



# **LIVING WITH DIGNITY AND WITHOUT FEAR:**

EQUALITY AUSTRALIA'S SUBMISSION TO THE QUEENSLAND LEGAL AFFAIRS  
AND SAFETY COMMITTEE INQUIRY INTO SERIOUS VILIFICATION AND HATE  
CRIMES

July 2021

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# LIVING WITH DIGNITY AND WITHOUT FEAR

Equality Australia welcomes the opportunity to make a submission to the Queensland Parliament's Inquiry into Serious Vilification and Hate Crimes.

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people. Borne out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to redress discrimination, disadvantage and distress experienced by LGBTIQ+ people.

## OUR GUIDING PRINCIPLE

**We start with the guiding principle that every LGBTIQ+ Queenslander should be able to walk down any street and participate fully in all aspects of public life with dignity and without fear. That means being able to work, study and live without facing or fearing any vilification or hate-based conduct on the grounds of their sexual orientation, gender identity and expression, or sex characteristics.**

## THE INCIDENCE OF PREJUDICE MOTIVATED ATTACKS AGAINST LGBTIQ+ PEOPLE

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

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

Tellingly, in a 2020 national survey of 6,835 LGBTIQ Australians (being the largest survey of its kind), many participants indicated that they did not feel accepted in a number of public venues, including at work, school or in public places. While 68.5% of LGBTIQ participants indicated feeling accepted 'a lot' or 'always' at LGBTIQ events and venues, only 52.2% indicated feeling the same with family members, only 43.4% indicated feeling the same when accessing health or support services, only 30.5% indicated feeling the same in public (such as on the street or in a park) and only 28.7% indicated feeling the same at mainstream events or venues. Non-LGBTIQ dating apps and websites, and faith-based events or services, were the places that the fewest participants felt accepted (21.7% and 10.5% respectively).<sup>3</sup>

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

Recent research also documents alarming rates of violence and harassment persisting against our communities. For example, the 2020 national *Private Lives 3* survey of 6,835 LGBTIQ Australians reported the following

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<sup>1</sup> See, e.g., Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University, at 37-41; Leonard et al (2012) [Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender \(GLBT\) Australians](#), Melbourne: ARCSHS, La Trobe University, at 47-8; Australian Human Rights Commission (2015) [Resilient Individuals: Sexual orientation, gender identity and intersex rights](#), Sydney: Australian Human Rights Commission, at 15-16.

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

<sup>3</sup> Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University, at 37.

experiences of violence and harassment due to sexual orientation or gender identity in the last year before the survey:

- 34.6% – verbal abuse (including hateful or obscene phone calls);
- 23.6% – harassment such as being spat at and offensive gestures;
- 22.1% – written threats of abuse via emails, social media;
- 14.6% – threats of physical violence, physical attack or assault without a weapon;
- 11.4% – receiving written threats of abuse in other ways;
- 4.8% and 3.7% respectively – deliberate damage to property or vandalism of a house and/or car; and
- 3.9% – physical attack or assault with a weapon (knife, bottle, stones).

When compared with the 2012 national *Private Lives 2* survey of 5,476 LGBT Australians, the 2020 results suggest that the incidence of violence and harassment has in fact increased over time. The 2012 national survey reported the following experiences of heterosexual violence and harassment in the last year before the survey:

- 25.5% – verbal abuse (including hateful or obscene phone calls);
- 15.5% – harassment such as being spat at and offensive gestures;
- 8.7% – threats of physical violence, physical attack or assault without a weapon (punched, kicked, beaten);
- 6.6% – receiving written threats of abuse including emails and graffiti;
- 3.3% and 2.4% respectively – deliberate damage to property or vandalism of a car and/or house; and
- 1.8% – physical attack or assault with a weapon (knife, bottle, stones).<sup>4</sup>

This data suggests both an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity), and also a significant number of LGBTIQ people (almost 1 in 5) who are now experiencing harassment online.

The research also shows that certain populations within the LGBTIQ+ population have experienced high – and sometimes higher than the broader LGBTIQ+ population – rates of violence and harassment, including:

- In data from the same 2012 national study, LGBT respondents with a disability were found even more likely to have been subject to verbal abuse than respondents without disability in the previous year (32% versus 24%); more likely to have ‘received written threats of abuse including emails and graffiti’ (11% versus 5%); more likely to have been subject to harassment (21% vs 14%); and more likely to have been subject to threats of physical violence or physical assault without weapon such as being punched, kicked, or beaten (13% vs 8%).<sup>5</sup>
- A 2018-19 national survey of 528 trans and gender diverse adults found that 71% reported verbal harassment (74% of which occurred in the last 12 months) and 37% reported physical

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<sup>4</sup> Leonard et al (2012) [Private Lives 2](#), Melbourne: ARCSHS, La Trobe University, at 47.

<sup>5</sup> Leonard and Mann (2018) [The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex \(LGBTI\) People Living with Disability](#), Melbourne: GLHV@ARCSHS, La Trobe University, at 54.

intimidation and threats (49% of which occurred in the last 12 months). One in five participants had been physically assaulted, with a third of those assaults occurring in the last 12 months.<sup>6</sup>

- A 2016 survey of 272 people with intersex variations (80% of which currently lived in Australia) included data from 77 participants who reporting experiencing bullying while at school, including on the basis of visible physical characteristics associated with a known intersex variation.<sup>7</sup>
- A 2010 national survey of 3,134 same sex attracted and gender questioning young people found that 61% reported verbal abuse and 18% reported physical abuse because of homophobia. School was the most likely place of abuse, accounting for 80% of those who were abused.<sup>8</sup>
- A 2018 national survey of 847 people living with HIV found that more than half of participants (56%) reported experiencing stigma within the last 12 months in relation to their HIV status, including 9% reporting that they 'often' or 'always' experienced stigma.<sup>9</sup> One-third also reported negative treatment by health workers.<sup>10</sup>

## THE NEED FOR ANTI-HATE LAWS PROTECTING LGBTIQ+ PEOPLE

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

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

That is why we call for stronger and better protections in Queensland's *Anti-Discrimination Act 1991* (the **Act**) against vilification, new provisions dealing with hate-based conduct, as well as better defined and expanded grounds of protection for sexual orientation, gender identity and expression, and sex characteristics. Queensland's current definitions of 'sexuality' and 'gender identity',<sup>11</sup> and its omission of a specific ground of 'sex characteristics', are out of step with other comparable Australian laws. As members of our communities are also members of other communities, we also support expanding the grounds of protection against vilification and hate-based conduct to include attributes such as gender, HIV/AIDS status and disability.

Our recommendations on reforming the Act, insofar as it deals with vilification in sections 124A and 131A, and to address properly other hate-based conduct, are set out below. The Act needs other reforms to ensure it better protects LGBTIQ+ people from discrimination. Given the upcoming Queensland Human Rights Commission review into the Act and the more limited scope of this inquiry, we will not address these wider areas of reform in this submission.

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<sup>6</sup> Kerr et al (2019) *TRANScending Discrimination in Health & Cancer Care: A Study of Trans & Gender Diverse Australians*, Bundoora: ARCSHS, La Trobe University, at 32-33.

<sup>7</sup> Jones (2016) 'The needs of students with intersex variations', *Sex Education*, at 13-14.

<sup>8</sup> Hillier et al (2010) *Writing Themselves In 3*, Melbourne: ARCSHS, La Trobe University, at 39.

<sup>9</sup> Centre for Social Research in Health (2019) *Stigma Indicators Monitoring Project: People living with HIV*, Sydney: CSRH, UNSW, at 1.

<sup>10</sup> *Ibid*, at 2.

<sup>11</sup> *Anti-Discrimination Act 1991* (Qld), Schedule.

## THE WAY FORWARD

### Changing laws

#### Updating definitions and including new attributes

The Queensland *Anti-Discrimination Act 1991* (the **Act**) prohibits unlawful vilification, by way of a civil regime (s 124A), and prohibits serious vilification by way of a criminal offence (s 131A). Both provisions rely on definitions of ‘sexuality’ and ‘gender identity’ currently contained in the Act, which are out of step with comparable contemporary Australian definitions. These definitions should be updated to properly protect all LGBTIQ+ people.

