



Victorian  
Aboriginal  
Legal Service



## **Fair and accessible anti-vilification protections for all Victorians**

### **Submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections**

31 January 2020

#### **Victoria Legal Aid & Victorian Aboriginal Legal Service**

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and traditional owners throughout Victoria, including elders past, present and emerging.

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## 1. Executive summary

Victoria Legal Aid (VLA) and the Victorian Aboriginal Legal Service (VALS) welcome the opportunity to contribute to this important inquiry into Victoria's anti-vilification protections. Addressing hate speech goes to the heart of promoting a welcoming, harmonious society and ensuring individuals do not experience fear or exclusion because of who they are. Strong and effective protections from hate speech benefit both individuals and the Victorian community as a whole by promoting inclusion and celebrating diversity.

### Demonstrating the urgent need for reform

Victoria's anti-vilification laws currently fall short of effectively tackling hate speech and require urgent reform. This joint submission outlines VLA and VALS' practice experience and our observations on the prevalence of hate speech and its harmful impact. We include further information about VLA and VALS' institutional role, client profiles and practice experience at **Annexures A and B**.

Our recommendations for reform are drawn from both our legal work and our clients' stories, six of which are included in this submission. Our clients' experiences highlight gaps in the law and problems with current legal protections and systems of enforcement.

Aboriginal and Torres Strait Islander peoples in particular suffer disproportionately from the harmful cumulative effects of hate speech and yet cannot rely on the *Racial and Religious Tolerance Act 2001 (Vic) (RRTA)* to stop this conduct. This is demonstrated by VALS' client Charmaine, who experienced hate speech in a restaurant and was discouraged to learn that racial incitement would be difficult to prove. Her full story on page 7 of our submission also demonstrates how current legal tests set the bar too high and fail to capture the harms of public hate speech:

"I learnt that very few cases have met the standards set out under this act. This was a shock to me and a great disappointment and immense source of frustration. I mean what's the point of the piece of legislation that isn't interested in either you (the victim) or the offender, but focuses on the impact on bystanders? Why call it racial vilification when it's so narrowly defined and tested? I can only hope that my case is one of those very few that meet the threshold..."

Many of our clients also experience hate speech on grounds other than their race or religion. Timothy's story on page 9 of our submission highlights how the current scope of the law leaves many groups who commonly experience hate speech, including members of the LGBTIQ+ community, with no legal recourse.

To adequately address the pervasive problem of hate speech, Victoria's anti-vilification laws must be broadened, modernised and strengthened. Our submission sets out the need for reform both to civil and criminal approaches to hate speech to provide for clear, accessible legal protections that can readily be enforced.

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## Key recommendations

1. **Broader protections:** Introduce protections from hate speech on the basis of gender, for people with disability, LGBTIQ+ people, and for people targeted because of their connection with a protected group.
2. **Improved civil test:** Update the existing “inciting hatred” test to remove technical barriers to victims proving vilification, and introduce a new harm-based civil protection for behaviour that offends, insults, humiliates or intimidates people protected under anti-vilification laws.
3. **Modernise exceptions:** Update exceptions from anti-vilification laws to align them more closely with international human rights law and require any public interest purpose to be “genuine”.
4. **Review criminal offences:** Review serious vilification criminal offences to facilitate reporting and prosecution and improve deterrence.
5. **Stronger enforcement:** Allow representative complaints and give the Victorian Equal Opportunity and Human Rights Commission the power to investigate vilification and enforce remedies.
6. **Online hate speech:** Expressly extend liability for authorising or assisting vilification to corporations and give the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) powers to find the identity of a person accused of hate speech using an online account.
7. **Prevention:** Fund additional research into root causes and effective responses to hate speech, and for support services for impacted communities.

We have included a summary of our recommendations in full at **Annexure C** of this submission.

## 2. Prevalence and impact of hate speech on our clients

Our combined practice experience confirms that people are too commonly targeted by hate speech in our community. When it comes to who is targeted, our experience is that minority groups disproportionately experience vilification, including Aboriginal and Torres Strait Islander peoples, people from migrant or culturally and linguistically diverse backgrounds, minority religious groups, people living with disabilities and members of the LGBTIQ+ communities. We frequently advise individuals who have been victims of hateful, derogatory speech on the basis of their race, nationality, colour and ethnicity, or their gender identity or sexual orientation. This speech takes place in the workplace, in public places, online and in the provision of goods and services. In many instances we see hate speech accompanied by other forms of discriminatory treatment in workplaces and service settings.

Groups of people who bear the brunt of hate speech are diverse. Their experiences of vilification are not uniform; the impact on an individual may be influenced by a range of other factors (e.g. their age, the frequency of experiences of vilification, or whether they are experiencing mental health issues) and intersecting attributes. Our clients generally experience serious distress, feelings of humiliation and worthlessness and mental health deterioration that can impact on their ability to participate in the workforce and our communities more broadly. Studies have also confirmed the multiple adverse impacts of

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hate speech and discrimination including the compounding of other forms of disadvantage (e.g. social isolation or an increased risk of physical illness<sup>1</sup>).

Hate speech can undermine a person's feeling of safety and inclusion in society. Ashaar's story below demonstrates the long-lasting detrimental effects of hate speech, including its capacity to impact negatively on family members and the broader community of people sharing the victim's characteristics:

#### **The impact of racial vilification: Ashaar's story**

I am a taxi driver and for a long time I would wait in the same taxi rank in the city every day for someone who needs a ride. One day a person who worked for the building I park in front of started abusing me because I had nicely asked a truck driver to move out of the taxi rank. He called me a "black c..." and told me this was not my land, not my country, and I had no right to be here.

I always felt and believed that I carried myself well when in the public since arriving in Australia as a young child. I always heard stories of racial discrimination against others through word of mouth and media but not once did I ever think that it would happen to me. My matter has made me now become more aware of my surroundings and people I spend time with, it has had a negative effect on me when communicating with people and trusting people has been a struggle. I struggle to trust people and society and always have a feeling that others in the community might or could have seen me the same way.

After this happened I stopped driving in the CBD where I could make the most money. I needed to make a complaint to try and make things right. I had nothing to do with this person, they were not my employer but their actions were making it hard for me to support my family. Because it happened in public and it impacted on my rights I was able to make a complaint under the Racial Discrimination Act.

My health deteriorated throughout the process. The majority of my family were not aware of the situation and I only kept my close uncle in the loop. Once the matter was finalised I informed other family members as I was scared that they too would take this matter to heart and become disappointed in society. I am a father of young children and I would hate to think that they too would one day be discriminated against. The majority of the children were born in Australia and have never seen or been overseas and back to Africa. However, because of their skin complexion I would now be ignorant to think that it could not happen to them eventually.

As a father I have had a conversation with my children and I can tell you that it was not an easy process and one that I would not wish on any parent. How can a parent look into their children's eyes and tell them that there are people in society that do not welcome them in Australia even though Australia is now the only place they call home?

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<sup>1</sup> Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' in Mari J Matsuda (ed), *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendments* (New York: Routledge, 2018) 89, 92–3; Ferdinand A, Kelaher M & Paradies Y 'Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full report' (2015) 401 *Victorian Health Promotion Foundation*.

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## Focus on prevalence and impact of hate speech on Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander peoples disproportionately experience racial discrimination and vilification and VALS frequently advises clients on their rights relating to this conduct. Our clients experience pervasive and widespread racial vilification and discrimination in a range of areas, including employment contexts, in public spaces, from police and the justice system and with service providers.

