive bystanders or workers associated with events such security guards). <p>Each of these protections should also benefit from extensions that protect people with past, future, and perceived personal associations or allyship, and characteristics imputed to or associated with people who have a personal association or allyship, as discussed in question 1.1b.</p>

²⁰ City of Monash, ‘[IDAHOBIT Event Cancelled Due to Threats of Violence](#)’, News (Webpage, 4 May 2023).

²¹ Allanah Sciberras, ‘[Melbourne council forced to call off drag story time event after threats of violence](#)’, 9 News (Webpage, 4 May 2023).

²² Equal Opportunity Act 2010 (Vic), s 6(q).

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		<p>The effect of these changes would be to ensure protections for:</p> <ul style="list-style-type: none"> • a parent, child, friend or carer etc. who is targeted because of their personal association with a person or group with a protected attribute (e.g. the children of rainbow families who are attacked because their parents are members of the LGBTIQ+ community); and • strangers or bystanders who are targeted because they have expressed or are perceived to have expressed support for people or groups with a protected attribute. This could include librarians, members of the public, or councillors etc. who are targeted because they are supporting or seen to be supporting LGBTIQ+ people by being associated with LGBTIQ+ events or causes. <p>Importantly, we only intend for these protections to be extended in the ways discussed further in response to Consultation Papers 2 and 3. That is, our view is criminal offences that respond to threats of physical harm and damage to property, and civil protections that include provisions that preserve genuine debate and discussion in the public interest, should be carefully targeted at conduct that causes harm to people in ways which ought not be tolerated as part of a pluralistic democratic society. If the legal tests we have proposed in response to Consultation Papers 2 and 3 are not adopted, the scope of protection afforded to allies may need to be further considered.</p> <p>Further, the drafting of these protections will need careful thought because some attribute protections will be equally supportive of groups that are historically disadvantaged and groups which are not. An example of this is the attribute of 'sexual orientation', which protects minority sexualities as well heterosexuality. Extending the protections too far will mean protecting people who advocate for protecting heterosexuality in ways that could incite hatred against minority sexualities. One option is therefore to extend the protection to people who engage in conduct reasonably and in good faith in opposition to fascism, Nazism, neo-Nazism, homophobia, transphobia etc. or other ideologies that are antithetical to the purposes of the legislation. Another option could be to extend this protection only in the criminal offence because it is limited to threats to persons or property, rather than a broader range of conduct and speech. We would be happy to explore these options further, but the intention is to recognise that there are innocent victims of hate that are not necessarily members of targeted groups but who experience harm based on the same underlying forms of hate (e.g. racism, homophobia, transphobia, sexism, ableism etc.).</p>
1.7	Do you have any views on clarifying the law to ensure individuals can make vilification complaints based on one or more attributes?	<p>We support the Inquiry's recommendation to clarify that people who are vilified on a combination of attributes should be able to make a complaint on that basis.²³</p> <p>This would protect a person who is targeted because of a unique combination of two or more attributes. For example, Muslim women who wear hijabs are commonly targeted, and this is an experience that is uniquely informed by both their religious beliefs and sex.</p>

²³ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 60.