‘Sexuality’ is defined to *mean* heterosexuality, homosexuality and bisexuality.<sup>12</sup> By contrast, Victoria, the ACT and Tasmania provide more inclusive and contemporary definitions of ‘sexual orientation’ that more clearly extend to people however they define their sexual orientation. The ACT and Tasmania define ‘sexuality’/‘sexual orientation’ as *including* heterosexuality, homosexuality and bisexuality (meaning, these definitions are not exhaustive).<sup>13</sup> Victoria has recently adopted the definition contained in the Yogyakarta Principles, an internationally-recognised statement drafted by human rights experts on the application of international human rights law to issues concerning sexual orientation, gender identity and expression, and sex characteristics.<sup>14</sup> We would be comfortable with either approach, with a slight preference for the ACT and Tasmanian definitions because they achieve simplicity while retaining their ability to be inclusive.

‘Gender identity’ is currently defined in the Act by reference to people who live or seek to live as members of the ‘opposite sex’, including those of ‘indeterminate sex’.<sup>15</sup> This definition is problematic for several reasons. First, it does not specifically protect gender-related expression. Second, it defines gender by reference to a binary, meaning non-binary people may be excluded from protection. Third, it conflates gender identity and innate variations of sex characteristics because of the inclusion of ‘indeterminate sex’ in the definition. As Intersex Human Rights Australia explains, and the Darlington Statement warns, this conflation imposes descriptions on the intersex population that marks them out as a ‘third sex’ and assumes that innate variations of sex characteristics determine a person’s gender identity.<sup>16</sup>

The ACT, Tasmania and Victoria (and also, to a lesser extent, the Commonwealth and South Australia) have better definitions of gender identity that include gender-related expression, and provide protection to people with intersex variations using standalone protections and more contemporary definitions. ‘Gender identity’ is variously defined in the laws of the ACT, Victoria, Tasmania, South Australia and the Commonwealth to include gender-related expression, and to clarify that people do not need to have undergone medical treatment or updated their

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<sup>12</sup> *Anti-Discrimination Act 1991* (Qld), Schedule.

<sup>13</sup> *Discrimination Act 1991* (ACT), Dictionary (definition of ‘sexuality’); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of ‘sexual orientation’).

<sup>14</sup> See <https://yogyakartaprinciples.org/>. *Equal Opportunity Act 2010* (Vic), s 4 (definition of ‘sexual orientation’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)].

<sup>15</sup> *Anti-Discrimination Act 1991* (Qld), Schedule.

<sup>16</sup> Intersex Human Rights Australia (2019), ‘Intersex is not a gender identity, and the implications for legislation’, <https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/> [accessed 16 July 2021]; [Darlington Statement](#) (2017), [8]. The Darlington Statement is a joint statement by Australia and Aotearoa/New Zealand intersex community organisations and independent advocates, including the Androgen Insensitivity Syndrome Support Group Australia (AISSGA), Intersex Trust Aotearoa New Zealand (ITANZ), Organisation Intersex International Australia (OIIAU), Eve Black, Kylie Bond (AISSGA), Tony Briffa (OIIAU/AISSGA), Morgan Carpenter (OIIAU/Intersex Day Project), Candice Cody (OIIAU), Alex David (OIIAU), Betsy Driver (Bodies Like Ours), Carolyn Hannaford (AISSGA), Eileen Harlow, Bonnie Hart (AISSGA), Phoebe Hart (AISSGA), Delia Leckey (ITANZ), Steph Lum (OIIAU), Mani Bruce Mitchell (ITANZ), Elise Nyhuis (AISSGA), Bronwyn O’Callaghan, Sandra Perrin (AISSGA), Cody Smith (Tranz Australia), Trace Williams (AISSGA), Imogen Yang (Bladder Exstrophy Epispadias Cloacal Exstrophy Hypospadias Australian Community – BEECHAC) and Georgie Yovanovic.

legal gender in order to be protected.<sup>17</sup> An independent protection for people with innate variations of sex characteristics is achieved through a separate ‘sex characteristics’ ground in the ACT, Victoria and Tasmania, which is the more contemporary and preferred approach.<sup>18</sup> ‘Intersex status’, as defined in the Commonwealth and South Australia, also provides protection to intersex people, but now reflects outdated definitions.

In addition to protecting LGBTIQ+ people properly, we would also support expanding protections to other groups that may experience vilification or hate-based conduct, including based on gender, HIV/AIDS status and disability. Gender is protected in Tasmania; HIV/AIDS status is protected in NSW and the ACT; and disability is protected in the ACT and Tasmania. Tasmania also provides protection on several other grounds, such as age, marital status, pregnancy and parental status.

### **Introduce a new harm-based protection against hate-based conduct**

The key issue with vilification protections is that they tend to focus on the potential effects of the conduct in inciting hatred, contempt and ridicule in a hypothetical audience, ignoring the very real and direct harm that they cause to the person who is targeted by that conduct. For example, in considering whether anti-LGBTIQ+ graffiti painted on someone’s fence amounts to vilification, the current legal provisions focus on whether that conduct incites hatred, serious contempt or severe ridicule of persons on the ground of their sexual orientation, gender identity or sex characteristics. It does not consider whether the person whose fence has been graffitied has suffered any harm, such as the experience of being humiliated, intimidated, or being made to feel unsafe in their own home.

For this reason, we support enacting a new protection against hate-based conduct which uses a harm-based legal standard, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee *Inquiry into Anti-Vilification Protections*.<sup>19</sup> We would support a provision which makes unlawful public conduct on the basis of a protected attribute that humiliates or intimidates a person or group of persons, or which has profound and serious effects on their dignity or sense of safety, and which is not done reasonably and in good faith for a legitimate purpose. The formulation proposed by the Victorian Parliamentary Legal and Social Issues Committee provides a good way forward, which builds on the strengths of existing Commonwealth and Tasmanian laws.

### **Introduce an aggravating sentencing factor when crimes involve prejudice**

Many commonly committed crimes, such as assaults or damage to property, can be motivated by prejudice, and that motivation can make a real difference in the impact it has on victims long after the crime has been committed.

For example, it is a very different thing for someone to have their car or fence vandalised with a meaningless slogan, than it is for someone to have their car or fence vandalised with words that express condemnation or disgust about their sexual orientation, gender identity or sex characteristics. The first act of vandalism results in economic loss. The second act results in both economic loss and the loss of safety, dignity and sense of belonging which may have once been felt by the victim of that crime.

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<sup>17</sup> *Discrimination Act 1991* (ACT), Dictionary (definition of ‘gender identity’); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of ‘gender identity’ and ‘gender expression’); *Acts Interpretation Act 1915* (SA), s 4(1) (definition of ‘gender identity’); *Sex Discrimination Act 1984* (Cth), s 4(1) (definition of ‘gender identity’); *Equal Opportunity Act 2010* (Vic), s 4 (definition of ‘gender identity’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)].

<sup>18</sup> *Discrimination Act 1991* (ACT), Dictionary (definition of ‘sex characteristics’); *Equal Opportunity Act 2010* (Vic), s 4 (definition of ‘sex characteristics’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)]; *Anti-Discrimination Act 1998* (Tas), s 3 (definition of ‘intersex variations of sex characteristics’). See also, now out of date definitions in *Acts Interpretation Act 1915* (SA), s 4(1) (definition of ‘intersex status’) and *Sex Discrimination Act 1984* (Cth), s 4(1) (definition of ‘intersex status’).

<sup>19</sup> Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into Anti-Vilification Protections](#), Melbourne: Parliament of Victoria, Recommendations 9 and 10.

Similarly, it is a very different thing for someone to drive their car dangerously, than it is for someone to do so at a group of people with the intention of harming them because of who they are. Both acts are deplorable, but the latter causes additional harms for victims who know they were specifically targeted because of who they are. These prejudice-motivated aspects of a crime mean that victims of hate crimes can experience long lasting trauma beyond the economic or physical effects of a crime.

NSW, Victoria and the Northern Territory recognise these harms in their sentencing laws. They require courts to consider – often as an aggravating factor when imposing sentences – whether an offence was motivated (whether wholly or partly) by hatred for or prejudice against a group of people that the offender believed the victim belonged.<sup>20</sup>

We would support adding a sentencing consideration to section 9 of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people with variations of sex characteristics or a particular disability). This would ensure that whatever the offence, prejudice-motivated conduct is recognised as part of appropriate sentencing.