The Victorian Equal Opportunity and Human Rights Commission's 2015 Report Racism trial outcomes report highlighted that "[a]ctions to incite racial hatred was the most common theme" Aboriginal peoples reported.<sup>2</sup> Past studies have shown that Aboriginal people are one of the main groups targeted by more intense vilification, due to it being persistent, widespread and serious.<sup>3</sup>

A VicHealth survey of Aboriginal Victorians found that 97% of those surveyed had experienced racism in the previous 12 months, including 84% of people who were sworn at, verbally abused or subjected to offensive gestures because of their race.<sup>4</sup> This type of abuse may amount to racial vilification depending on the circumstances. 58% of people in this survey experienced racism in public places, which would be unlikely to fall within existing discrimination protections.<sup>5</sup>

Studies suggest that racism against Aboriginal and Torres Strait Islander peoples is pervasive and normalised within society, with around 20% of non-Indigenous people admitting that they would discriminate against Aboriginal people and believe that using racist terms to describe Aboriginal people is not that bad.<sup>6</sup>

VALS' clients tell us that the cumulative effect of experiencing racist behaviour over a long period of time, often on a daily basis, fundamentally impacts on their mental health and this is supported by studies which demonstrate strong links between race-based discrimination and poor mental and physical health.<sup>7</sup> A report by the Victorian Department of Health and Human Services found that the impact of racial discrimination as a stressor on health is so high that "racism may go a long way in explaining the gap between the health of Aboriginal and non-Aboriginal people in Australia".<sup>8</sup> Racial discrimination of Aboriginal Victorians often occurs in the context of intergenerational trauma and dispossession and clients who are members of the stolen generation have reported that experiencing racism often re-awakens past trauma.<sup>9</sup>

More broadly, this pervasive experience of racism creates barriers for Aboriginal people and prevents them from participating fully and safely in society. Clients report avoiding

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<sup>2</sup> Victorian Equal Opportunity and Human Rights Commission, *2015 Report Racism trial report outcomes* (Report, 2015).

<sup>3</sup> Committee to Advise the Attorney-General on Racial Vilification, *Racial Vilification in Victoria* (Report, March 1992), 11.

<sup>4</sup> Vic Health, *Mental health impacts of racial discrimination in Victorian Aboriginal communities. Experiences of Racism survey: a summary* (Research Summary, November 2012).

<sup>5</sup> Ibid.

<sup>6</sup> Beyond Blue, *Discrimination against Indigenous Australians: A snapshot of the views of non-Indigenous people aged 25–44* (Report, 2014).

<sup>7</sup> VicHealth, *Ethnic and race-based discrimination as a determinant of mental health and wellbeing* (Research Summary, August 2008).

<sup>8</sup> Victorian Department of Health and Human Services, *Racism in Victoria and what it means for the health of Victorians* (Report, 2017), 26.

<sup>9</sup> VicHealth (n 7).



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places where they have experienced racism and having to leave employment because of the mental harm caused by racist remarks.

Charmaine's story below highlights the impact of racial vilification on Aboriginal people and the importance of having strong and effective laws to protect against this behaviour:

**The impact of racial vilification on Aboriginal people and the importance of effective remedies: Charmaine's story**

I am a proud Gunditjmara Elder and am employed as an Indigenous Family Violence Researcher for my community organisation in Warrnambool.

Recently I attended a local restaurant for lunch. During the course of my meal, I heard a young man making racist comments about Aboriginal people. I looked to where he was seated and he was expressing his views to a number of people seated with him. He was saying things like the country does not belong to Aborigines and he was complaining about the closure of Uluru. As an Elder, I felt responsible to educate others about our history and heritage, so I approached the table and addressed the young man, explaining who I am and trying to bring greater understanding. Unfortunately the mother snidely told her son to just ignore 'those people'. As soon as she said this, the young boy became aggressive towards me, and started racially abusing me and calling me offensive names. Both he and others smirked and scoffed at me.

I felt a deep humiliation, belittling and fear during the incident. I was nervous even to approach the table in the first place, but felt honour bound to address misinformation and promote reconciliation. I am an advocate for reconciliation in the community, and I actively do 'welcome to country' for a number of services and community events.

This incident of racism is not in isolation, but has a cumulative affect and impacts my self-esteem, my mental health (I'm stolen generation) and my sense of safety in public. Having experienced years of racial vilification, this incident adds to the burden of yet another assault, another wounding, another stripping of dignity and safety. I made a formal complaint to the management of the restaurant and was satisfied with their prompt and sincere response. They apologised and worked collaboratively with both myself and Victoria Police in gathering information around the incident. When I discussed legal representation with the Victorian Aboriginal Legal Service, I learnt that very few cases have met the standards set out under this act. This was a shock to me and a great disappointment and immense source of frustration. I mean what's the point of the piece of legislation that isn't interested in either you (the victim) or the offender, but focuses on the impact on bystanders? Why call it racial vilification when it's so narrowly defined and tested? I can only hope that my case is one of those very few that meet the threshold. It's a lot to put yourself through to just get one small shot at justice.

### **3. Expanding protection of our vilification laws**

Anti-vilification laws in Victoria currently only protect against hate speech related to a person's race or religion. However, as set out above, we see individuals commonly targeted by hate speech on the basis of characteristics other than race or religion.

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There is also substantial evidence of the prevalence of hate speech directed at LGBTIQ+ people,<sup>10</sup> and its serious impact on their quality of life. In particular, the Australian Human Rights Commission reported in 2015 that more than 70% of LGBTIQ+ people have been attacked, bullied or harassed.<sup>11</sup> Similarly, there are reports documenting the widespread use of ridiculing, derogatory language to describe people living with disabilities and the role this plays in influencing limiting attitudes about disability generally.<sup>12</sup>

This research is consistent with our practice experience. We routinely advise clients seeking advice about discrimination on the basis of disability, sexual orientation and gender identity, who also describe being subject to hate speech. This can include the use of names such as “retard” and “cripple” to humiliate those living with disabilities, or other derogatory terms to denigrate trans and gender diverse individuals. Depending on the circumstances and the setting, hate speech may amount to unlawful discrimination and there are examples of racial epithets and slurs in the workplace being found to breach the *Equal Opportunity Act 2010* (Vic).<sup>13</sup> However, hate speech is often not captured by our anti-discrimination laws and we routinely advise clients that there is no suitable avenue for a remedy where they have suffered hate speech on the basis of characteristics other than race or religion.

Timothy’s experience of taking a complaint to VCAT (*Bye v Barkers Fresh Produce*<sup>14</sup>) highlights the lack of protection LGBTIQ+ people face from vilification and the impact this can have on their financial security and wellbeing.

#### **Homophobic vilification in the workplace: Timothy’s story**

I was bullied and harassed in the workplace by a man that thought it was ok to use hate speech against me.

He said gays don’t deserve to live and that we are disgusting. He didn’t say these things about me or to me, but he said them in the office and I heard them.

What’s worse is I put in formal complaints that were not taken seriously and then had to take the company to VCAT to try and get justice. Which was even worse as the VCAT member said “...intolerant or discriminatory behaviour is not sufficient to prove a claim of discrimination under the Act.”

How is this even allowed these days? I now suffer with severe PTSD and an adjustment disorder, I don’t like going to crowded places and have daily anxiety attacks. I have had nightmares for over 3 years and the law was not there to protect me from the abuser.

I have attempted to take my life 2 times since all of this because it has scarred and hurt me so bad, that I was not protected both by the current laws and by the company.

Please make these changes so that people who are in my position can be looked after and

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<sup>10</sup> Marian Pitts, Anthony Smith, Anne Mitchell and Sunil Patel, Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, *Private Lives: A Report on the Health and Wellbeing of GLBT Australians* (Report, 2006) 51.

<sup>11</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights* (Report, 2015) 16.