CONSULTATION PAPER 2: IMPROVING CRIMINAL ANTI-VILIFICATION PROTECTIONS FOR ALL VICTORIANS

Consultation question		Equality Australia response
2.1	What do you think about adopting the NSW definition of 'public act' under section 93Z(5) of the <i>Crimes Act 1900</i> for the criminal serious vilification offence?	<p>As discussed in our response to question 2.2, we have suggested a targeted serious vilification offence focused on threats of physical harm to persons or property. In light of that suggestion, we submit that limiting the serious vilification offence by reference to the concept of a 'public act' (however defined) may not be necessary for the criminal offence.</p> <p>The reference to a 'public act' would be necessary or warranted if a second criminal offence using an incitement test is also included. In which case, we refer to our response to question 3.9.</p>
2.2a	What are your views on having a criminal offence that is similar to the civil contraventions?	<p>As a starting point, we support having a simpler serious vilification offence which prohibits engaging in conduct, either intentionally or recklessly, that is likely to threaten physical harm or damage or property, or incites others to threaten physical harm or damage to property, based on a protected attribute. The threshold of engaging in conduct which threatens or incites others to threaten a person or property is sufficiently serious to justify criminalisation.</p> <p>For this offence, we reiterate our responses to questions 1.1-1.7 and 3.3 on the need to ensure the attributes are properly defined and the legal tests sufficiently extend protection to all likely targets of hate.</p> <p>There may be good reasons to include a second criminal offence for engaging in conduct, whether intentionally or recklessly, which is likely to incite hatred, serious contempt, revulsion or severe ridicule, based on a protected attribute. The key effect of such an offence would be to give the state the power to enforce anti-vilification protections through a criminal process that results in penalties including imprisonment.</p> <p>If such an offence were included, it would likely need a defence similar to the civil incitement vilification provisions that ensure genuine expressions in the public interest (such as for artistic or statistical purposes) are not criminalised. See further our response to question 3.12.</p> <p>While we remain open to exploring the benefits of such an offence, we are not sure if the risks of over-criminalisation are outweighed by the need for such an offence given that:</p> <ul style="list-style-type: none"> • as discussed in our response to questions 3.14-3.15 and 3.18-3.19, we recommend expanding the regulatory response mechanisms so that individual complainants do not solely bear the responsibility for responding to vilification and instead the regulator has more power to prevent and address vilification through expanded civil responses; and • a range of general criminal offences, together with the sentencing consideration in s 5(2)(daaa) of the <i>Sentencing Act 1991 (Vic)</i>, remain available to capture a range of harmful conduct that is motivated by hate, such as assaults, sexual assaults, damage to property, theft, intimate image abuse, causing serious injury or injury intentionally or recklessly, grossly offensive public conduct, stalking, etc.

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2.2b	The Inquiry recommends a criminal offence that requires incitement <u>or</u> threat (but not both). What are your views on this approach?	See response to question 2.2a.
2.2c	What are your views on creating two criminal offences with different levels of seriousness? i. an offence requiring incitement <u>or</u> threat, and ii. an offence requiring incitement <u>and</u> threat?	See response to question 2.2a.
2.3	What are your views on broadening the criminal offence to include reckless behaviour?	<p>Subject to our response to question 2.2a, we support including intention or recklessness as the relevant mental elements for a targeted serious vilification offence. This recognises that a person who is aware of a substantial risk that their conduct will likely threaten physical harm to a person or their property, or incite others to threaten physical harm to a person or their property, remains criminally responsible for their behaviour if they persist in that conduct while aware of that substantial risk.</p> <p>This standard would capture conduct such as that recently seen in response to a gathering of pro-trans protestors in Sydney, who were protesting outside a forum involving former NSW One Nation leader Mark Latham.</p> <p>A video was shared by a member of a group prior to the protest which encouraged <i>‘the real boys’</i> to <i>‘go there tomorrow, and fucking shake them up, drag them by their head and remove them from St Michael’s Belfield’</i>. The protestors were subsequently pelted with rocks and glass, and physically assaulted by a mob.²⁴</p> <p>The person who made and shared that video would have been aware of a substantial risk that their conduct would likely incite others to threaten physical harm to a person or their property, regardless of whether they intended for their comments to be taken literally.</p>
2.4	Should the Director of Public Prosecutions’ approval continue to be required before a	Consistent with the Inquiry’s conclusion that this requirement is inefficient and an unnecessary barrier to prosecution, we support removing the requirement for DPP approval. ²⁵

²⁴ Jordan Baker and Perry Duffin, [‘Time to rise: Christian activist charged after protest violence’](#), *Sydney Morning Herald* (Webpage, 22 March 2023).

²⁵ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 168.