### **Improve protections against vilification**

Section 124A of the Act prohibits public acts which incite hatred towards, serious contempt for, or severe ridicule of, a person or group based on the protected grounds. Section 131A goes further in criminalising such conduct that also includes threats of physical harm towards other people or property, or inciting others to threaten physical harm to other people or property.

We would support:

- revising the definition of a ‘public act’, consistently with the definition in section 93Z(5) of the *Crimes Act 1900* (NSW), to make it clear that it extends to social media (as proposed by the LGBTI Legal Service);
- improving the civil and criminal tests for vilification, to clarify that it does not require proof of actual incitement or intention and is satisfied by public conduct which is *‘likely to incite hatred towards, revulsion of, serious contempt for, or severe ridicule of’*, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee.<sup>21</sup>

### **Improve processes for enforcement**

Our experience of anti-vilification protections across the country is that they have rarely been utilised, and where they have been utilised, individuals who have brought them have not always understood the legal, financial and other costs involved in bringing such claims. This is partly because the procedure for bringing such complaints relies principally on individuals who are not always legally represented or well-funded, and who may not have had the benefit of legal advice regarding the extent of protections these laws provide and the costs implications of losing their claim. In addition to individual-led actions, we would support considering additional functions and powers that enabled the Victorian Human Rights Commission to investigate and initiate its own civil proceedings against people who breached the civil vilification and proposed civil hate-based conduct provisions.

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<sup>20</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(h) (aggravating factors); *Sentencing Act 1995* (NT), s 6A(e) (aggravating factors); *Sentencing Act 1991* (Vic), s 5(2)(daaa).

<sup>21</sup> Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into Anti-Vilification Protections](#), Melbourne: Parliament of Victoria, Recommendations 8 and 20.

## RECOMMENDATIONS

1. Expand the list of protected attributes in anti-vilification and anti-hate laws to include at least race, religion, gender, gender identity, sexual orientation, sex characteristics, HIV/AIDS status and disability.
2. Define 'sexuality' in the Act consistently with definitions in ACT, Tasmanian or Victorian laws, which are inclusive in protecting people of different sexual orientations.
3. Define 'gender identity' in the Act consistently with definitions in ACT, Victorian, Tasmanian, South Australian and Commonwealth laws, to include gender-related expression and to clarify that people do not need to have undergone medical treatment or update their legal gender in order to be protected.
4. Introduce a new protection in the Act and define 'sex characteristics' consistently with definitions in ACT, Victorian and Tasmanian laws, ensuring protections for people with innate variations of sex characteristics.
5. Enact new protections in the Act against hate-based conduct based on a harm-based civil test. The provision should protect people who experience public conduct, on the basis of a protected attribute, that humiliates or intimidates them, or has profound and serious effects on their dignity or sense of safety, and which is not done reasonably and in good faith for a legitimate purpose.
6. Provide the Queensland Human Rights Commission with powers to launch civil proceedings against people who breach the anti-vilification and proposed hate-based conduct protections.
7. Revise the definition of a 'public act' in the Act, consistently with the definition in section 93Z(5) of the *Crimes Act 1900* (NSW), to make it clear that it extends to social media.
8. Improve the civil and criminal tests for vilification in the Act, to clarify that it does not require proof of actual incitement or intention and is satisfied by public conduct which is '*likely to incite hatred towards, revulsion of, serious contempt for, or severe ridicule of*'.
9. Introduce a sentencing consideration into section 9 of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider whether any offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people with variations of sex characteristics or a particular disability).

### Changing attitudes

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

## FURTHER RECOMMENDATIONS

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

## FURTHER INFORMATION ABOUT OUR SUBMISSION

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

Further questions regarding our submissions can be addressed to:

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

# End the Hate

Responding to prejudice motivated speech and violence against the LGBTI community





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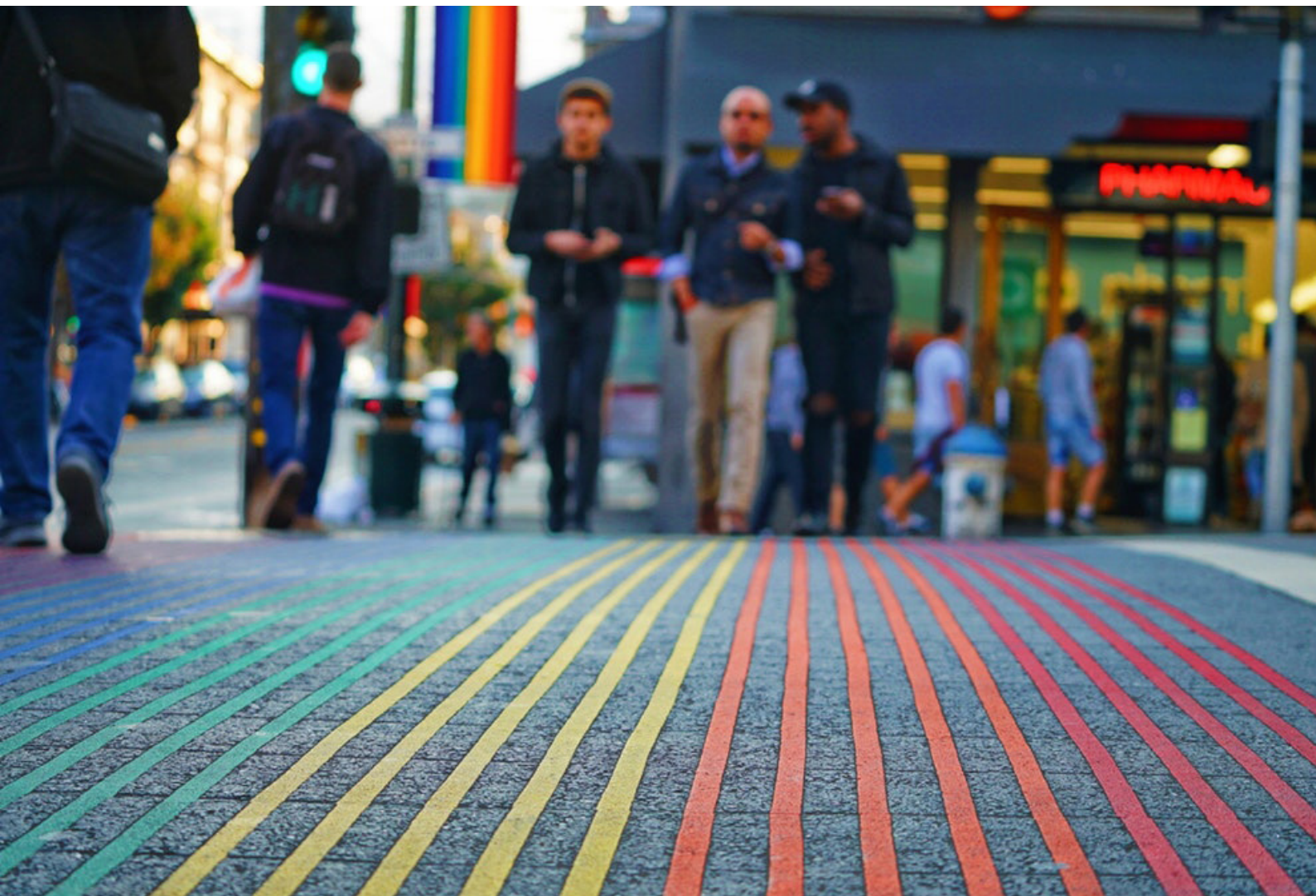
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# Contents

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Executive summary	1
Background	2
Defining hate conduct	3
Experiences of hate	5
Barriers to reporting	15
Prevention strategies	19
Challenges and opportunities	20
International best practice	21
Legislative responses	22
Recommendations for reform	26



# Executive Summary

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All human beings are equal and should be treated with equal dignity and respect.

Yet the horrific hate crime at the Pulse night club in Orlando, USA in 2016 and the drastic spike in incidents of hate conduct during the marriage equality postal survey in Australia in 2017 remind us that more needs to be done to eradicate harmful prejudice in our community.

For decades, members of lesbian, gay, bisexual, trans and intersex (LGBTI) communities have been calling for an end to the hate speech and hate violence which targets people based on who they are or who they love.