<sup>12</sup> Vario, Amber and Mandikos, Bridget Cullen, “‘Sticks and stones’: the lack of disability vilification law in Australia” (2010) 35(2) *Alternative Law Journal* 72, 72–76; Disability Discrimination Legal Service Inc, *Disability Vilification - Law Reform Submission to the Victorian Law Reform Commission* (April 2012).

<sup>13</sup> E.g. *Dirckze v Holmesglen Institute* (Human Rights List) [2015] VCAT 1116 and *Jemal v ISS Facility Services Pty Ltd* [2015] VCAT 103.

<sup>14</sup> *Bye v Barkers Fresh Produce* [2019] VCAT 632.

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those who want to cause pain by saying such hurtful things can be punished.

Given the prevalence of hate speech experienced by people not currently protected under existing Victorian anti-vilification law, the law should be amended to capture conduct on the basis of additional characteristics. Those characteristics should include sexual orientation, gender identity, sex characteristics, gender and disability. We recommend these attributes should be defined in accordance with best practice as follows:

- The definition of **sexual orientation** should be defined consistently with the Yogyakarta Principles: “understanding ‘sexual orientation’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.
- The definition of **gender identity** should be consistently with the Yogyakarta Principles to ensure people who are gender diverse, non-binary or gender non-conforming are also protected: “understanding ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.
- The definition of **sex characteristics** should accord with the Yogyakarta Principles Plus 10, as being “a person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.”<sup>15</sup>
- The definition of **gender** should expressly state that it is inclusive of sex to reflect the intended protection. The *Equal Opportunity Act 2010* (Vic) currently does not include gender as a protected attribute, although sex is included. Accordingly, it should also be amended to ensure any definition is inclusive of sex and gender, with consideration given to transitional provisions.
- The definition of **disability** should be defined consistently with the definition in the *Equal Opportunity Act 2010* (Vic) and expressly include HIV and AIDS status.

Consistent with the *Equal Opportunity Act 2010* (Vic),<sup>16</sup> the Act should also protect a person who has a personal association with a person with a protected attribute. This would include, for instance, family members, partners or advocates of the person with the relevant attribute.

**Recommendation 1: Victoria’s anti-vilification laws should be amended to include protection on the basis of sexual orientation, gender identity, diverse sex characteristics, gender and disability as well as someone who has a personal association with a protected attribute.**

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<sup>15</sup> International Commission of Jurists, *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, 6.

<sup>16</sup> *Equal Opportunity Act 2010* (Vic) s 6(q).

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## 4. Strengthening civil protections from vilification

### Lowering the threshold for civil incitement

The current test for vilification in a civil claim under the RRTA (ss 7 and 8), which focuses on incitement of hatred, is difficult to prove. The current test requires an applicant to prove that another person engaged in conduct on the ground of the race or religion of another person or class of persons that incites hatred against that person or a class of persons. Of the approximate 16 cases that proceeded to a hearing under the RRTA since it was enacted in 2001 only 2 have been successful.<sup>17</sup> The existing high threshold often discourages our clients from bringing a claim about harmful vilification they have experienced. Alternatively, as Charmaine and Keith's stories highlight, where clients do take action the high threshold increases their distress around the matter.

The complexity of the test is highlighted in the case of *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* where the Court of Appeal found that evidence of the harm caused is irrelevant as the focus should be on the impact of the statements on the congregation, and that it is necessary to separate out the hatred of beliefs from the hatred of adherents of those beliefs.<sup>18</sup> Nettle JA stated at paragraph 16:

“Evidently, there can be no incitement in the absence of an audience. It is not a contravention of s.8 to utter exhortations to religious hatred in the isolation of an empty room. If conduct is to incite a reaction, it must reach the mind of the audience. And if conduct is to be perceived as inciting a particular reaction, it must reach the mind of an audience as something which encourages that reaction. So, for conduct to incite hatred or other relevant emotion it must reach the mind of an audience as something which encourages those emotions. So, therefore, the question of whether it has that effect will depend upon the perception of the audience.”<sup>19</sup>

Whether the conduct happens on the street or in a newspaper it is very difficult to prove that racial or religious comments incite others to hatred. In the absence of evidence that people were incited in practice it is close to impossible to adduce evidence that people would have been incited by the conduct.

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<sup>17</sup> The two successful cases are: *Ordo Templi Orientis v Legg* (Anti Discrimination) [2007] VCAT 1484 (27 July 2007) and *Kahlil v Sturgess* (Anti Discrimination) [2005] VCAT 2446 (23 November 2005). The unsuccessful cases in descending order are: *Casley v ABC* (Human Rights) [2018] VCAT 1645 (23 October 2018), *Eshow v Zaia* (Human Rights) [2018] VCAT 1405 (31 August 2018), *Sisalem v The Herald & Weekly Times Ltd* (Human Rights) [2016] VCAT 1197 (19 July 2016), *Djime v Kearnes* (Human Rights) [2015] VCAT 941 (26 June 2015), *Bennett v Dingle* (Human Rights) [2013] VCAT 1945 (21 November 2013), *Unthank v Watchtower Bible and Tract Society of Australia* (Human Rights) [2013] VCAT 1810 (23 October 2013), *Pham v Drakopoulos & Ors* (Anti-Discrimination) [2012] VCAT 1198 (10 August 2012), *Australian Macedonian Advisory Council Inc. v LIVV Pty Limited trading as Australian Macedonian Weekly* (Anti-Discrimination) [2011] VCAT 1647 (30 August 2011), *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), *Francis v YWCA Australia* (Anti Discrimination) [2006] VCAT 2456 (1 December 2006), *National Italian Australian Foundation v Herald and Weekly Times and Andrew Bolt* (Anti Discrimination) [2005] VCAT 2704 (16 December 2005), *Fletcher v Salvation Army Australia* (Anti Discrimination) [2005] VCAT 1523 (1 August 2005), *Williams v Monash University* (Anti-Discrimination) [2005] VCAT 958 (15 April 2005), *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (13 March 2003).

<sup>18</sup> *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) per Nettle J.A.

<sup>19</sup> *Ibid* [16].

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The ACT Law Reform Advisory Council (**LRAC**) conducted an inquiry into the *Discrimination Act 1991* (ACT) in 2015 that considered reforms to the ACT's similar vilification provisions. LRAC formed the view that vilification should be amended to cover "conduct that expresses, or is likely in the circumstances to incite, hatred towards, serious contempt of, severe ridicule towards or revulsion of, a person or people with a protected attribute"<sup>20</sup>. The test for civil incitement should be amended in this way in Victoria to remove this barrier to proving vilification has occurred. This test should provide protection to all the attributes listed above.

**Recommendation 2: Victoria's anti-vilification laws should be amended to cover conduct that expresses or is likely in the circumstances to incite hatred towards, serious contempt of, severe ridicule towards or revulsion of, a person or people with a protected attribute.**

### **Introducing a complementary harm-based cause of action**

In addition to strengthening the incitement test it is necessary to introduce a complementary harm-based test because the current test for vilification in Victoria does not provide protection for our clients against harmful race-based public conduct. For example, multiple clients have experienced neighbours telling them to "go back to where you came from" and calling them racial or religious slurs.

While this has a significant impact on our clients' sense of safety and belonging in their community, it is unlikely that they will be able to satisfy the current high threshold test (i.e. to prove that this is conduct that *incites others* to hate them because of their race or religion). This form of conduct and public harm can be distinguished from incitement of others to hatred, and people living in the Victorian community should be protected from both harms.