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	<p>serious vilification matter can proceed to court? Why / Why not?</p>	<p>There are two key reasons for this:</p> <ul style="list-style-type: none"> • It is prone to human error: In NSW, where an identical requirement exists,²⁶ it was revealed in March 2021 that NSW police had failed to obtain DPP approval to prosecute two convictions due to a <i>‘technical error in the administrative process’</i>.²⁷ This led to both convictions being annulled, despite them being the only successful convictions under that law in three years.²⁸ • It is unnecessary: Given we recommend a targeted criminal offence for serious vilification, there is no need for this requirement. Serious vilification should be treated in the same way as other forms of criminal offences which capture similar conduct.
<p>2.5</p>	<p>Should the maximum penalty for criminal serious vilification offences be increased? If so, what should the maximum penalty be for an offence:</p> <p>i. requiring incitement or threat</p> <p>ii. requiring incitement and threat?</p>	<p>Given our recommendation for a targeted serious vilification offence as discussed in our response to question 2.2a, we support an increase of the maximum penalty for serious vilification so that it is commensurate with offences covering equivalent forms of behaviour.</p> <p>As an example, threats to kill attract a maximum penalty of 10 years and threats to inflict injury attract a maximum penalty of 5 years in Victoria.²⁹</p> <p>The equivalent vilification offence in NSW attracts a maximum penalty of 100 penalty units or imprisonment for 3 years, or both for an individual.</p> <p>A higher maximum penalty would still allow courts to take into account the relative seriousness of the conduct during sentencing and set a lower penalty (or a non-custodial penalty) if that would be more appropriate in all the circumstances of the case.</p>
<p>2.6</p>	<p>Is there anything else you would like to tell us in relation to criminal serious vilification offence/s? For example, is there conduct that should not be covered?</p>	<p>One of the issues which has not been addressed by the Consultation Paper is the extension of liability to people who are involved in contraventions of the principal offence, and provisions relating to vicarious liability. We assume that this will be part of the reform, notwithstanding its omission.</p> <p>Sections 105 and 106 of the EOA extend liability to people who request, instruct, induce, encourage, authorise or assist a person to contravene a discrimination prohibition. Similar provisions exist in sections 15 and 16 of the <i>Racial and Religious Tolerance Act 2001 (Vic) (RRTA)</i>. These provisions should be maintained and consideration be given to whether the extension of liability should apply not only to those who authorise or assist a person to contravene the criminal offences, but also those who request, instruct, induce or encourage these offences. Thought should also be given to how these extensions will sit alongside criminal accessory liability, as well criminal offences that apply to attempts and conspiracies to commit an offence in concert.</p>

²⁶ *Crimes Act 1900* (NSW), ss 93Z(4).

²⁷ Christopher Knaus and Michael McGowan, [‘NSW Police Botch the Only Two Race Hate Prosecutions Under New Laws’](#), *The Guardian* (Webpage, 2 March 2021).

²⁸ *Ibid.*

²⁹ *Crimes Act 1958* (Vic), ss 20, 21.

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		Further, sections 109 and 110 of the EOA impute to principals and employers the misconduct of their agents and employees, unless reasonable precautions are taken to prevent the agent or employees from such misconduct. Similar provisions exist in sections 16 and 17 of the RRTA. Vicarious liability provisions will be necessary for the protections to work well, particularly as they provide a basis for regulatory responses addressing systemic issues.
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CONSULTATION PAPER 3: STRENGTHENING CIVIL ANTI-VILIFICATION PROTECTIONS FOR ALL VICTORIANS

Consultation question		Equality Australia response
3.1	Do you have any views on changing the current legal test to prove incitement-based vilification, to clarify that a person's behaviour or conduct is against the law if it is <i>likely to incite</i> hate speech or conduct?	We support the Inquiry's recommendation that the incitement test should be amended to clarify that conduct that is <i>likely to incite</i> hate is captured. ³⁰ This is consistent with the way in which the law is already interpreted.
3.2	Do you have any views on introducing a new harm-based vilification protection?	<p>We support introducing a new harm-based vilification protection. This recognises the harm experienced by people and groups who are the target of hate by directly prohibiting conduct that undermines their sense of safety, belonging and dignity.</p> <p>Capturing experiences of hate commonly suffered by LGBTIQ+ people</p> <p>Regardless of which test is used, it is critical that the provision clearly captures the most common forms of hate conduct experienced by LGBTIQ+ people.</p> <p>For LGBTIQ+ Victorians this includes the following types of conduct:</p> <ul style="list-style-type: none"> • verbal abuse; • written and verbal threats of abuse, physical violence, physical attack and assault, both in person and online; • threats of abuse including through the use of graffiti; • physical attack or assault, including sexual assault; • harassment, such as being spat at and offensive gestures; and • deliberate damage to property, vandalism and theft.³¹

³⁰ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 118.

³¹ Hill et al (2020) [Private Lives 3: The Health and Wellbeing of LGBTIQ people in Australia](#), Melbourne: Australian Research Centre in Sex, Health and Society at 32.