The Australian Human Rights Commission has found that almost 75% of LGBTI people had experienced some type of bullying, harassment or violence on the basis of their sexual orientation, gender identity or sex characteristics.<sup>1</sup>

This report discusses three facets of hate which cause physical, psychological and emotional harm not only to individuals, but to members of the targeted group and other minority communities, and damage our community as a whole.

**Hate crimes** are unlawful actions which target marginalised and vulnerable members of our communities.

**Hate speech** is speech which expresses hatred of a group of people in our society.

**Hate conduct** is a broader category of prejudice motivated behaviour which includes hate crimes and hate speech, as well as potentially non-criminal activity such as harassment and bullying.

It is difficult to progress solutions on these issues without access to accurate data on the prevalence of hate speech and hate crime which targets LGBTI people. As a result, it remains under-researched, poorly understood and almost impossible to effectively respond to.

The Human Rights Law Centre calls on the Victorian Government to:

1. **Legislation:** Introduce a Hate Crimes Act to ensure all people are equally protected from hate crime, hate speech and hate conduct, including LGBTI Victorians.
2. **Research and data collection:** fund further research and improve data collection methods and policies of all government agencies, including Victoria Police, to ensure accurate information on the prevalence of prejudice motivated conduct is available.
3. **Support for victims:** Introduce adequately funded independent third party reporting to improve rates of incident reporting, and introduce specialist support programs for victims of LGBTI-related hate crime.

# Background

## Methodology

The Human Rights Law Centre initially convened an LGBTI Hate Crime Expert Roundtable with stakeholders and experts in the aftermath of the Pulse nightclub shooting in Orlando, USA in 2016. The purpose of the Expert Roundtable was to develop an updated understanding of the prevalence of and responses to prejudice motivated harassment and violence against LGBTI people in Victoria and to identify and implement improvements in line with international best practice.

Our focus was expanded following the marriage equality postal survey held between August and November 2017 to capture reported increases in rates of hate conduct and to identify the barriers which led to under-reporting and inaccurate data collection during this period. This report provides an overview of the contemporary understandings of existing barriers preventing effective responses to hate speech, hate crime and hate conduct.

*"After the survey was announced, my world becomes hell. It was the hate and vitriol of the 1990s that I experienced, but this time our Prime Minister gave this hatred a name – respectful debate."*

- Submission to Senate Inquiry into the postal survey

## Previous research

Prejudice motivated crimes against LGBTI people have been considered in detail in previous reports, including:

- *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria* report (2006) (**With Respect report**);
- *Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria* (2008) (**Coming Forward report**);
- *With Respect Awareness Project* report (2010); and
- *Review of Identity Motivated Hate Crime* undertaken by the Hon Justice Geoffrey Eames AM QC (2010) (**Eames Review**).<sup>2</sup>

There remains a poor understanding of the exact prevalence of hate conduct LGBTI people face, which impedes progress. Since 2010, Victoria has made significant advances in the protection of the rights of LGBT people. Despite this progress, the same types of harassment, abuse and violence identified in past reports, which are motivated by prejudice or hatred, still persist today.

Victoria's hate crime legislation<sup>3</sup> was introduced in 2010 to allow for heavier sentences to be imposed for crimes motivated by prejudice but has rarely been used. Reasons for this include under-reporting, failure to identify and record crimes as hate crimes by police, difficulties locating perpetrators, reluctance by prosecutors to raise the provision and the high threshold of proving prejudice motivation in court.

# Defining hate conduct

## Hate crime

Hate crimes, also known as prejudice-motivated crimes, are unlawful actions that target a victim because of their membership (or perceived membership) of a certain social group.<sup>4</sup>

A hate crime is comprised of two elements:

- (a) a criminal offence; and
- (b) prejudice motivation, also known as a 'bias motive'.

Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice which can be pervasive in the wider community. Specific laws that address hate crime are necessary to demonstrate our society's condemnation of crimes committed based on prejudice. Such laws would acknowledge that hate crimes have a greater impact and affect a broader community's sense of safety, while also recognising the increased culpability of the offender.

## Hate speech

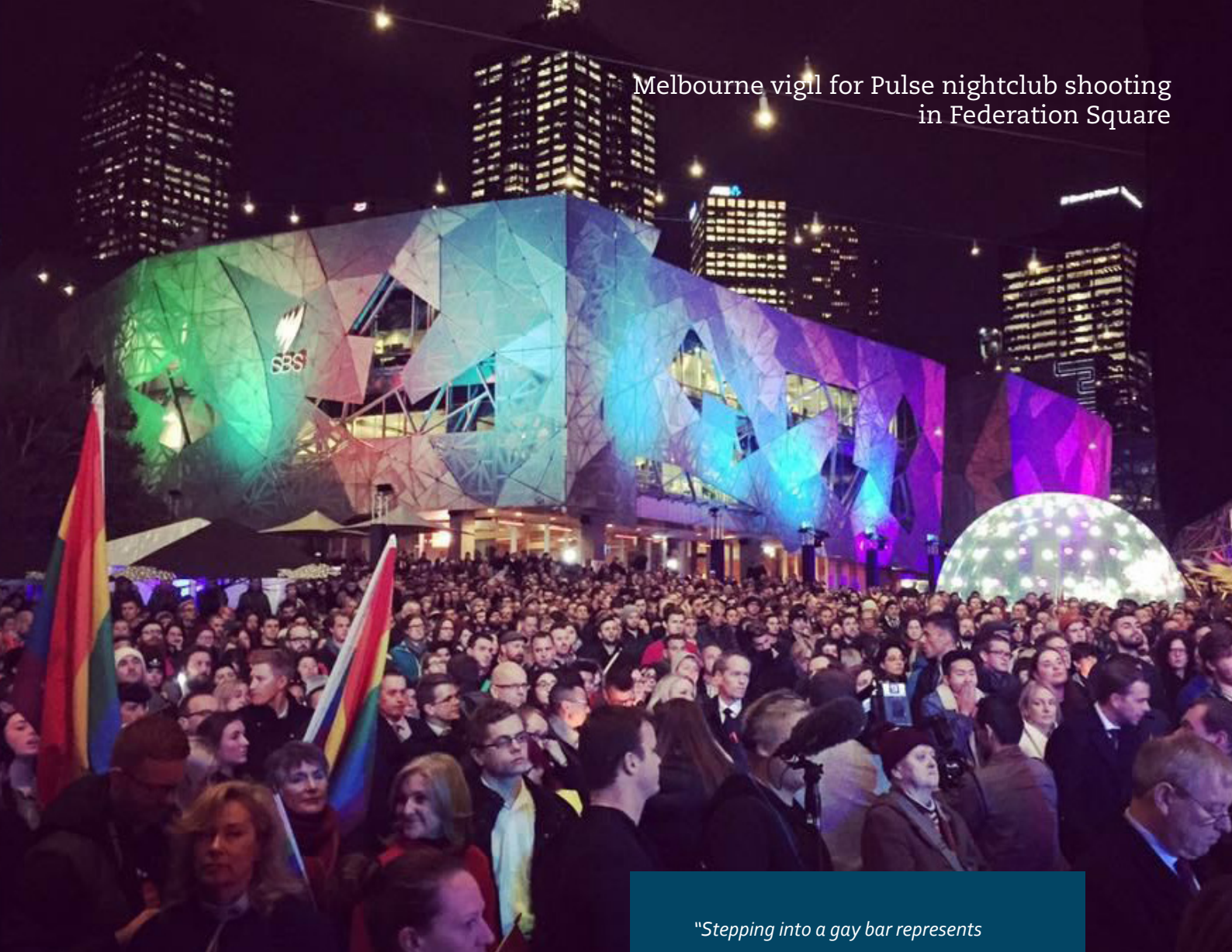
Hate speech, also known as vilification, is speech which expresses hatred of a group of people in our society. Vilification of people because of their sexual orientation, gender identity, sex characteristics or other protected attribute diminishes the dignity, self-worth and integration into our community of people from a diverse range of backgrounds.

If left unchecked, hate speech can embed discrimination and provide an 'authorising environment' for the escalation to violence.

## Hate conduct

Hate conduct, also known as prejudice motivated conduct, is a broader category of prejudice motivated behaviour which includes non-criminal conduct that is motivated by hatred or prejudice based on a person's membership (or perceived membership) to a social group.

It is an umbrella term used to describe a range of behaviours from online bullying or street harassment, to public graffiti and offensive publications. It can include actions which are not deemed serious enough for criminal investigation but which have a significant detrimental impact on individual and community safety.