Keith's story below highlights the difficulty of capturing harmful conduct under the current vilification test and the impact this has on people who experience vilification:

#### **The difficulty of bringing a racial vilification claim under the current test: Keith's story**

I am an Aboriginal Elder and strongly connected to my local community. One day as I was doing some grocery shopping I noticed that the shop assistant was hovering around me and making me feel uncomfortable. I asked him to move away and said I didn't need any help but they wouldn't leave me alone. Instead they called across the security guard and store manager. I tried to explain what was happening and that I just wanted to finish my shopping but they didn't listen to me. The police were called and a big group of people started gathering around. When the police arrived they realised that I was being unfairly targeted. As I was leaving the store the manager yelled out to me very loudly and sarcastically that she could lend me some money if I was begging. The police officer told her that this comment was not appropriate and that there was no reason to speak to me like that.

I felt very embarrassed and humiliated by these comments in front of my local community. I didn't go back to the store for a long time after this happened. Everyone knew about what happened and people kept asking me about it. It affected my mental health and brought back my memories of past trauma as a member of the Stolen Generations. I was also worried about

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<sup>20</sup> ACT Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT)* (Final Report, March 2015) 96.

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the impact on the local Aboriginal community, as there is a history of our people being treated like this.

The Victorian Aboriginal Legal Service helped me to make a complaint of racial vilification and discrimination to the Australian Human Rights Commission, but the matter didn't settle so we lodged the claim at VCAT. My lawyers told me that it would be difficult to make a successful claim of racial vilification under the law in Victoria. This made me feel quite frustrated as I know that the manager made that comment because of my race and it was a very humiliating public act that offended me deeply. While the matter did eventually settle on the basis of the discrimination claim I think it's really important for Victoria to have stronger protections against racial vilification as well to protect against this kind of verbal abuse. You should have the right to be able to bring legal action whether racial abuse and vilification happens in a shop or on the street.

One of the striking examples of complaints that were not found to be vilification by the Victorian Civil and Administrative Tribunal (**the Tribunal**) is the case of *Bennett v Dingle*. In that matter the applicant was walking his dog in the park and another man yelled at him "you big fat Jewish slob" and "Hitler was right about you bastards". The Tribunal found that the words were said, but found that there was no evidence that the words were heard by other people walking by or that an ordinary person would perceive the words "as going beyond venting".<sup>21</sup> This case, and the experience of Keith outlined above, highlight that it is necessary to introduce a new protection that focuses on the harm caused by a statement that offends, humiliates, insults or intimidates someone because of their protected attribute.

While personal safety intervention orders may be available to some clients who experience this form of harm, there are two key limitations which require complementary protection under vilification laws:

1. Firstly, in order to obtain a personal safety intervention order for harassment it is necessary to show a course of conduct.<sup>22</sup> In other words, it is necessary for the conduct to occur more than once. In comparison, the RRTA currently enables a complaint to be made about a one-off incident of vilification.<sup>23</sup>
2. Secondly, it is not possible under the *Personal Safety Intervention Orders Act 2010* (Vic) to obtain compensation for loss or injury suffered as a result of the harassment. Under the RRTA it is possible for people like Ashaar to obtain compensation for his lost income and the impact on his health and wellbeing.

Victoria's anti-vilification laws should include a complementary harm-based test modelled on existing harm-based tests under section 18C of the *Racial Discrimination Act 1975* (Cth) and subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas). This protection should apply to all protected attributes listed above. We note the ACT LRAC's concern around the inherently controversial nature of religion and the fact that some religious beliefs may offend other religious groups.<sup>24</sup> In practice, the terms "offend, insult, humiliate or intimidate" have been judicially interpreted together as applying to serious conduct and this existing body of case law will shape the interpretation of comparable protections in Victoria. Accordingly, we

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<sup>21</sup> *Bennett v Dingle* (Human Rights) [2013] VCAT 1945 (21 November 2013) [45].

<sup>22</sup> *Personal Safety Intervention Orders Act 2010* (Vic) s 7.

<sup>23</sup> *Racial and Religious Tolerance Act 2001* (Vic) ss 7(2), 8(2).

<sup>24</sup> ACT Law Reform Advisory Council (n 20) 96.

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consider that LRAC's concerns may be suitably addressed through appropriate religious purpose and public interest exceptions.

**Recommendation 3: Victoria's anti-vilification laws should include a complementary harm based civil protection alongside an amended incitement protection.**

## 5. Clarifying and limiting exceptions

### Clarifying the religious purpose exception

The RRTA currently provides an exception for any conduct engaged in reasonably and in good faith for a religious purpose. The term "religious purpose" is undefined in the RRTA, other than a clarification at subsection 11(2) that it includes teaching a religion or proselytising. Leaving the term undefined creates significant uncertainty as to the scope of the exception and fails to provide sufficient protection for people engaging with religious organisations and individuals.

**Recommendation 4: Victoria's anti-vilification laws should replace the definition of "religious purpose" with a definition that reflects the manifestation of freedom of religion and belief under article 18 of the International Covenant on Civil and Political Rights to mean religious "worship, observance, practice and teaching".**

### Ensuring the public interest test is fit for purpose

The RRTA also provides an exception to conduct that is engaged in reasonably and in good faith in the public interest. While the qualifier "genuine" is required for academic, artistic, religious or scientific purposes it isn't included for the public interest. This is out of step with the similar exception in section 18D of the *Racial Discrimination Act 1975* which requires that it be for a genuine purpose in the public interest.

**Recommendation 5: The broad exception for conduct engaged in "for any purpose in the public interest" under Victorian anti-vilification law be amended to include "any genuine purpose in the public interest".**

### Avoiding a general limitations exception

We note that some groups are calling for exceptions to be replaced with a general limitations clause and we caution against this approach. This represents a substantial departure from established anti-discrimination protections in Australia. We have serious concerns about the potential impact of such a clause on people who have experienced vilification and their ability to seek legal redress.

In our view, a general limitations clause should not be adopted for the following reasons:

- **Uncertainty:** It would introduce significant uncertainty, confusion and ambiguity for our clients (and duty holders) about whether discrimination or vilification is lawful or not.
- **Lack of transparency:** The current list of exemptions sets out a clear and publicly available list of situations in which an exception from anti-vilification law exists. A general limitations clause would permit a broad range of reasons for vilification, some of which may currently be unlawful.

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- **Increased likelihood of litigation:** VLA and VALS resolve nearly all our clients' discrimination and vilification cases by agreement, without the need to proceed to a hearing at a Court or Tribunal. We anticipate that a general limitations clause would result in a greater level of litigation being required to resolve claims due to the greater uncertainty about where the line is drawn by the law, with few options for people who cannot afford a lawyer to assist them with their complaint.
  - **Greater burden on victims:** It would place a greater burden on individuals who have experienced vilification to pursue complaints before a Court or Tribunal to develop case law and resolve uncertainty about the general limitations clause. In practice, this will act as a barrier to our clients seeking redress for the harm they have suffered given the difficulty our clients face enduring the emotional burden of litigation.

We support a process for ensuring exceptions are consistently reviewed, effectively balance competing rights, and reflect modern community expectations. However, careful consideration is required to ensure any new exceptions do not permit a broader scope of vilification. While a broad exemption may enable a reduction in the number of specific targeted exemptions currently in place in anti-vilification law, it is our view that this would lead to greater confusion and uncertainty and reduced effectiveness of our laws in preventing vilification and promoting equality.

**Recommendation 6: Victoria's anti-vilification laws should not adopt a general limitations clause as an alternative to existing exceptions.**

## 6. Criminal offences

### **Criminal offences in the *Racial and Religious Tolerance Act 2001***

The RRTA creates criminal offences of "serious vilification" based on racial or religious grounds, punishable by a fine and/or 6 months imprisonment (ss 24 and 25).

As these offences are almost never prosecuted, VLA and VALS do not have specific experience with representing people charged with these offences. However, as the state's largest criminal law practice and largest provider of criminal law services for Aboriginal and Torres Strait Islander peoples respectively, we have experience with summary and indictable prosecutions. Furthermore, we largely represent a disadvantaged and marginalised client base, a significant number of whom report being subject to ethnic and religious profiling, and victims of prejudice motivated harassment and crime.