		<p>LGBTIQ+ people also experience:</p> <ul style="list-style-type: none"> the intentional use or disclosure of personal information about a person without their consent in order to cause harm, such as to intimidate or humiliate them (e.g. outing or doxing); and the closure or cancellation of pride and LGBTIQ+ advertised events from fear of violence or intimidation. <p>Whatever the test adopted, we will be looking to ensure these common experiences of hate conduct are captured by the legislation.</p> <p>This could be done through:</p> <ul style="list-style-type: none"> the use of legislative examples or notes; reference to the most common experiences of vilification in the explanatory memorandum; or the use of a non-exhaustive deeming provision which automatically deems certain conduct which is obviously hate conduct as satisfying whatever legal test is adopted. This will make it easier for victim-survivors of hate to show the conduct has satisfied the test. Examples of such conduct could include harassment, intimidation, abuse, assault or damage to persons or their property based on a protected attribute. <p>The relevant test</p> <p>As stated in our initial submission to the Victorian Parliamentary Inquiry, we support a test that provides practical relief to a person who experience conduct based on a protected attribute 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).</p> <p>Subject to our comments above on ensuring the test applies clearly to common yet diverse experiences of hate conduct, we would support the formulation of the test proposed by the Consultation Paper subject to:</p> <ul style="list-style-type: none"> clearly defining a ‘reasonable person’ in the legislation as being a person from the perspective of the target group. The use of a simple ‘reasonable person’ test can otherwise result in unintended consequences. For example, in <i>Bennett v Dingle</i>, the respondent told the complainant that he was a ‘big fat Jewish slob’ and that ‘Hitler was right about you bastards’ at a local dog park. VCAT assumed the relevant audience was ‘<i>the ordinary member of the class of persons being non-Jewish members of the public present in the park when the words were uttered</i>’. On that basis, VCAT concluded that it was doubtful the ‘<i>ordinary non-Jewish person would perceive the words as going beyond venting</i>’.³² improving the causation (‘because of’) test, as set out in our response to question 3.3; ensuring that the recognition (and compensation) of harm extends beyond the conduct itself to its reasonably foreseeable consequences. For example, threats against holding a Drag Story Time event which results in the cancellation of the event for safety reasons should be considered part of the harm caused, notwithstanding this harm is a consequential or indirect result of the conduct in a legal sense. <p>We would also be open to the use of a different test that appropriately addresses hate conduct experienced by LGBTIQ+ people, such as a formulation</p>
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		<p>based on s 18C of the <i>Racial Discrimination Act 1975</i> (Cth) (which is also reflected in Tasmanian and Northern Territory law) but is modified to reflect the actual interpretation taken by the courts in applying the test only to conduct that has ‘<i>profound and serious effects</i>’ and which are not ‘<i>not to be likened to mere slights</i>’;³³ There is a view that the words ‘offend’ and ‘insult’ set too low a threshold on prohibiting speech and that these words do not actually represent how the provisions are interpreted in any event, so we do not see merit in using language that suggests the protection is stronger than it is, as this unfairly undermines the support for the provision.</p>
3.3	<p>Do you have any views on the proposed requirement that hate speech or conduct must have been done ‘because of’ a person or group’s protected attribute for it to amount to harm-based vilification?</p>	<p>We have concerns about the potential narrowness implied in a ‘because of’ test. We are concerned that a test formulated in this way might require a victim of hate conduct to prove a direct, causative link between the conduct and a protected attribute, which may be difficult where the evidence does not clearly show the cause for the conduct (e.g. because it is influenced by multiple factors or is influenced by a range of beliefs held by the person who engages in the conduct that are not clearly expressed).</p> <p>Consider, for example, the display of a sign that stated ‘Destroy Paedo Freaks’ at the recent Let Women Speak rally in Melbourne.³⁴ By using the word ‘destroy’, the sign was clearly inciting hatred and violence, but towards whom? The words alone are not enough to establish which attribute was being attacked, and a ‘because of’ test formulation may not recognise that multiple attributes may be attacked at the same time. These evidentiary difficulties should not prevent effective protections for those who were the target of these attacks: in this case, trans and gender diverse people.</p> <p>We know that identifying prejudice-motivated conduct can be difficult, particularly where there are multiple motives or the conduct is ambiguous. Hate crime bias indicators tell us that it is necessary to consider a range of circumstances related to the victim, offender and the context to identify whether prejudice was a reason for the conduct.³⁵</p> <p>For this reason, we suggest using a ‘based on’ test which is extended by:</p> <ul style="list-style-type: none"> • a definition of ‘based on’ that clarifies that the protected attribute need only be one of the reasons for the conduct and not the main, substantive or dominant reason; • a provision which articulates that courts ought to look at all the circumstances, including the identity of the victim, the identity of the offender, and the context, to work out whether conduct was ‘based on’ an attribute;

³² *Bennett v Dingle* [2013] VCAT 1945.