Hate crimes have ripple effects that affect a much broader community than those directly affected.

On 12 June 2016, 49 people were killed and 58 others wounded in a mass shooting hate crime inside Pulse, a gay nightclub in Orlando, USA.

Following the attack, candlelight vigils were held across Australia and the world in memory and support of the victims of the massacre.

It also re-ignited discussions within LGBTI communities about how to tackle hate crime and its insidious effects.

*"Stepping into a gay bar represents leaving behind what can be an intolerant and violent outside world, and entering a place where you can be whoever you are..."*

*I think you can see by the numbers of people that have come out tonight that these issues have a ripple effect across the globe.*

*It affects all LGBTI people. We understand what it means. Maybe not to be shot at but certainly to have verbal and physical violence just as a threat under our skin all our lives."*

Victorian Gender & Sexuality Commissioner Ro Allen at the Melbourne vigil (2016)

# Experiences of hate

*"The most shocking finding of the study was that LGBTIQ respondents said that experiences of verbal and physical assaults more than doubled in the three months following the announcement of the postal survey compared with the prior six months.*

*They reported an increase of more than a third in depression, anxiety and stress during the same period. Almost 80% of LGBTIQ people and almost 60% of allies said they found the marriage equality debate considerably or extremely stressful."*

The Australia Institute and National LGBTI Health Alliance  
Study of nearly 10,000 LGBTIQ Australians, families and friends<sup>5</sup>

## LGBTI experiences of hate conduct

The LGBTI community is diverse. The prevalence, experience and impact of prejudice motivated crime and incidents can affect individuals and groups in very different ways.

For example, available research does not fully explain anecdotal reports that transgender women of colour and people from culturally and linguistically diverse communities are disproportionately targeted by hate conduct.

There is very little available data on the experiences of hate conduct targeting by intersex people. In addition, the experience of a young intersex person is very different to the experiences of young LGBT people, who have access to more readily available information and specialist support services.<sup>6</sup>

The intersection of different aspects of identity can also have an impact on how LGBTI people experience prejudice motivated crime and incidents. For example, LGBTI experts have identified that:

- Aboriginal and Torres Strait Islander sisters and brotherboys may be targeted both because of their race and gender identity.
- Older LGBTI people are particularly vulnerable to being targeted, are less likely to have family supports and are more reluctant to report to police.
- LGBTI people living in rural, regional and remote Victoria are at risk of further marginalisation as a result of social isolation and a lack of LGBTI specific support services.

Starlady (pictured right) and two other members of the LGBTI community were assaulted and chased down the street in Melbourne on a Friday night in November 2016.

*"I was screaming loudly for someone to call the police... There was a crowd of people around as well, and nobody said or did anything. It was sad. It's very different – you're being targeted because of your sex, gender identity, sexuality, race or religion.*

*Those crimes are very different and need to be handled differently by police, but they don't understand that."*

Extract from Matthew Wade, *Star Observer*, 'Three LGBTI people assaulted in Melbourne' (7 November 2016).

Photo: Anna Cadden (Film: *Queen of the Desert*)



Danny Bryce-Maurice was bashed by four men while celebrating a friend's birthday in the St Kilda Botanical Gardens with his husband in January 2016.

*"The verbal abuse started as soon as they noticed me ... [redacted] freak" ...*

*"This is the men's toilet, not the ladies, [redacted] [redacted], get the [redacted] out of here!"*

*They started punching and kicking me repeatedly to the face, head, and finally my body.*

*It was relentless. I could not defend myself."*

Extract from Liam Mannix, *The Age*, 'Four teenagers wanted for homophobic bashing in St Kilda' (3 February 2016)

A 15 year old boy was hospitalised after a violent attack in Alexandra Gardens in January 2016.

Police say the teen and a friend were making their way to the Midsumma festival at 5pm when he was approached by a man, believed to be known to him, and assaulted.

Numerous passers-by intervened, holding the man so the two teens could leave and report the matter to police.

The victim was treated at the Royal Children's Hospital.

Extract from Beau Donnelly, *The Age*, 'Boy attacked at Midsumma Festival' (19 January 2016)

Brendan (pictured right) was attacked by a group of men in Smith Street in Collingwood after leaving a gay bar where he had been having a night out with friends in January 2018.

*"He said a word that wasn't so nice ... [REDACTED] [REDACTED]  
... then there was one giant punch to my left eye.*

*I'm no longer going out at night by myself... it doesn't matter what part of the city I'm in, I'm always looking over my shoulder."*

Brendan was beaten unconscious, and left with cracked ribs, his skull fractured in several places and lasting eye damage.

Extract from Tammy Mills & Daniella Miletic, *The Age*, 'Police seek witnesses after man bashed in homophobic assault in Collingwood' (9 April 2018).

9 News, "'I'm always looking behind my shoulder":

Man brutally bashed in homophobic attack' (9 April 2018)



Photo: Victoria Police



Photo: Twitter

Elliott Harvey (pictured below left) was left blind in one eye after being violently attacked by three men after leaving a gig he was attending with friends in Brunswick in May 2017.

*"I think they particularly disliked my hair cut, having my hair up in a fountain like this. All the things they said to me were pretty trivial, just homophobic insults.*

*It was cowardly really... I was on the ground when they punched my eye out.*

*It's drastically affected my life. I can't work because I can't drive, but also depth perception has a lot to do with walking through undulating forests. I can't really go surfing because of the glare. A lot of the things that make me happy are pretty sad right now."*

Extract from Emily Woods & Melissa Cunningham, 'Two men arrested after Brunswick club attack that left victim blind in one eye' (7 July 2017)

# Prevalence of LGBTI hate conduct

The prevalence of prejudice motivated conduct and crime directed at the LGBTI community is not fully understood, though research suggests that the LGBTI community experiences prejudice motivated conduct at a higher rate than the general population:

1. Numerous research studies conducted by Gay & Lesbian Health Victoria have outlined ongoing experiences of harassment and abuse on the basis of sexual identity and gender identity, with a close nexus established between incidents of harassment and abuse and both acute and ongoing psychological harm.<sup>7</sup>
2. Only a small amount of research details the experiences of intersex people. However, the available research shows that many intersex young people had experienced bullying and discrimination, including physical violence in schools, based on a known variation or more commonly on the basis of physical traits.<sup>8</sup>
3. Results from 2012's Private Lives 2, the second national survey of the health and wellbeing of LGBT Australians, found that trans people report higher rates of abuse (including higher rates of sexual assault against trans women) and that a significant percentage of respondents would hide their sexual orientation or gender identity out of fear of experiencing violence or discrimination.<sup>9</sup>
4. The Australian Human Rights Commission has reported that 6 in 10 LGBTI people experienced verbal homophobic abuse and 1 in 5 experienced physical abuse in a 12 month period.<sup>10</sup>
5. LGBTI community advocates at the Expert Roundtable discussed the high prevalence of harassment perpetrated in public spaces. LGBTI community advocates also noted that somewhere between 9% and 24% of harassment occurs in the home. This statistic includes family violence which is perpetrated by family members, but which is not always recognised by victims as such.<sup>11</sup>
6. One study found that 50.4% of LGBTIQ+ participants experience public harassment on a weekly or monthly basis, with common experiences including staring (65.1%), verbal comments (63%), horn honking (62.3%), wolf whistling (41.4%) and unwanted conversation (42.5%), with 31.5% of experiences targeting gender identity and 29.1% targeting sexual orientation.<sup>12</sup>

As the majority of prejudice motivated conduct is not reported to police (and therefore not recorded as a prejudice motivated crime or incident), the exact prevalence of this type of behaviour remains unclear.

Photo: Scott Webb, Pexels.

# 2017 Postal survey



Photo: The Human Rights Law Centre's Anna Brown speaking to reporters outside the High Court following the unsuccessful legal challenge to the postal survey on 9 August 2018.

*"I will personally hunt you down and break your head. You ---- piece of [redacted] [sic]-----. I voted no because you are all a bunch of [redacted] [redacted] [redacted] I hope you all die due to aids. [redacted] [sic]"*

Message sent to the Equality Campaign (2017)

In late 2017, the Australian Government announced a non-compulsory postal survey to be conducted by the Australian Bureau of Statistics on whether the law should be changed to allow same-sex couples to marry.