Our organisations have an interest in contributing to a discussion on vilification offences because we could assist in ensuring recommended criminal offences should be appropriate and fair. This submission provides some high-level comments on the success or otherwise of the enforcement of the Act and the appropriateness of sanctions, based on our general criminal practice experience.

### **Limited reporting and enforcement of serious vilification offences**

The available data indicates a very low use of the RRTA offences, compared with a significantly higher rate of reports.

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) indicates that there has only been one successful prosecution of serious vilification: in 2017 three men



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were convicted in the Melbourne Magistrates' Court, of inciting serious religious vilification of Muslims by staging a mock beheading to protest the building of a mosque in Bendigo. In late 2019, the County Court upheld the serious religious vilification offence under the RRTA, and provided judicial guidance on the proper construction of subsection 25(2) in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>25</sup> As Chief Justice Kidd states:

"The only inference available is that the mock beheading scene was intended to whip up extreme negative feelings in the audience about Muslims, including fear, loathing, disgust and alarm.

The violent pantomime, coupled with the stated desire of the appellant to ensure attendance at the rally all drive me to conclude that the appellant intended that the target audience feel serious contempt for, revulsion, and severe ridicule for Muslims as a result.

The appellant's evidence that he intended to be absurd and humorous in participating in the mock-beheading is inconsistent with all of the evidence."<sup>26</sup>

There are a number of barriers to reporting and collecting accurate data on prejudice motivated criminal offenders.<sup>27</sup> There is very little research in Australia on the prevalence of vilification.<sup>28</sup> Mason et al note that:

"Determining the prevalence of hate crime is always difficult and, although there is ample Australian research documenting the problem of hate crime, only a few studies have used official statistics or a population-based sample to examine such incidents."<sup>29</sup>

Mason's 2019 inter-jurisdictional comparison of bias crime data from Victoria and NSW is the first of its kind. Mason concludes that that "[b]ias crime continues to be a problem in Australia and one that is experienced primarily by minority groups. Approximately one bias crime, suspected bias crime or bias incident is reported in NSW every day."<sup>30</sup> While the majority of bias crimes reported are not at the threshold of serious vilification, Mason cites international research which demonstrates that bias crime is 'massively under-reported and under-recorded', noting that the NSW police data likely "represents the tip of the iceberg".<sup>31</sup> Furthermore, research suggests that prejudice motivated crime, particularly gay hate-related incidents, are significantly more likely to involve a high level of brutality.<sup>32</sup>

The Crime Statistics Agency of Victoria provided VLA with the following data on recorded offences and alleged offender incidents, demonstrating very low formal recording of offences and incidents.

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<sup>25</sup> *Cottrell v Ross* [2019] VCC 2142.

<sup>26</sup> *Ibid* [327]–[329].

<sup>27</sup> E.g. Human Rights Law Centre, *End the Hate: Responding to hate speech and violence against the LGBTI community* (Report, 2018) 8,15.

<sup>28</sup> Gail Mason notes that existing studies have been undertaken by community organisations, academics and human rights agencies: G Mason, 'A Picture of Bias Crime in New South Wales' (2019) 11(1) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 47, 48.

<sup>29</sup> G Mason et al, *Policing Hate Crime: Understanding Communities and Prejudice* (Routledge London, 2017) 15.

<sup>30</sup> G Mason et al (n 28) 59.

<sup>31</sup> *Ibid* 62.

<sup>32</sup> *Ibid* 15.

**Table 1.** Offences recorded and alleged offender incidents under the *Racial and Religious Tolerance Act 2001* - July 2009 to June 2019<sup>33</sup>

	2009 - 2010	2010 - 2011	2011 - 2012	2012 - 2013	2013 - 2014	2014 - 2015	2015 - 2016	2016 - 2017	2017 - 2018	2018 - 2019
<b>Offences recorded<sup>34</sup></b>	2	6	3	12	4	18	14	8	17	10
<b>Alleged Offender Incidents<sup>35</sup></b>	≤ 3	6	≤ 3	11	5	14	7	7	8	7

There have been three successful prosecutions in Victoria from the commencement of the Act on 1 January 2002 to May 2019.<sup>36</sup> The CSA record of alleged incidents is substantially higher than the number of prosecutions. The extreme rarity of prosecutions under the RRTA (three in 18 years), particularly in light of the reported number of alleged offences, suggests that there are significant barriers to prosecuting the RRTA offences, limiting their effectiveness as a deterrent.

Most Australian jurisdictions have a specific offence targeting hate crime. As well as Victoria, there are offences in the ACT, NSW, Qld, SA, WA and a Commonwealth offence. However, Victoria is not alone in reporting low charge rates for such incitement of hatred offences, NSW<sup>37</sup> and WA<sup>38</sup> have similarly reported low rates of prosecution for such offences.

The low prosecution rate is likely to be due to a number of contributing factors, rather than a single reason. The following may contribute in some way and addressing these may improve enforcement of serious vilification offences:

- the elements of the offences are complex and proving prejudice motivation may be difficult;
- maximum penalties for general criminal offences which may apply to the same conduct (yet are easier to prove) are higher;
- a prosecution can only be commenced with the consent of the Director of Public Prosecutions (**DPP**); and
- the offences are located outside the *Crimes Act 1958* (Vic) and may be unfamiliar to

<sup>33</sup> Data extracted from LEAP on 18 July 2019 and is subject to change.

<sup>34</sup> *Recorded offences* include any criminal act or omission by a person or organisation for which a penalty could be imposed by the Victorian legal system. For the purposes of CSA statistics, an offence is counted and included in the data where it was reported to, or detected by, Victoria Police; and, was first recorded in LEAP within the reference period. Offences that are recorded but remain unsolved at the date the data was extracted are included in the CSA dataset.

<sup>35</sup> *Alleged offender incidents* are incidents involving one or more offences to which an individual, business or organisation has been linked as an alleged offender. An alleged offender incident: involves only one offender (where two individuals have participated in the same incident two alleged offender incidents will be recorded), can involve one or more victims, can involve offences that occur over a period of time but have been processed by Victoria Police as the same incident. Where there were multiple offences recorded within the one incident, the incident is assigned an offence category of the most serious offence in the incident for statistical purposes, known as the principal offence.

<sup>36</sup> Hagar Cohen and Scott Mitchell, 'Hate crime laws rarely used by Australian authorities, police figures reveal' *ABC News* (online, 3 May 2019) <<https://www.abc.net.au/news/2019-05-03/hate-crimes-rarely-prosecuted-in-australia/11055938>>.

<sup>37</sup> Nicholas Cowdery AM QC, 'Review of law of vilification: criminal aspects' (Paper presented at *Roundtable on Hate Crime and Vilification Law: Developments and Directions*, University of Sydney, 28 August 2009). The author noted that no prosecution had been commenced since 1977 when the legislation came into effect in NSW.

<sup>38</sup> See also: G Mason, 'Hate crime laws in Australia: Are they achieving their goals?' (2009) 33(6) *Criminal Law Journal* 326, 331 and Rees et al, *Australian Anti-Discrimination Law* (Federation Press, 2008) 592-3.

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law enforcement officers.

## **Facilitating enforcement of serious vilification offences**

### **(a) Reducing complexity**

The RRTA offences are also quite complex and require proof of a number of elements. Sections 24 and 25 require proof of multiple elements relating to the defendant's subjective motivations and awareness.