³³ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007.

³⁴ Anthony Anderson and Aisling Brennan, ‘[Not Welcome: Dan Andrews Slams Neo-Nazi Protesters After Violent Melbourne Clash](#)’, *news.com.au* (Webpage, 19 March 2023).

³⁵ Vergani et al (2022) [Defining and identifying hate motives: bias indicators in the Australian context](#), Melbourne: Centre for Resilient and Inclusive Societies.

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		<ul style="list-style-type: none"> • a provision that allows an act or a series of acts to be considered together as one, so that conduct taken together can satisfy the nexus with an attribute when one act alone might not; • linking the nexus to an attribute <i>per se</i>, not a person or group with the attribute (thereby capturing hate which is misdirected, directed at large, or which is directed at a venue associated with a group which has an attribute e.g. a gay bar, place of worship etc). This means that the test would be framed as ‘based on sex, gender identity etc.’, rather than based on ‘persons or a group with a particular sex, gender identity etc.’; • implementing our recommendations in response to questions 1.1b and 1.6, which deal with extensions to the definition of an attribute (including characteristics and stereotypes associated with an attribute) and the range of potential victims, including those do not personally share the attribute.
3.4	Do you have any views on the proposed exceptions to harm-based vilification? Is there any other conduct or activity that should be included as an exception?	<p>Subject to our response to questions 3.10 to 3.12 and our further comments below, we agree with the need for a carefully crafted exception that would apply to conduct done reasonably and in good faith for a genuine public purpose (such as an artistic, scientific, academic or other purpose consistent with the freedoms of thought, expression and religion) both in respect of the incitement and harm-based civil vilification protections. Given our view on a more targeted criminal serious vilification offence in our response to question 2.2a above, these exceptions are not necessary for the criminal offence.</p> <p>We think that some of the proposals made in the Consultation Paper are redundant and are already captured by the exception in s 11 of the RRTA. Currently, section 11 of the RRTA allows an exception for conduct engaged in reasonably and in good faith for artistic expression, genuine purposes in the public interest (including any genuine academic, artistic, religious or scientific purpose), or for fair and accurate reporting in the public interest.³⁶ The RRTA also allows an exception for private conduct in s 10, which is discussed further below.</p> <p>The term ‘any purpose that is in the public interest’ is already broad enough to capture genuine cultural or educational purposes and expressions of opposition to forms of hatred, while the artistic exception would already apply to tattoos (as an artistic work). Therefore, there is no need for the addition of vague terms such as ‘cultural’. We also do not see the need for an exception for tattoos created after the laws commence and consider that all artistic works should be dealt with in the same way. A savings provision could apply to tattoos created prior to the commencement of the laws but should not apply to tattoos that incite hatred or which offend the harm-based hate prohibitions created after the commencement of the laws.</p> <p>We deal specifically with the religious purpose exception in our response to question 3.11 below.</p>
3.5	Do you have any views on allowing anyone affected by harm-	As discussed in our response to questions 3.14 to 3.15 and 3.18 to 3.19, our preference is to focus beyond individual complaints towards systemic regulatory responses that include information gathering, research, education,

³⁶ *Racial and Religious Tolerance Act 2001* (Vic), s 11.