During this period and in the subsequent months, LGBTIQ Australians reported an increase in hate speech and hate conduct.<sup>13</sup> Specialist mental health services also reported a corresponding spike by up to 40% in people seeking counselling and support.<sup>14</sup>

In February 2018, a Senate Committee released a report recommending that questions of human rights for minority groups should not be resolved by a public vote.<sup>15</sup>

The Senate Committee received evidence from a large number of people about offensive and misleading behaviour and material. It acknowledged that the postal survey was 'deeply distressing to the LGBTIQ community and highly divisive within the community more broadly'.<sup>16</sup>

The Federal Parliament passed the Marriage Law Survey (Additional Safeguards) Act 2017 in late 2017, 36 days after the postal survey period commenced.

This was the first time in Australia that LGBTIQ people were protected from hate speech at a federal level. However, the Senate Committee confirmed that the legislation proved insufficient to curb much of the offensive material distributed by mail and throughout social media.<sup>17</sup>

Thalia Black, a 16 year old trans woman, was physically assaulted by a man in Hobart in another instance of transphobic hate violence during the postal survey in September 2017.

*"He came up and started to say really horrible things. I just tried to laugh it off because I've dealt with this all my life.*

*The next thing I know he has his hands around my throat and started squeezing. I was really scared, I don't feel as safe as I used to ... I'm wondering if I'm going to get be attacked again."*

Extract from Patrick Billing, *The Mercury*, 'Sixteen-year-old Thalia Black alleges she was attacked by a man in Hobart's Elizabeth Mall' (25 September 2017)

A 26 year old woman was punched in the face as she walked her dog in Gippsland while wearing a t-shirt showing a rainbow with the words "Born fabulous, not straight", in a homophobic attack in November 2017.

*"As a woman, I should be able to go for a walk around the lake at any time of the day or night, wearing whatever I want, and feel safe.*

*Regardless of sexual preference, gender or religion, we should all have that right. I simply wanted my attackers to be found and brought to justice."*

Extract from *The Gippsland Times*, "'Homophobic' assault in Sale' (3 November 2017)

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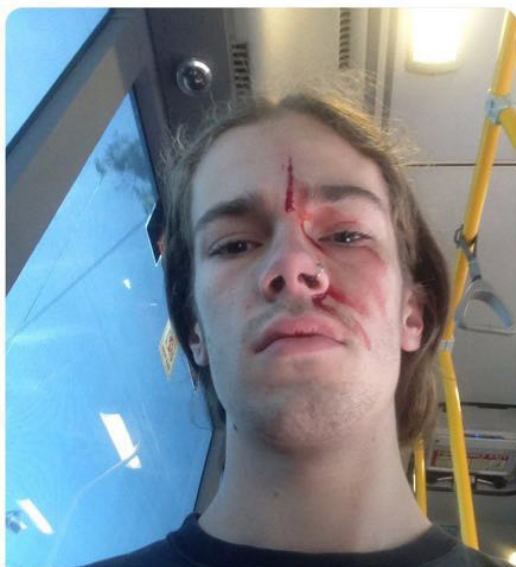
## Examples of hate conduct

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Kevin Rudd  
@MrKRudd

So many warnings to Turnbull about what the postal vote cld unleash. Now my godson Sean has been punched standing up for [#MarriageEquality](#)

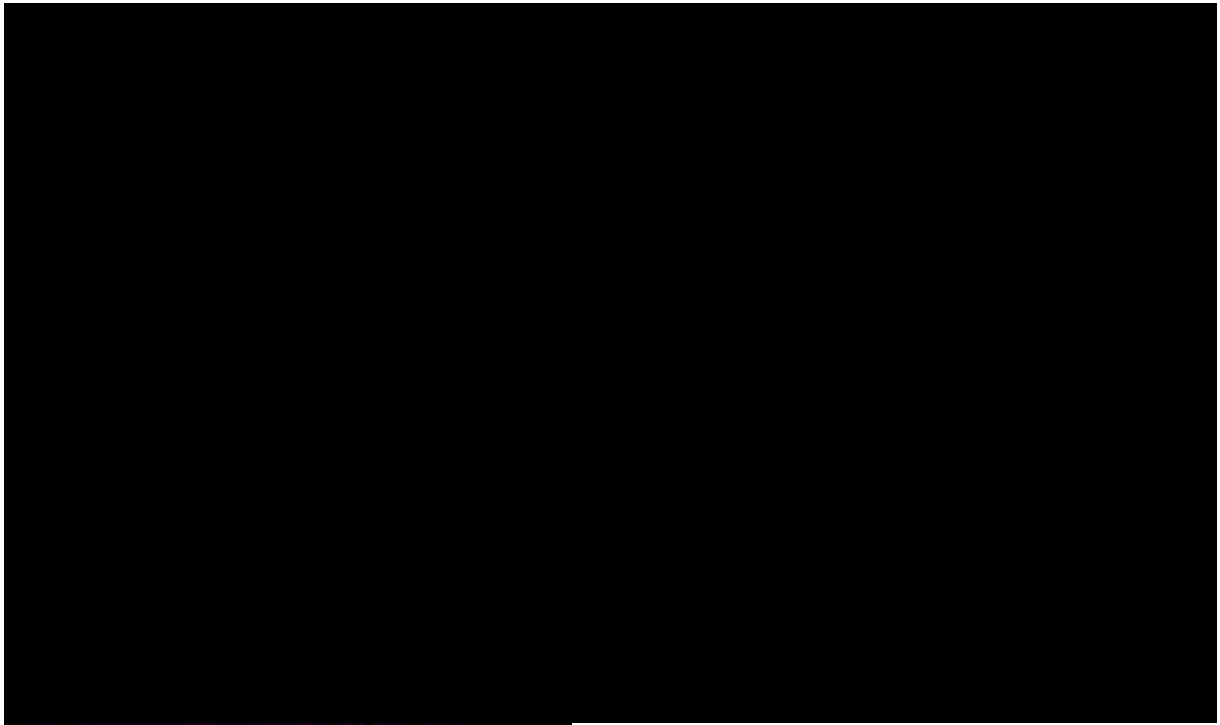


19 year-old Sean was punched in the head while waiting for a bus, by a man in Brisbane in September 2017.

According to a Facebook post on "Bulimba 4 Marriage Equality", the attacker was tearing down rainbow flags put up by local 'Yes' campaigners and yelling slurs about gay people.

The man then directed slurs at Sean, who responded. The attacker then asked Sean if he had called him a "homophobe" and then punched Sean in the face after he answered in the affirmative.

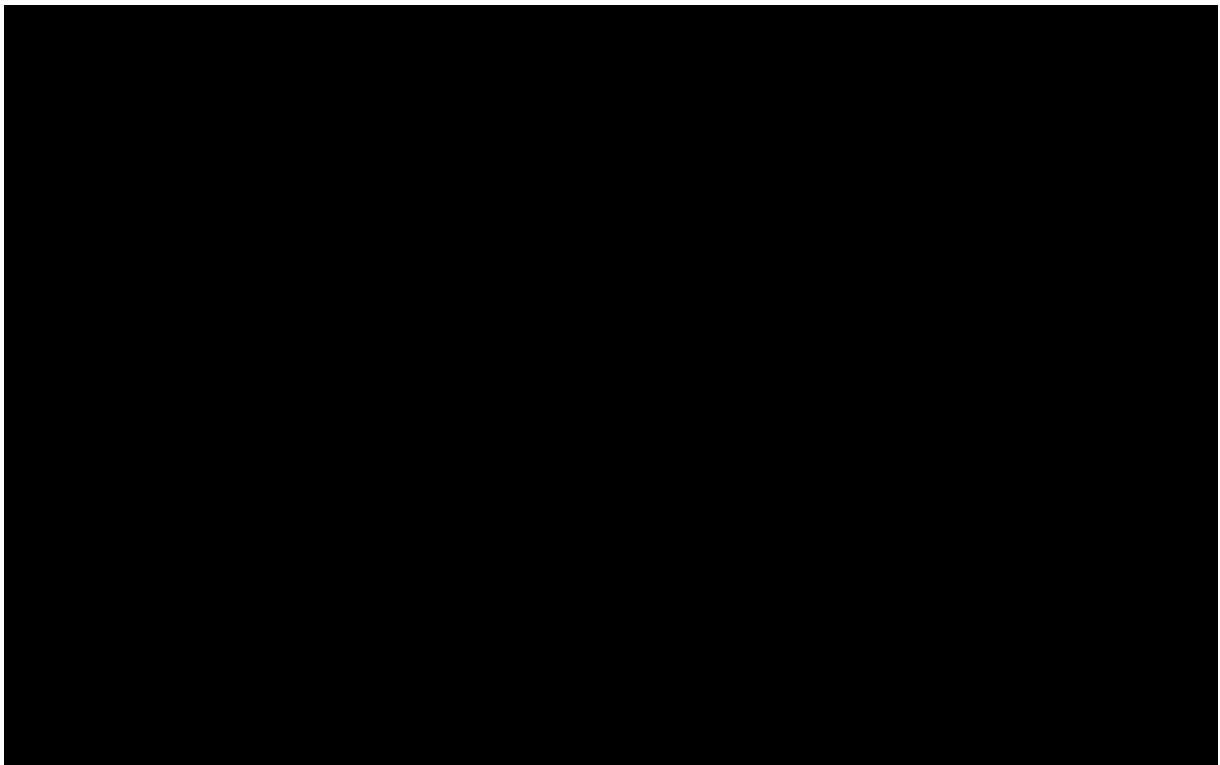
Extract from Michael McKenna & Remy Varga, *The Australian*, "Kevin Rudd's godson 'victim of same-sex marriage attack' "(13 September 2017)