Prosecuting a general offence and then addressing the issue of prejudice motivation during sentencing may be easier in practice, by making submissions that they should be taken into account as an aggravating feature of the offending and inviting the judicial officer to apply the sentencing factor in subsection 5(2)(daaa) of the *Sentencing Act 1991 (Vic)*.<sup>39</sup>

The 2015 Report Racism trial run by VEOHRC noted the high threshold for the police to charge someone under the RRTA as a barrier to reporting.<sup>40</sup>

In our view, strengthening anti-vilification offences could facilitate greater reporting and contribute to deterring hate speech and harmful vilification.

We note that the RRTA does not currently expressly prohibit the display of hate symbols or the publication of hate materials. We can provide comments on any proposed drafting to ensure any provisions are appropriately drafted.

### **(b) Considering more appropriate maximum penalties**

The RRTA incitement offences have a maximum penalty of 6 months imprisonment and/or 60 penalty units for a person, or 300 penalty units for a body corporate. The sentences available for comparable general offences are substantially higher, and incitement to commit any *Crimes Act 1958 (Vic)* offence (regardless of whether it is motivated by prejudice) carries the same maximum penalty as for the offence incited.<sup>41</sup> For example, the maximum penalty for incitement to assault would be 5 years imprisonment (the same as the maximum penalty for committing an assault).<sup>42</sup> The maximum penalty for incitement to property damage would be 10 years (the same as for destroying or damaging property).<sup>43</sup>

The RRTA offences serve an important educative function and as a social condemnation of harmful behaviour that incites hatred and violence. Maximum penalties serve as a guide for the perceived seriousness of this conduct, both for individuals and the target community as a whole. A maximum penalty of 6 months imprisonment does not effectively highlight the serious harm of hate speech and vilification, potentially undermining the deterrent force of the offences.

It may be appropriate for serious vilification offences to match other similar offences in the *Crimes Act 1958 (Vic)*, such as causing injury recklessly, threats to inflict serious injury,

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<sup>39</sup> "a court must have regard to... whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated".

<sup>40</sup> Victorian Equal Opportunity and Human Rights Commission (n 2).

<sup>41</sup> *Crimes Act 1958 (Vic)* ss 321G, 321I.

<sup>42</sup> *Crimes Act 1958 (Vic)* s 31.

<sup>43</sup> *Crimes Act 1958 (Vic)* s 197.

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conduct endangering persons, and assault, which all carry a maximum penalty of 5 years' imprisonment.<sup>44</sup>

### **(c) Reviewing DPP consent for prosecution**

The low maximum penalty makes the RRTA incitement offences summary offences that are heard in the Magistrates' Court. Summary offences are usually prosecuted by Victoria Police, rather than the Office of Public Prosecutions. Despite this, the consent of the DPP is required to initiate a prosecution. This may act as a barrier to police prosecutions, who are rarely required to seek DPP consent to file charges for comparable offences.

**Recommendation 7: Consideration should be given to the reform of the RRTA offences alongside any work to reform the civil provisions. This could include consideration of:**

- (a) Moving the offences to the *Crimes Act 1958* (Vic)**
- (b) Reducing the complexity of the offences**
- (c) Reviewing the maximum penalties, and**
- (d) Reviewing the role of the DPP in consenting to a prosecution.**

## **7. Consolidating relevant laws**

For consistency with other Australian jurisdictions and to increase awareness of vilification laws, VLA and VALS recommend that the civil provisions in the RRTA be incorporated into the *Equal Opportunity Act 2010* (Vic).

VLA and VALS also recommend that the criminal provisions in the RRTA be moved to the *Crimes Act 1958* (Vic). While a symbolic statement of the importance of condemning racial and religious intolerance, it may be that separating serious vilification offences from the majority of prosecuted offences contributes to them being less readily accessible to police officers laying charges and preparing briefs. Placing the offences in the *Crimes Act 1958* (Vic) would both clearly highlight their criminality and increase visibility to the investigating police officers.

**Recommendation 8: The civil provisions in the RRTA should be incorporated into the *Equal Opportunity Act 2010* (Vic).**

**Recommendation 9: The criminal provisions in the RRTA should be moved to the *Crimes Act 1958* (Vic).**

## **8. Improving compliance and enforcement of vilification laws**

Reform is needed to address the fact that our laws and agencies currently place the burden wholly on a victim of vilification to bring a legal claim to enforce their rights. Bringing a complaint is stressful and clients are often concerned about the impact on their reputation or fearful of victimisation.

VicHealth research into experiences of racism by Aboriginal people in Victoria found that the two most common responses were to ignore the incident or verbally confront the

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<sup>44</sup> *Crimes Act 1958* (Vic) ss 18, 21, 23, 31.

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perpetrator. Making a complaint or taking legal action were far rarer responses.<sup>45</sup> This reliance on individual complaints means that there are rarely consequences for perpetrators and the law does not have its intended effect of promoting racial and religious tolerance.<sup>46</sup>

#### **Vilification claim dropped without an outcome: Lilly's story**

We made a vilification complaint because a newspaper was saying distressing things about my religion. The paper said that followers of my religion are murderers and said that we are criminally insane. We experience constant persecution and I felt like something had to be done.

We made a claim to the Tribunal but we had trouble getting someone to represent us. We got some advice from VLA but weren't eligible for ongoing help. I was expected to write particulars without a legal degree. The Tribunal's system was imposed upon me. The whole thing made no sense. Was it stressful? Absolutely! It was revolting. We were worried about further attacks in the papers. When you are already a persecuted group more persecution is par for the course. I acquired an anxiety condition struggling to manage this legal battle on top of being a carer for 20 years. I am still feeling the effects today.

At conciliation, rather than go to hearing, we settled on nothing. They had two lawyers and they were quite vicious. They said we'll continue to do whatever we want. We had a lawyer, but he said do you really want a hundred thousand-dollar five day hearing? No. We didn't go to hearing because we couldn't afford to. In the end we had already spent nearly 12 months of our lives travelling into the city, the whole thing was just too much. It was all the stress combined with the finances.

It was like vilification is allowed to happen to vulnerable groups because the system was the way it was. So they could get away with vilification because there was no recourse for me to do anything.

I think that it would be really great to have the Commission be able to help enforce the law. I really truly believe the Commission should be able to stand up for the values that we live by in Australia.

### **Introducing representative complaints**

To protect against victimisation and encourage reporting, Victoria's anti-vilification laws should allow representative complaints without the need to identify all complainants. This could be modelled on the *Australian Human Rights Commission Act 1986* (Cth), which allows representative complaints that 'describe or otherwise identify the class members' without naming them.<sup>47</sup> This enables action to be taken on behalf of a group of people without all of them needing to endure the stress and exposure of a legal proceeding.

**Recommendation 10: Victoria's anti-vilification laws should be amended to enable representative complaints in line with *the Australian Human Rights Commission Act 1986* (Cth).**

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<sup>45</sup> VicHealth (n4) 6.

<sup>46</sup> *Racial and Religious Tolerance Act 2001* (Vic) s 1.

<sup>47</sup> *Australian Human Rights Commission Act 1986* (Vic) s 46PB.

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## Increased VEOHRC powers and functions

Most of our clients' experiences do not relate to conduct taking place in a newspaper or on the television where a large number of people are subjected to the conduct. As a result, most of our clients would not have the option of being protected by a representative complaint should the above recommendation be adopted. It is also necessary for VEOHRC to play a greater role in ensuring compliance with vilification protections.

Currently VEOHRC does not have the power to enforce the vilification provisions alongside their education and conciliation functions. The well-established concept of a regulatory pyramid is based on the idea that efforts to persuade compliance with the law are more effective if they are backed by the threat of punishment for non-compliance.<sup>48</sup> British academics Hepple, Coussey and Choudhury developed an enforcement pyramid for regulating anti-discrimination laws with persuasion on the bottom of the pyramid, investigation being the next step up combined with the power to make enforceable undertakings and issue compliance notices, and with prosecution and sanctions being at the top of the pyramid which increase the impact of the lower powers..<sup>49</sup>

VEOHRC lacks enforcement powers in relation to vilification provisions. VEOHRC has education and dispute resolution functions, and minimal investigation powers, but no power to compel compliance with anti-discrimination or anti-vilification laws. Reforms in the original *Equal Opportunity Act 2010* (Vic) would have enabled VEOHRC to enter into enforceable undertakings and issue compliance notices, however these reforms were removed in 2011 before the Act came into force.