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	<p>based vilification (including those against whom it is directed, and those in a targeted group) to be able to make a complaint to VEOHRC and VCAT?</p>	<p>and investigation and compliance options where conduct is more serious or systemic. Individual complaint resolution options should remain open to individuals who wish to pursue them.</p> <p>We support the ability for individuals and organisations representing affected individuals and target groups to be able to lodge complaints with VEOHRC, provided that VEOHRC also has discretion in how to handle those complaints, including by offering (where appropriate) conciliation through to investigation and compliance measures where there are serious or systemic breaches of the law. VEOHRC should also retain some discretion to close out complaints where another body is more appropriate to deal with the complaint or where the complaint is lacking in substance or vexatious. In managing complaints, VEOHRC should be required to proceed with procedural fairness towards all parties involved.</p> <p>Keeping open avenues for reporting and information gathering which does not necessarily require conciliation or complaints resolution in each case will allow VEOHRC to monitor emerging issues or hot spots, and focus on preventative and systemic responses rather than focussing solely on individual-led outcomes.</p>
3.6	<p>Do you have any views on the remedies available for vilification complaints made to VEOHRC and VCAT?</p>	<p>As discussed in our response to questions 3.14 to 3.15 and 3.18 to 3.19, our preference is to focus beyond the notion of individual complaints towards systemic regulatory responses.</p> <p>In terms of remedies, we support adding systemic remedies to the list of remedies which can be ordered to individual complaints. However, our view is that the best way to achieve systemic change is to provide a regulator with more powers to enforce the law with no requirement for an active individual complainant. Enforcement mechanisms such as enforceable undertakings or compliance orders that can be sought by a regulator ensures that those with the most limited resources are not left to ensure compliance with the laws.</p> <p>See also our response to question 3.7.</p>
3.7	<p>Do you have any views on clarifying that VCAT may order a person to take down online vilifying material?</p>	<p>We support clarifying that VCAT may order a person to take down online vilifying material as a specific remedy for online vilification in an appropriate case.</p> <p>See also our response to question 3.6.</p>
3.8	<p>Do you have any views on retaining the existing ban on incitement-based vilification alongside introducing a new harm-based vilification protection?</p>	<p>We support retaining the ban on incitement based-vilification in addition to the new harm-based protection, as they have different emphases. One is focussed on the incitement of hatred where the person who sees or hears the conduct may not necessarily be part of the target group but is susceptible to the hateful messages being spread. The other is focussed on the target of the hate and the harm caused to them.</p> <p>A need for both tests will become more important if the regulator is to be given a compliance function beyond resolving individual complaints, which is what we recommend in our response to questions 3.18 to 3.19.</p>

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3.9	Do you have any views on defining a ‘public act’ (similar to section 93Z(5) of the <i>Crimes Act 1900</i> (NSW)) to make it clearer that only public acts are covered by anti-vilification laws?	<p>We broadly support using the section 93Z(5) definition of a ‘public act’ for the purposes of the incitement-based provisions because these are focused on the spreading of hate among third parties. However, we have concerns about limiting the application of the harm-based provisions to public acts as the distinction between a public and private act may unintentionally exclude conduct that ought to be captured.</p> <p>In this regard, if a definition of ‘public act’ is to be adopted, it is necessary to ensure that the definition extends to:</p> <ul style="list-style-type: none"> • conduct engaged in on private property which is not domestic or residential in nature (such as in hospitals, schools and workplaces) and which is seen, heard or otherwise perceived by others; and • certain communications which might be considered ‘private’, such as direct communications or in private online groups between persons who are not otherwise in a close personal or domestic relationship with each other. This would protect those who are harassed or vilified by people through direct communications via social media or email, via hate mail left in their letterbox, or which is spread in closed online networks of mostly unrelated people.
3.10	Do you have any views on retaining the private conduct exception to clarify what conduct is not captured by anti-vilification laws?	Subject to our response to question 3.9, we support the retention of a private conduct exception similar to section 12 of the RRTA.
3.11	<p>Do you have any views on whether to:</p> <p>a. Change the religious purpose exception to specify the forms of religious expression covered, consistent with the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)? or</p> <p>b. Retain the current religious purpose exception?</p>	<p>We have two specific concerns with the existing religious purpose exception.</p> <ul style="list-style-type: none"> • It is asymmetrical. The exception gives people who express comments that would otherwise amount to incitement or harm-based conduct an immunity that those who are not religious would not be able to rely on. That is, an atheist expressing a view about religion would not be able to rely on the exception, while a religious person expressing a view about atheism would. • Religion may be used as a guise for vilification. Subject to the requirements for reasonableness and good faith (which are relatively relaxed legal thresholds), the exception gives religious people who express views that are contrary to the rights of others more latitude to express those views based on their religion than those without a religion. <p>Accordingly, one option is to remove the reference to ‘religious purposes’ altogether, leaving the ‘any purpose in the public interest’ exception to capture all forms of expression consistent with section 15 of the Charter and the freedom of thought, conscience, religion and belief in section 14 of the Charter.</p> <p>Otherwise, we have no objection to clarifying that the religious purposes exception is intended to operate consistently with the freedom (and limitations) expressed in the Charter. However, we are not sure that merely specifying the allowable forms of religious expression achieves that aim.</p>