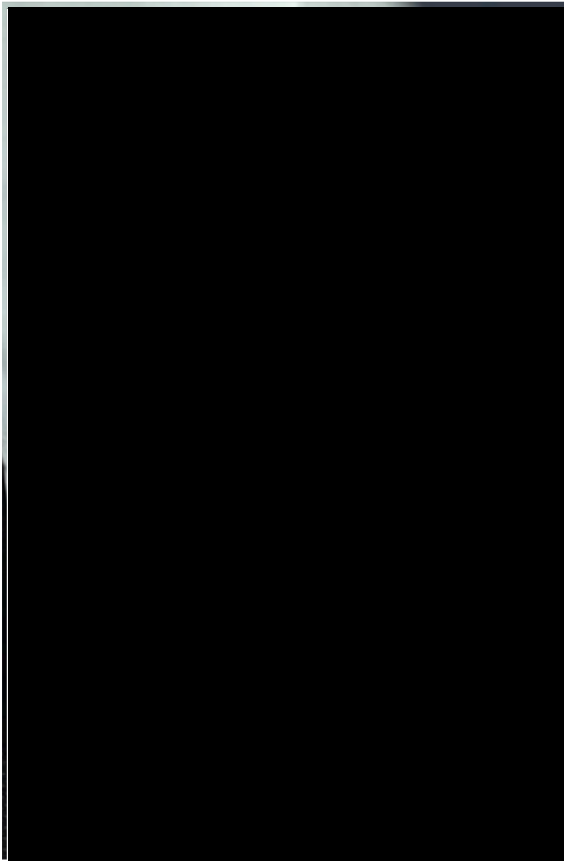


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## Examples of 'No' posters

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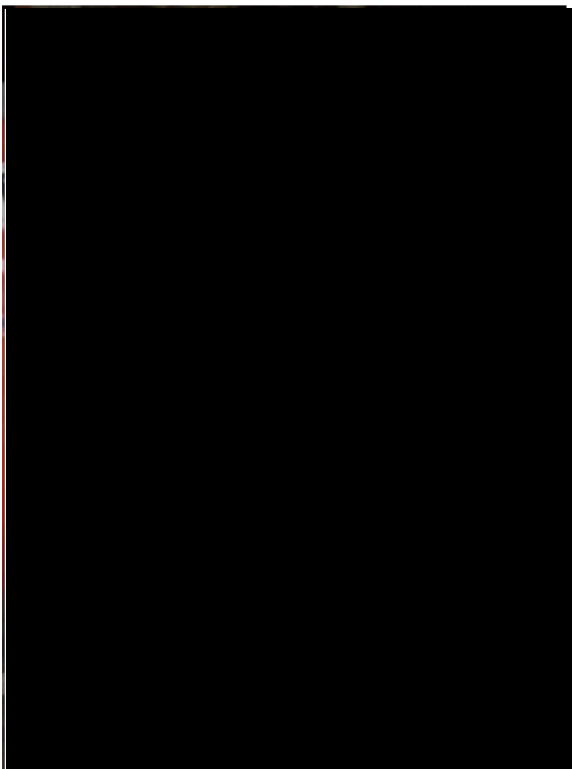




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## Examples of hate conduct

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Bonnie Hart, an intersex advocate in Brisbane, was targeted by vandals who spray-painted a swastika on her garage after she hung a rainbow flag from her home.

*"My sister and I both burst into tears. It was very triggering. We were born biologically between male and female and we have had a lot of stigmatisation as a result of that, as well as medical treatments and surgeries when we were younger that we didn't want.*

*Bonnie is my younger sister and I was so afraid it would traumatise her, seeing the swastika... To us, it was a hate crime."* (Phoebe Hart)

Extract from Melissa Davey, *The Guardian*, "Rocks thrown through windows amid spate of homophobic attacks" (26 September 2017)

# Impact of hate conduct

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## Impact on the individual

Victims of hate conduct can experience significant physical, psychological and emotional harm, as well as long-term repercussions on their sense of identity, self-worth and feelings of safety and belonging in the community or in public.

## Impact on the target community

Members of a target group can feel threatened and vulnerable to victimisation when they are aware of individual incidents of prejudice motivated speech, conduct and crime, which has a broader impact on the entire group to which the victim belongs.

## Impact on other minority groups

Other vulnerable and minority groups can also experience this threat to personal safety and community cohesion, particularly where the prejudice motivation is based on an ideology, doctrine or sentiment which has a negative view of a number of minority groups in society.

## Impact on the broader community

In diverse and accepting communities, hate conduct diminishes our community as a whole. Instead of encouraging people to live together on an equal footing, the deliberate targeting of individuals within our community undermines our fundamental rights to live safely and be treated equally.



Visibility is a key factor in experiences of public harassment. The cumulative impact of experiencing public harassment causes a broad range of harms, including emotional and psychological impacts, physical impacts, social exclusion and identity expression.

People from LGBTI communities may also have less support from family to recover from incidents of violence and are more likely to experience mental health issues as a result of previous experiences of bullying, marginalisation, exclusion and prejudice motivated conduct.<sup>18</sup>

Hate conduct and bullying has a significant impact on the mental health of LGBTI people.

For example, in 2017, Trans Pathways<sup>19</sup> - the largest ever survey into the mental health of trans young people in Australia - found that:

- nearly 90% had been rejected by their friends or peers;
- almost 70% had experienced discrimination;
- almost 80% had experienced bullying in educational institutions;
- almost 80% of young trans people had self-harmed and almost half had attempted suicide, as a result of their experiences of discrimination, violence and bullying;
- almost two thirds had felt a lack of family support; and
- 1 in 5 young trans people had encountered unstable accommodation, including homelessness.

# Barriers to reporting

## Summary of barriers

People who experience prejudice motivated conduct face distinct barriers when it comes to reporting these incidents and crimes to police.

People from LGBTI communities are less likely to report violence, seek support or identify experiences of non-physical harassment and abuse as a prejudice motivated crime, partly because of a fear of being outed as well as actual or perceived discrimination.

Under-reporting of crime or incidents to police occurs for a variety of reasons, including a lack of trust in reporting to police, a lack of awareness about available offences, an inability to identify perpetrators, fears reporting will exacerbate bullying, cause victimisation or escalate the behaviour, and barriers caused by the significant psychological trauma and ongoing mental health impacts of being a victim of crime.

Persistent reasons for LGBTI people not reporting LGBTI-related hate conduct identified in Gay & Lesbian Health Victoria's (GLHV) Coming Forward Report remain, including the belief that their complaint will not be taken seriously (e.g. family violence), shame (e.g. offences at beats), lack of confidence in police responses, inconsistency in police responses and 'self-triaging' by a victim.