Victoria's anti-discrimination and vilification laws should be amended to:

- Ensure VEOHRC has the power to investigate acts or practices of its own motion that may be inconsistent with anti-discrimination and vilification laws, without additional procedural requirements such as those present under section 127 of the Victorian *Equal Opportunity Act 2010* (Vic).
- Enable VEOHRC to enforce compliance with anti-discrimination and vilification laws following an investigation, including entering into enforceable undertakings, issuing compliance notices and prosecuting breaches of these laws.

**Recommendation 11: The full range of regulatory powers and functions provided under the original *Equal Opportunity Act 2010* (Vic) should be reinstated and extended to cover vilification provisions.**

It is essential that increased resourcing be provided to VEOHRC to make these enforcement powers meaningful and increase its ability to undertake public education and inquiries functions.

## 9. Addressing online hate speech

Online platforms are increasingly being used to express and disseminate hate speech. It has been reported that 35% of Australian internet users have witnessed such behaviour

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<sup>48</sup> See: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>49</sup> Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000) 58–59.

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online.<sup>50</sup> There has also been an increase of complaints relating to online material submitted Australian Human Rights Commission (AHRC), with 25% of complaints in 2017-18 relating to online conduct.<sup>51</sup>

This is particularly concerning given the widespread use of social media platforms and their expansive reach. There is a dangerous capacity for prejudicial ideas and attitudes to spread on these forums, causing significant harm to people's mental health and wellbeing, social inclusion and feeling of safety in our community. Tyson's story is evidence of this problem and the limitations of online platforms' approaches to policing hate speech:

**Racial vilification online: Tyson's story**

I'm a young Aboriginal man. I use an online chat-room which is pretty open, the chat rooms have about 400 people in them. People can put photos up and can post things to other people. You don't have to be logged in so it's better than Facebook. You get addicted to the site. It's pretty good when you've got nothing to do.

I get teased a lot because I'm Aboriginal. In both the chat rooms I'm on Aboriginal people and African-Americans cop it. They put down Aboriginals and they tease African-American people as well. I get called a "coon" and people attack my Aboriginality. I get upset when other cultures attack my nationality. There is an American guy who attacks me and call me the "missing link". People have called me an ape or a monkey and have posted that they hate "blackys". People have said that I have no teeth, that I'm broke, and I'm homeless just because I'm Aboriginal.

I have tried reporting people when they say something racist, but they only get a 15-minute ban. When I have told people off because they have been racist I have got a two day ban. I think they are protecting people being racist on the site. It's very hard to get someone permanently banned, it is very difficult to contact the company directly as it is based overseas. I don't do it anymore. It's hard to bring a racial vilification complaint because I don't know the identity of the people who abuse me and the company is based overseas.

There's no help and you don't know what to do, there is no support. It's giving me mental problems. All I want to do is chat and have a good time.

Victoria's current anti-vilification laws do not ensure social media platforms play an active role as intermediaries to monitor and respond to online hate speech, including 'trolling'. Nor does the law currently provide a solution to the barriers victims face in identifying perpetrators of online vilification, who may use a pseudonym, fake account or otherwise remain anonymous.

The policing or regulation of the internet is a complex problem. However, there are concrete measures available to the Victorian Government to address online hate speech. This includes amending the law to expressly provide liability for corporations that assist conduct that breaches the Act to capture platforms that host or spread hate speech, as well as empowering VEOHRC to require a person or entity to identify unknown perpetrators.

**Recommendation 12: Victoria's anti-vilification laws should be amended to expressly extend liability for authorising or assisting vilification or**

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<sup>50</sup> G Mason and N Czapski, 'Regulating cyber-racism' (2017) 41(1) *Melbourne University Law Review*, 284.

<sup>51</sup> Australian Human Rights Commission, *Annual Report 2017-2018* (Report, October 2018).

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**victimisation to corporations (in addition to natural persons and unincorporated associations in the current provision).**

**Recommendation 13: VEOHRC should be empowered to identify an unknown respondent by requiring a person or entity, where reasonable and necessary, provide the respondent's name and contact details to support the dispute resolution process.**

## **10. Prioritising prevention**

Reforming Victoria's anti-vilification laws to ensure they are enforceable and accessible to victims of hate speech will not only send a strong message that this conduct will not be tolerated, it is likely to have a deterrent effect on would-be perpetrators. However, a robust response to the problem of hate speech must include consideration of non-legal preventative measures that tackle the root drivers of hate speech.

Hate speech is usually understood to be a symptom of prejudicial attitudes held by an individual about another group. Accordingly, common non-legal responses employed to address it are usually aimed at addressing those beliefs. These responses include public media campaigns to counter hate speech narratives and harmful stereotypes,<sup>52</sup> as well as educational interventions in schools and workplaces. There is also a need to consider the systemic factors beyond individually held beliefs that may drive and facilitate the occurrence of hate speech.<sup>53</sup>

We therefore recommend that resources be dedicated to further research aimed at identifying these root drivers of hate speech and evaluate what strategies will be most effective in preventing this conduct and facilitating normative, systemic change. Alternatively, any public awareness campaign or educational strategy must consider lessons that can be gleaned internationally from the use of these measures.<sup>54</sup>

Holistic measures of redress and support for victims of hate speech are also important if anti-vilification laws are to be effective and the harms of hate speech addressed. Victims are unlikely to exercise their rights under anti-vilification provisions if they do not have access to appropriate and timely specialist support. This should include access to legal information and assistance, and counselling that is appropriately resourced and coordinated.

**Recommendation 14: Further research should be conducted on the individual and systemic drivers for racial discrimination, prejudice and hate speech and the most effective strategies to address these drivers.**

**Recommendation 15: Additional funding should be granted to support services for impacted communities such as First Nations peoples and LGBTIQ+ communities.**

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<sup>52</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, *United Nations strategy and plan of action on hate speech* (web page) <<https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml>>.

<sup>53</sup> Equality and Human Rights Commission, *Processes of prejudice: Theory, evidence and intervention* (Research Report 56, 2010).

<sup>54</sup> Maureen McBride, *What works to reduce prejudice and discrimination? A review of the evidence* (Research Paper, 14 October 2015).