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3.12	Do you have any views on amending the public interest exception, in order to provide that a person’s conduct is not vilification if they establish that it (reasonably and in good faith) was for a <i>genuine</i> purpose in the public interest?	We support the Inquiry’s recommendation to add ‘genuine’ to the public interest exception. ³⁷
3.13	Is there any other conduct or activity that should be covered by an exception to vilification that is currently not?	No.
3.14	Do you have any views on providing VEOHRC with the power to request information to help people identify who vilified them?	<p>We support the Inquiry’s recommendation that VEOHRC should be provided with powers to assist a complainant to identify the person who may have vilified them.³⁸</p> <p>In 2020, the Office of the eSafety Commissioner published a report which demonstrated that most people who had experienced vilification online were unable to attribute the vilification to an identifiable person, while 47% of people attributed it to a stranger.³⁹ Currently, VEOHRC has no power to compel a person to provide information or produce a document relevant to a vilification complaint,⁴⁰ meaning that VEOHRC is reliant on the voluntary cooperation of suspected perpetrators to commence consideration of a complaint.⁴¹ The bodies equivalent to VEOHRC in all other Australian jurisdictions except South Australia are empowered to compel information and documents for the purpose of conciliating complaints.⁴² The new legislative framework should empower VEOHRC with the ability to obtain information or documents that are necessary to assist with the identification of perpetrators and resolution of complaints.</p>
3.15	Do you have any views on whether representative	The current framework largely relies on those who have been vilified to identify the conduct as vilification and make a timely complaint to the correct entities.

³⁷ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 126.

³⁸ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 137.

³⁹ eSafety Commissioner (2020) [Online Hate Speech: Findings from Australia, New Zealand and Europe](#) at 10.

⁴⁰ Victorian Equal Opportunity and Human Rights Commission, ‘[Creating Stronger Laws to Protect Victorians From Hate Conduct](#)’ (Webpage).

⁴¹ Royal Commission into Victoria’s Mental Health System, [Witness Statement of Kristen Hilton](#) (Melbourne, 15 July 2020) at 16.

⁴² *Australian Human Rights Commission Act 1986* (Cth) s 46PI; *Anti-Discrimination Act 1992* (NT) s 84; *Human Rights Commission Act 2005* (ACT) s 73; *Anti-Discrimination Act 1977* (NSW) s 90B; *Anti-Discrimination Act 1998* (Tas) s 97; *Anti-Discrimination Act 1991* (Qld) s 156; and *Equal Opportunity Act 1984* (WA) s 86.

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	organisations should be able to make a complaint to VEOHRC on behalf of an unnamed person or group who have experienced vilification?	<p>This is a considerable burden on individual complainants and does not address the issue of underreporting, which is estimated to be significant.⁴³</p> <p>We support a mechanism allowing not-for-profit representative organisations to make a complaint to VEOHRC on behalf of their relevant constituency without naming or seeking consent from individuals within their consistency.⁴⁴</p> <p>For example, the ACT allows any person with a ‘sufficient interest’ to bring a vilification complaint where: <i>‘a person has a sufficient interest in a complaint if the conduct complained about is a matter of a genuine concern to the person because of the way conduct of that kind adversely affects, or has the potential to adversely affect, the interests of the person or interests or welfare of anyone the person represents.’</i>⁴⁵</p>
3.16	Do you have any views on moving Victoria’s anti-vilification laws to the <i>Equal Opportunity Act 2010</i> (Vic)?	Provided our recommendations on ensuring the appropriate legal technical framework is in place, we do not have a view on whether to move the civil vilification protections into the EOA (leaving the criminal provisions for the <i>Crimes Act 1958</i>) or to retain a standalone anti-vilification and anti-hate Act with all the relevant provisions. From a legal standpoint, it makes no difference provided all the ancillary provisions and definitions are in place wherever the civil and criminal provisions are inserted.
3.17	Do you have any views on requiring a statutory review of the anti-vilification laws to be commenced in five years?	We have no objection to a statutory review provision.
3.18	Do you have any views on extending VEOHRC’s powers to address systemic vilification?	<p>Addressing vilification should be the responsibility of everyone – not just the people who are targeted by vilification directly.</p> <p>As set out in our response to question 3.19, we support extending VEOHRC’s powers to address systemic vilification. One way to expand VEOHRC’s mandate in respect of systemic vilification is to first instate a positive duty on persons to take reasonable and proportionate steps to eliminate vilification as far as is possible. The purpose of a positive duty would be to prevent vilification before it happens and relieve the burden on affected individuals by encouraging those with the ability to prevent vilification to take steps to do so. The burden could then be placed on a regulatory agency to investigate a potential breach and take appropriate steps where a contravention has occurred.</p> <p>Definition of a positive duty to eliminate vilification</p> <p>A positive duty needs to be able to adjust to different circumstances and keep up with evolving standards. But positive duties also need a degree of specificity, so that duty holders are guided as to the steps and due diligence they need to undertake to meet their obligations.</p>

