



Submission of the
Australian Discrimination Law Experts Group

in response to the

**Victorian Department of Justice and Community
Safety Consultation on ‘Overview of Proposed
Anti-Vilification Protections for all Victorians’**

9 October 2024

Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group (ADLEG), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission builds on ADLEG's previous submissions on Victorian anti-vilification law reforms, from 2020 to 2023. It focuses on the overview of changes proposed at this fourth stage of consultation.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can further assist this inquiry by emailing liam.elphick@monash.edu.

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List of Recommendations

Recommendation 1: That HIV/AIDS status be added to the list of protected attributes in section 4, as proposed by the Department in their 2023 Consultation Paper 1.

Recommendation 2: That the Department review why other protected attributes in section 5 of the *Equal Opportunity Act 2010* (Vic) should not be protected from vilification, and reconsider their inclusion in anti-vilification reforms.

Recommendation 3: That the Department adopt the below definition of ‘associate’, from section 4 of the *Disability Discrimination Act 1992* (Cth), for the purposes of defining ‘personal association’ in the proposed anti-vilification reforms:

associate, in relation to a person, includes:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.

Recommendation 4: That the Department’s proposal that vilification complaints in Victoria be permitted on the basis of multiple attributes be achieved by inserting the following into the proposed anti-vilification reforms:

vilification on the basis of an attribute, where a person has 2 or more attributes, includes vilification in relation to:

- (a) any of the attributes; or
- (b) 2 or more of the attributes; or
- (c) the combined effect of 2 or more of the attributes

Recommendation 5: That a harm-based test, with the same language as section 18C of the *Racial Discrimination Act 1975* (Cth), be adopted as the single test for vilification in Victoria.

Recommendation 6: That the Victorian Equal Opportunity and Human Rights Commission be granted powers to obtain information from online publishers needed to identify people who allegedly breach anti-vilification laws, particularly through anonymous social media comments, by adopting the reforms contained in clause 17 of the Racial and Religious Tolerance Amendment Bill 2019 (Vic).

Recommendation 7: That the proposed reforms in Parts 6.1 (moving civil anti-vilification protections to the *Equal Opportunity Act*), 6.4 (continuing to capture only public conduct)

and 6.5 (continuing to provide exceptions to protect legitimate conduct) of the Department's overview paper be implemented.

Recommendation 8: That the proposed definition of 'public conduct' be amended to include:
(a) conduct at any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place; and
(b) conduct done in sight or hearing of people who are in such a place.

Submission

This submission focuses on Parts 4 (protected attributes) and 6 (civil protections) of the Victorian Department of Justice and Community Safety's ('the Department') overview paper on proposed anti-vilification protections for all Victorians. ADLEG does not have the requisite expertise to make submissions on Part 5 (criminal anti-vilification laws).

1. The inquiry

While recognising delays caused by the pandemic, and without attributing the blame to overworked staff at the Department, this inquiry has dragged on for far too long.

A two-year parliamentary inquiry preceded this fourth stage of consultation by the Department. It has been almost five years since these reforms were first proposed in the Victorian Parliament and since the first submission and consultation process. This has caused consultation fatigue amongst stakeholders, including ADLEG, and has delayed the introduction of important reforms to protect Victorians from vilification.

We urge the Victorian government to proceed urgently, and not to delay anti-vilification reforms any further. Far more complicated and comprehensive reforms have proceeded at a much quicker pace in other jurisdictions. Victoria has among the weakest anti-vilification protections in Australia; it is well and truly overdue that it catches up with other jurisdictions.

2. Protected attributes

We support the addition (proposed in Part 5 of the overview paper) of new protected attributes to Victoria's anti-vilification protections, namely: disability, gender identity, sex, sex characteristics, sexual orientation, and personal association. However, we are disappointed that HIV/AIDS has been removed as a proposed attribute since the last consultation process in 2023.