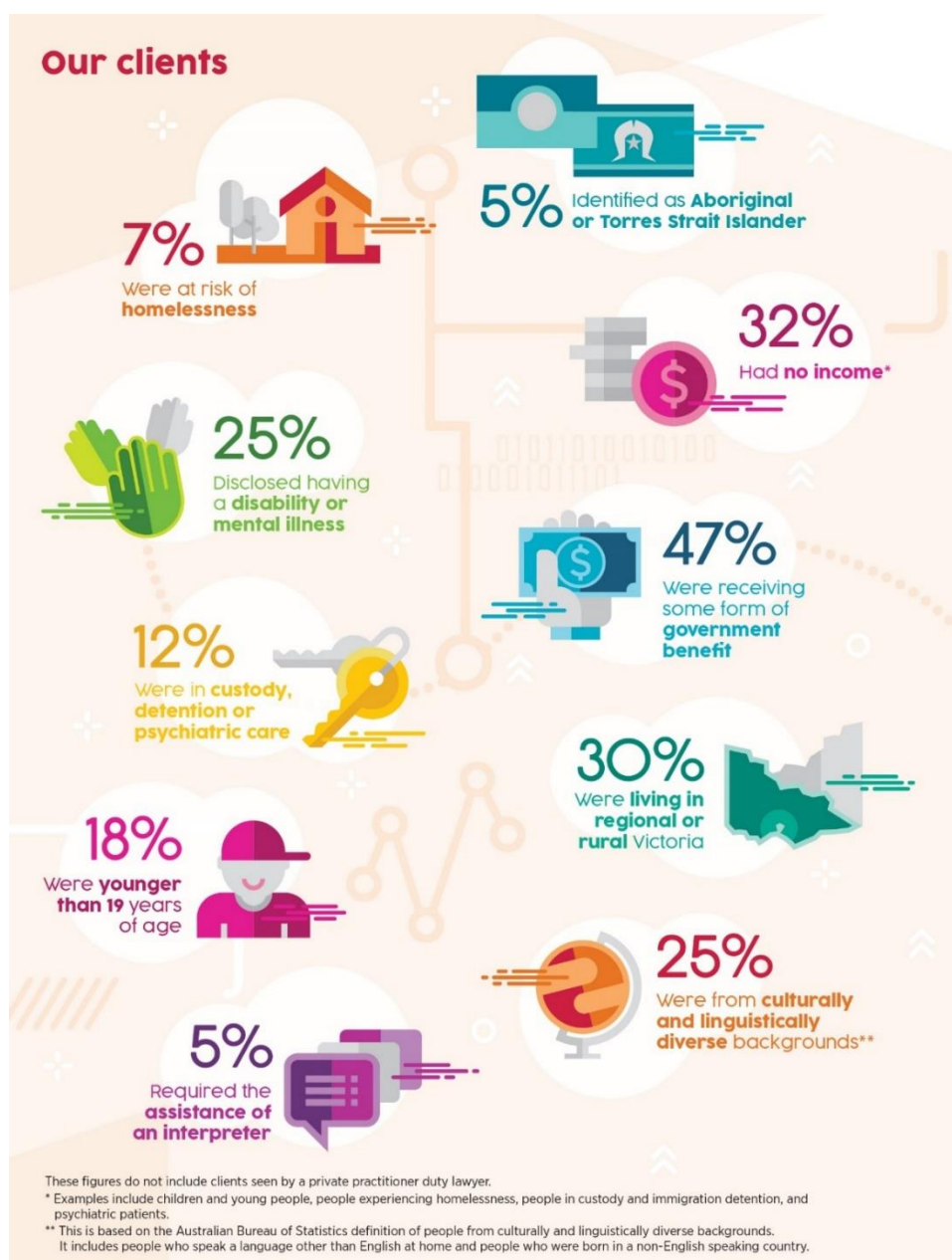
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Please contact Victoria Legal Aid on [aimee.cooper@vla.vic.gov.au](mailto:aimee.cooper@vla.vic.gov.au) or (03) 9269 0215, and Victorian Aboriginal Legal Service on [kbrowne@vals.org.au](mailto:kbrowne@vals.org.au) or (03) 9418 5999 with any queries.

## Annexure A – About Victoria Legal Aid

VLA is a Victorian statutory agency responsible for providing information, advice, and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, we help people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

As the graphic below shows, our clients are diverse and experience high levels of social and economic disadvantage, putting them at risk of discrimination, sexual harassment, vilification and victimisation, including as a result of their race, socio-economic status or homelessness, disability or mental health, criminal record and/or age.



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In 2018–19, VLA provided assistance to over 100,000 unique clients.<sup>55</sup> Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We work to improve access to justice and pursue innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, commissions and tribunals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education and non-legal advocacy.

VLA is the leading provider of legal advice and advocacy to people seeking assistance with discrimination matters in Victoria. Through our Equality Law Program, we provide telephone and in-person advice services in addition to representation in legal proceedings. In the last financial year, we provided 1,376 legal advices on discrimination, sexual harassment, victimisation and vilification.

VLA is also the leading provider of criminal law services, including duty lawyer services for people in custody or appearing on bail or summons at Magistrates' Courts and other courts across Victoria. In 2018–19 VLA provided 67,427 criminal duty lawyer services. VLA is one of the largest criminal law solicitor practices in Victoria and undertakes legally aided criminal casework for summary and indictable matters.

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<sup>55</sup> Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education.

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## **Annexure B – About the Victorian Aboriginal Legal Service**

VALS is an Aboriginal Community Controlled Organisation established in 1972 by committee and incorporated in 1975. VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and respecting the cultural diversity, values and beliefs of our clients. VALS vision is to ensure that Aboriginal Victorians are treated with true justice before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak ACCOs in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, family law and civil law. In our civil practice, we provide legal assistance to clients facing racial discrimination and vilification.

Our 24-hour support service is backed up by the strong community-based role our Client Service Officers play, in being the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, Djirra, community legal centres and private practitioners as appropriate.

VALS takes this opportunity to acknowledge Aboriginal and Torres Strait Islander peoples and traditional owners throughout Victoria, including elders past and present. We acknowledge the strength and bravery of our clients who have allowed us to share their stories as part of this submission.

## Annexure C – List of recommendations

#	Recommendation
1	Victoria's anti-vilification laws should be amended to include protection on the basis of sexual orientation, gender identity, diverse sex characteristics, gender and disability as well as someone who has a personal association with a protected attribute.
2	Victoria's anti-vilification laws should be amended to cover conduct that expresses or is likely in the circumstances to incite hatred towards, serious contempt of, severe ridicule towards or revulsion of, a person or people with a protected attribute.
3	Victoria's anti-vilification laws should include a complementary harm based civil protection alongside an amended incitement protection.
4	Victoria's anti-vilification laws should replace the definition of 'religious purpose' with a definition that reflects the manifestation of freedom of religion and belief under article 18 of the International Covenant on Civil and Political Rights to mean religious 'worship, observance, practice and teaching'.
5	The broad exception for conduct engaged in 'for any purpose in the public interest' under Victorian anti-vilification law be amended to include 'any genuine purpose in the public interest'.
6	Victoria's anti-vilification laws should not adopt a general limitations clause as an alternative to existing exceptions.
7	Consideration should be given to the reform of the RRTA offences alongside any work to reform the civil provisions. This could include consideration of: <ul style="list-style-type: none"> <li>(a) Moving the offences to the Crimes Act 1958 (Vic)</li> <li>(b) Reducing the complexity of the offences</li> <li>(c) Reviewing the maximum penalties, and</li> <li>(d) Reviewing the role of the DPP in consenting to a prosecution.</li> </ul>
8	The civil provisions in the RRTA should be incorporated into the <i>Equal Opportunity Act 2010</i> (Vic).
9	The criminal provisions in the RRTA should be moved to the <i>Crimes Act 1958</i>

	(Vic).
<b>10</b>	Victoria's anti-vilification laws should be amended to enable representative complaints in line with <i>the Australian Human Rights Commission Act 1986</i> (Cth).
<b>11</b>	The full range of regulatory powers and functions provided under the original <i>Equal Opportunity Act 2010</i> (Vic) should be reinstated and extended to cover vilification provisions.
<b>12</b>	Victoria's anti-vilification laws should be amended to expressly extend liability for authorising or assisting vilification or victimisation to corporations (in addition to natural persons and unincorporated associations in the current provision).
<b>13</b>	VEOHRC should be empowered to identify an unknown respondent by requiring a person or entity, where reasonable and necessary, provide the respondent's name and contact details to support the dispute resolution process.
<b>14</b>	Further research should be conducted on the individual and systemic drivers for racial discrimination, prejudice and hate speech and the most effective strategies to address these drivers.
<b>15</b>	Additional funding should be granted to support services for impacted communities such as First Nations peoples and LGBTIQ+ communities.