⁴³ Legislative Assembly Legal and Social Issues Committee, [Transcript of Inquiry into Anti-Vilification Protections](#) (Melbourne, 25 June 2020) at 2.

⁴⁴ Parliament of Victoria (2021) [Inquiry into Anti-vilification Protections](#), Legislative Assembly Legal and Social Issues Committee at 197.

⁴⁵ *Human Rights Commission Act 2005* (ACT), ss 43(1)(f), 43(2).

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		<p>The EOA already imposes a positive duty on eliminating discrimination, sexual harassment and victimisation.⁴⁶ In the context of discrimination, sexual harassment and victimisation, the duty holders are confined by the specific relationships and circumstances defined by these provisions. But because the anti-vilification provisions proposed will apply to the public at large, a positive duty to prevent vilification must be defined to ensure it is clear, reasonable, and enforceable.</p> <p>There are a number of options on how this can be achieved, including by:</p> <ul style="list-style-type: none"> • limiting the duty itself by reference to steps that are reasonable and proportionate for a person to take in respect of matters over which they have control. This could mean for example, that an individual only has a personal duty not to vilify others, whereas a large employer may be required to conduct employee training, demonstrate that they have introduced policies and procedures for employees to make complaints about vilification and report to VEOHRC on compliance; • limiting the duty to duty holders in the specific areas covered by the EOA (i.e. employment, education, goods and services etc.); • limiting the duty to specific classes of people or circumstances prescribed under regulations; • empowering the regulator to prescribe standards relating to vilification that apply to specific classes of people or in specific circumstances (e.g. standards that target 'hot spots' or people that have an obvious role in preventing or responding to vilification, such as police or in the context of social media platforms); or • a combination of the above.
3.19	Do you have any views on providing VEOHRC with investigative powers for anti-vilification matters?	<p>VEOHRC has previously been empowered to investigate vilification under Part 2 of the RRTA. However, these powers were removed by the <i>Equal Opportunity Bill 2010</i>,⁴⁷ and replicated in Part 9 of the <i>Equal Opportunity Act 2010</i> in relation to harassment and discrimination,⁴⁸ with no equivalent powers retained to investigate vilification.</p> <p>A sophisticated regulatory scheme should empower the regulator to have a full and flexible toolkit that allows it to take appropriate steps to prevent and address harm, not merely accept individual complaints once harm has occurred.</p> <p>Like any sophisticated regulator, VEOHRC should have powers to:</p> <ul style="list-style-type: none"> • develop and provide education and guidance and disseminate information to the public on the vilification protections; • receive reports of instances of vilification by an affected person, a representative or the public for purposes including research, monitoring and complaints handling;

⁴⁶ EOA s 15.

⁴⁷ [Explanatory Memorandum](#), Equal Opportunity Bill 2010 (Vic), 57.

⁴⁸ *Equal Opportunity Act 2010* (Vic) Part 9. This Part permits VEOHRC to investigate any matter relating to the operation of that Act, if the matter raises a serious issue in relation to a class or group of persons and cannot be resolved by dispute resolution or application to VCAT.

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		<ul style="list-style-type: none">• when instances of vilification are serious or systemic, do any of the following, either as a result of a report or of their own motion:<ul style="list-style-type: none">▪ conduct investigations;▪ compel the production of documents, the provision of information or attendance to give answers;▪ issue notices for further information or documents; and/or▪ issue compliance notices or seek protective orders and enforceable undertakings on behalf of victims which (if breached) would give rise to further penalties for non-compliance;• engage in other functions, such as intervene to assist tribunals and courts when individual matters are being heard;• refer reports to and share information with appropriate enforcement bodies, such as the Victorian Police, Director of Public Prosecutions or the Office of the eSafety Commissioner (or support affected persons to do so).
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