The overview paper is correct that 'disability' would protect people with HIV – but many people with HIV do not self-identify as having a disability. While the substantive protection offered by anti-vilification law is important, this does not mean that labels or terms used are unimportant. How potential complainants self-identify will impact their use – or not – of anti-vilification protections.

It is important that people with HIV see themselves protected and reflected in the law, and that those who may seek to vilify others on the basis of HIV/AIDS status are deterred from doing so. New South Wales, often seen as a laggard on discrimination and anti-vilification laws in comparison to other Australian states and territories, has specifically prohibited HIV/AIDS vilification since 1994.¹

Recommendation 1: That HIV/AIDS status be added to the list of protected attributes in section 4, as proposed by the Department in its 2023 Consultation Paper 1.

¹ *Anti-Discrimination Act 1977* (NSW) s 49ZXB.

As we have consistently submitted throughout this five-year reform process, anti-vilification protections should extend to *all* groups protected under discrimination laws. We note, for example, that age is omitted from the list of attributes that would be protected under the proposed anti-vilification reforms. This represents a critical gap.

The protected attributes listed in the *Equal Opportunity Act 2010* (Vic) indicate the type of characteristics that are likely to be subject to vilifying conduct;² the coverage of anti-vilification laws should, therefore, match the coverage of discrimination laws in Victoria.

Recommendation 2: That the Department review why other protected attributes in section 5 of the *Equal Opportunity Act 2010* (Vic) should not be protected from vilification, and reconsider their inclusion in anti-vilification reforms.

As we proposed in our last submission to this inquiry in 2023, ‘personal association’ should match the definition of ‘associate’ in section 4 of the *Disability Discrimination Act 1992* (Cth). The definition proposed in the overview paper is merely ‘personal association (whether as a relative or otherwise)’; this does not go far enough in ensuring protection of associates.

Recommendation 3: That the Department adopt the below definition of ‘associate’, from section 4 of the *Disability Discrimination Act 1992* (Cth), for the purposes of defining ‘personal association’ in the proposed anti-vilification reforms:

associate, in relation to a person, includes:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.

As we proposed in our last submission to this inquiry in 2023, complaints should be permitted on the basis of multiple protected attributes.

The Department has briefly noted a proposal that ‘a complaint may be brought based on multiple attributes’ in Part 6.6.2 of the overview paper. The Department’s noting in the overview paper that ‘a First Nations woman might experience vilification due to both her gender and race’ reflects an outdated understanding of protected attributes that is *additive*: namely, that you can ‘add’ protected attributes to assess how a person of diverse gender and race experiences discrimination. The reality is that a First Nations woman’s experiences of vilification are not additive but, rather, compounded and unique because of her multiple attributes. A First Nations woman does not experience vilification due to her gender as an

² *Equal Opportunity Act 2010* (Vic) s 6.

‘additive’ to vilification she experiences due to her race; her experience is one where her gender and race are *together* her identity.

This proposal should be based on this *intersectional* understanding: namely, that protected attributes can combine and compound disadvantage, rather than their being distinct and separate.³ This would better reflect the real ways in which people experience vilification (and discrimination) in practice, which is multiple and overlapping, with a substantial portion of the population having multiple protected attributes.⁴

The Australian Capital Territory legislated for an intersectional approach to discrimination in 2016, with a simple amendment to the meaning of ‘discrimination’ to refer to a person’s having ‘1 or more protected attributes’. Queensland recently enacted an intersectional approach to discrimination in the *Anti-Discrimination Act 1991* (Qld), which will commence on 1 July 2025. Those amendments will provide that discrimination on the basis of an attribute, where a person has two or more attributes, includes discrimination in relation to:

- (a) any of the attributes; or
- (b) 2 or more of the attributes; or
- (c) the combined effect of 2 or more of the attributes.⁵

Recommendation 4: That the Department’s proposal that vilification complaints in Victoria be permitted on the basis of multiple attributes be achieved by inserting the following into the proposed anti-vilification reforms:

vilification on the basis of an attribute, where a person has 2 or more attributes, includes vilification in relation to:

- (a) any of the attributes; or
- (b) 2 or more of the attributes; or
- (c) the combined effect of 2 or more of the attributes

3. Harm-based test

The Department proposes to add a new ‘harm-based’ test of vilification, which would operate in addition to the current ‘incitement-based’ test (modified to conduct ‘likely to incite’ rather than conduct ‘that incites’). We reiterate our support for a harm-based test: this was one of the main recommendations in the 2021 final report of the parliamentary review of Victorian anti-vilification protections.⁶ Importantly, a harm-based test focuses on the harms of

³ Alysia Blackham and Jeremy Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43(3) *UNSW Law Journal* 773.

⁴ Julia Mansour, ‘Consolidation of Australian Anti-Discrimination Laws: An Intersectional Perspective’ (2012) 21(2) *Griffith Law Review* 533, 545.

⁵ Respect at Work and Other Matters Amendment Act 2024 (Qld) s 7A.

⁶ Victorian Parliament, Legislative Assembly, Legal and Social Committee, *Inquiry into Anti-Vilification Protections* (Final Report, March 2021).

vilification as experienced by members of the target group;⁷ this is the appropriate focus of vilification laws. The new proposed ‘harm-based’ test requires that the conduct is ‘reasonably likely to be considered harmful from the perspective of a person or a member of a group with that attribute’ (page 15 of the overview paper).

However, both of the proposed tests for vilification – the modified incitement-based test and the new proposed harm-based test – require conduct which is ‘hateful, seriously contemptuous, reviling or seriously ridiculing’ (page 13 of the overview paper). This establishes a very high threshold for complainants to meet. The danger of having such a high threshold for liability is that various instances of harmful speech and conduct, which are based on a person’s protected attribute/s, will remain outside the remit of Victoria’s anti-vilification protections. A key driver for this inquiry was the need to expand the reach of Victoria’s anti-vilification protections, in light of a limited number of successful complaints being made in the 23-year operation of the *Racial and Religious Tolerance Act 2001* (Vic), and to increase the effectiveness of these legislative protections. While expanding the range of groups who are protected by anti-vilification law is a step in the right direction, this is unlikely to have much substantive effect if the test for vilification remains so difficult to establish.

Further, this high threshold for the test for vilification would disproportionately prioritise freedom of speech over freedom from harm. Legislative exceptions already exist to protect legitimate freedom of speech, which the Department has proposed to keep (page 17 of the overview paper); it is neither necessary nor desirable to set such a high standard for liability in order to protect legitimate speech. This work is already done by the exceptions provided.

We propose the adoption of the harm-based test in section 18C of the *Racial Discrimination Act 1975* (Cth), which makes unlawful conduct which is ‘reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate another person or group of people’. This test has the significant advantage of being well-understood by courts and supported by a significant body of case law, as well as being focused on harm rather than incitement. The Department’s proposed new ‘harm-based’ test, on the other hand, is likely to cause confusion and uncertainty rather than clarity and consistency – especially in creating two alternate tests for complainants and respondents to consider, rather than one uniform test.

Recommendation 5: That a harm-based test, with the same language as section 18C of the *Racial Discrimination Act 1975* (Cth), be adopted as the single test for vilification in Victoria.

4. Enforcement

The Department notes in the overview paper that the proposed new civil protections against vilification are intended to cover ‘conduct communicated online or by email’ (page 13). The Department also acknowledges in the overview paper the challenges of online vilification: ‘people may act anonymously, and it can be difficult to identify where the conduct takes

⁷ Ibid 120.

place’ (page 9). Despite this, the Department has not proposed any substantive measures to respond to the challenges of online vilification.

Anonymous abuse should not be allowed to continue unchecked. The advent of social media and ability to promulgate anonymous statements and comments online has drastically changed the enforcement landscape since civil anti-vilification laws were first adopted in Victoria in 2001 – yet the Department is proposing a continuation of the same enforcement regime.

It is true, as the Department says in the overview paper, that ‘it can be difficult to identify where the conduct takes place’ (page 9), but efforts can and should be made. For example, we reiterate our support for granting the Victorian Equal Opportunity and Human Rights Commission power to obtain information from online publishers about the identity of persons who may be the subject of vilification complaints. Such powers were contained in the Racial and Religious Tolerance Amendment Bill 2019 (Vic).⁸

These powers would increase the capacity to ‘unmask’ anonymous social media users who make vilifying comments online. Without these powers, a significant medium for vilification in the modern age – social media and other online fora – would remain difficult to capture under Victorian anti-vilification laws and weaken their effect and reach.

Recommendation 6: That the Victorian Equal Opportunity and Human Rights Commission be granted powers to obtain information from online publishers needed to identify people who allegedly breach anti-vilification laws, particularly through anonymous social media comments, by adopting the reforms contained in clause 17 of the Racial and Religious Tolerance Amendment Bill 2019 (Vic).

5. Other proposed reforms

Firstly, we support moving Victoria’s anti-vilification laws into the *Equal Opportunity Act 2010* (Vic). This is a sensible change that will increase understanding of anti-vilification protections amongst the general population and, in particular, complainants without legal representation. As we submitted when we appeared before a Victorian parliamentary inquiry hearing into anti-vilification laws in 2020:⁹

It is legislatively neat to have all of the provisions that relate to those protected attributes in one piece of legislation...[but] we should not allow those concerns about freedom of expression to spill over into our prohibitions on discrimination. If we do move [vilification protections] into the [Equal Opportunity Act], then they should be in a separate division and

⁸ Racial and Religious Tolerance Amendment Bill 2019 (Vic) clause 17, proposing new sections 22A to 22E to be inserted into the *Racial and Religious Tolerance Act 2001* (Vic). These powers can easily be translated into a new section on vilification in the *Equal Opportunity Act 2010* (Vic).

⁹ Victorian Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (Hearing on 11 March 2020, with Professor Beth Gaze and Mr Liam Elphick) 18 <<https://www.parliament.vic.gov.au/49c30f/contentassets/014cce028679481280620a35385cf5c1/11.03.2020-final-transcript-adleg-avp-inquiry.pdf>>.

it should have very clearly separate purposes...we do not want to wind down the objects of the discrimination provisions.

Second, the Department's proposal in Part 6.5 of the overview paper to continue to provide exceptions to protect legitimate conduct, and to tweak some of these for clarity, is sensible; these exceptions are found in almost all comparable anti-vilification laws and are well-justified. As stated above, these appropriately balance protection from the harms of vilification with other legitimate rights and interests, such as freedom of speech.

Third, the Department's proposal in Part 6.4 of the overview paper of a new definition of 'public conduct' is a step in the right direction, but more should be done to ensure greater clarity. The Department should adopt the definition of 'public place' in section 18C(3) of the *Racial Discrimination Act 1975* (Cth) to clarify how a 'place not open to the general public' is to be defined:

"public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

The current inclusion of schools and workplaces as an example of a 'place open to the general public' does not go far enough to establish clearly identifiable principles on which to define such places. The above definition would rectify this.

The inclusion in section 18C(2)(c) of the *Racial Discrimination Act 1975* (Cth) of conduct done in sight or hearing of people who are in a public place should also be adopted. This would ensure, for instance, that vilification occurring from a private balcony of an apartment complex which is projected loudly into a public place, such as a park or public square, would be captured by the proposed reforms. While the Department has proposed that conduct 'might be considered public even if it occurs on private property', the above definition would be less equivocal.

Recommendation 7: That the proposed reforms in Parts 6.1 (moving civil anti-vilification protections to the *Equal Opportunity Act*), 6.4 (continuing to capture only public conduct) and 6.5 (continuing to provide exceptions to protect legitimate conduct) of the Department's overview paper be implemented.

Recommendation 8: That the proposed definition of 'public conduct' be amended to include: (a) conduct at any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place; and (b) conduct done in sight or hearing of people who are in such a place.