Key feedback provided from LGBTI stakeholders and organisations, academics, government officials and Victoria Police about barriers to reporting included:

- LGBTI community members are often unaware of the range of police responses available for public harassment and family violence.
- Many trans and gender diverse people who have experienced harassment and hate crime anticipate or expect it to happen again, have strong responses to triggering events and change their behaviour to avoid reminders of the experience (including not reporting an event).
- Young people are more likely to experience online bullying by multiple perpetrators where the cumulative impact leads to school disengagement and barriers to reporting include no contact with or support from their family.
- Under-reporting of LGBTI family violence is perpetuated by gendered models for understanding family violence which do not apply to same-sex relationships.
- LGBTI Liaison Officers (GLLOs) have made a significant impact in building LGBTI confidence in police and this network continues to grow. However, access to GLLOs is limited, particularly in rural and regional Victoria.

# LGBTIQ+ community perceptions of police

The Victorian Gay & Lesbian Rights Lobby's *Community Survey 2017: Perceptions and Experiences of Victoria Police* surveyed 274 adults aged 18 to 49 about their perceptions of and experiences with Victoria Police.

The survey found that most respondents would report a LGBTI-related crime to the police. Tellingly, trans and gender diverse people were less likely to feel safe discussing or reporting a crime related to their gender identity with the police. The responses revealed positive experiences:

*"My private and public dealings with police have always been excellent. No complaints but plenty of praise for what they do. Thanks."*

*"My partner and I were preparing signed statements to support my partner visa and felt comforted/less stressed when we spoke with a police officer to help us legitimise the documents. He gave us words of encouragement and support that helped calm our nerves."*

However, there were also a number of reports of negative experiences, with 1 in 3 negative responses being reported by trans and gender diverse people. For example:

*"I was assaulted in my own home, the guy taking my statement acted like I was wasting his time. After that, I got a very general information letter, and never heard from them again!"*

*"Tried to report verbal abuse when walking in Brunswick. The cop asked how they knew we were gay. I said because I was holding hands with my partner. The cop replied, well there's your problem and laughed. It was pathetic."*

In May 2018, La Trobe University released the *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians* report in collaboration with Victoria Police.<sup>20</sup>

76 young SSASGD people were interviewed. Almost 95% of young people surveyed had experienced some form of targeted abuse, with just under 90% reporting currently experiencing mental health issues.

The majority of respondents (58.3%) disagreed that police officers understand the issues facing SSASGD young people, with responses revealing a lack of trust and confidence in Victoria Police. 1 in 2 young SSASGD people surveyed said they were unlikely to report hate crime to the police in the future, with 60% identifying perceived prejudice within Victoria Police as a major disincentive to reporting.

Again, trans and gender diverse people were more likely to report negative experiences with Victoria Police, such as perceived over-policing or discrimination.

On a positive note, 43% of respondents were aware of GGLOs and 68% said that they would prefer reporting a crime to GLLOs in the future.

The SSASGD young people interviewed recommended that Victoria Police focus on:

- cultural change, education and training;
- recruiting more LGBTIQ+ people to Victoria Police;
- promoting and expanding the role of GLLOs; and
- technology-related reported options (e.g. phone apps or online chat).

# Victoria Police perceptions of LGBTIQ+ communities

La Trobe University's 2018 report also featured interviews with 361 police officers – the largest sample of the attitudes and perceptions of Victoria Police about LGBTIQ+ inclusion to date.

Approximately half of the police respondents had contact with an SSASGD young person in their current role, but police officers reported generally low levels of knowledge about the needs of SSASGD young people.

Respondents accurately identified that SSASGD young people would be more comfortable reporting LGBTI-related hate crime to GLLOs. General members consistently viewed GLLOs as being more knowledgeable about the needs of LGBTIQ+ communities, but 78.6% had never consulted a GLLO on an issue related to LGBTIQ+ communities.

When it came to training, almost 60% of police officers surveyed said they had not received any training on LGBTIQ+ communities, and 10.8% were unsure or could not remember if they had received relevant training.

The small number of police officers who had received training on LGBTIQ+ issues reported that it was highly beneficial.

Victoria Police have committed to implementing the recommendations from the 2018 La Trobe report, which focus on:

- senior leadership promoting great LGBTIQ+ inclusive practice, including through policies and procedures and visibility;
- capacity building through training and community engagement, particularly a mandatory LGBTIQ training package for new GLLOs;
- strengthening and developing the role of GLLOs within Victoria Police; and
- considering ways to address SSASGD young people's perceptions of police.



# Assisting victims of hate crime

In June 2016, James\*, a gay man living in inner city Melbourne was subjected to ongoing threats and harassment from a neighbour. Decades earlier, James was walking through a park near a beat, and was beaten and stabbed by a stranger who used homophobic slurs as he attacked him. He did not report this incident to the police out of fear of being outed.

James' recent experience of ongoing homophobic harassment and threats to his safety triggered his past experience of crime. He no longer felt safe in his own home and moved to stay with a family member in rural Victoria.

James attended a local country police station to report the threats and harassment, but was told by the duty police officer that he would need to report at the police station closest to where the incidents occurred.

James contacted Greg Adkins from the Anti-Violence Project (pictured below) who made an informal third party report to a GLLO at Victoria Police. The GLLO promptly followed up with the country police station to ensure the incident was reported and appropriate training and protocols were followed in the future.

\* Not his real name.

Photo: Greg Adkins, Anti-Violence Project - Simon Dwyer/Fairfax Syndication



# Prevention strategies

## Police responses

Victoria Police initiated a Prejudice Motivated Crime Strategy in 2011 and over time has implemented a range of policies aimed at improving police officers' responses to LGBTI community members, including LGBTI Liaison Officers (GLLOs), LGBTI specific content in training curriculum and regular consultation with LGBTI community members through consultative mechanisms.

## Data collection

The lack of accurate, comprehensive and disaggregated data about LGBTI people and hate conduct makes it very difficult to fully understand the issue and to form responses to deal with it effectively.

Significant under-reporting of incidents to police also means that the data does not fully capture incidents of prejudice motivated crime affecting LGBTI people in Victoria.

There are also practical information technology and system constraints that limit how data can be collected. Victoria Police are in the process of reviewing their current reporting and recording processes including database restraints.

There remain gaps in our knowledge about both the numbers of LGBTI-related prejudice motivated crimes and outcomes from reporting these crimes. There are a range of reasons for inaccurate data collection, including:

- Confirming that crime is prejudice motivated is difficult – it is inherently difficult to prove a person's motivation.
- Database constraints can lead to situations where data is not accurately recorded and negative experiences for victims of crime (e.g. a gender diverse person being asked whether they identify as 'male' or 'female').
- Inconsistent entry in the LEAP database can affect hate crime statistics.
- Intersectionality of data (e.g. where a person experiences prejudice on the basis of their race and sexuality) may not always be recorded.
- The sheer volume of information stored by police makes data analysis a very difficult task.

More violent forms of harassment rest on a background of everyday LGBTI harassment. Individual-based remedies are ineffective at producing a broader systemic cultural change to prevent prejudice motivated conduct against LGBTI people.

# Challenges & opportunities

## Third party reporting

LGBTI community organisations have advocated that LGBTI people are more likely to speak to people with specific LGBTI experience and knowledge in the issues affecting them. In addition, LGBTI victims of prejudice motivated crime will not report incidents unless they have confidence in the people they turn to for help (including friends, family, NGOs, support workers and police).

GLLOs can be used as a 'soft contact point' or first point of referral for reporting to Victoria Police, but not all LGBTI community organisations report to GLLOs.

### International examples

- The UK and Scotland have introduced third party reporting - organisations that have agreed to make reports to the police on behalf of victims who do not want to make direct reports.
- Belgium uses apps to report certain crimes.
- New Zealand's AUROR third party reporting program requires petrol stations to report incidents of violence and is currently being tested with retailers.

## Reporting racism trial

The Victorian Equal Opportunity and Human Rights Commission has shared key learnings from a Reporting Racism trial<sup>21</sup> - an online platform for victims and bystanders to report incidents of racially motivated violence anonymously, focusing on Aboriginal and Torres Strait Islander victims of race-related hate crime. The majority of online reports were made by the person who experienced racism, but some were made by witnesses.

Key difficulties included:

- Retention of volunteers to run the program was challenging due to exposure to details of traumatic incidents and vicarious trauma, despite formal training provided to volunteers.
- Only 25% of reports were referred to Victoria Police, but the people who reported as part of the trial were sceptical about who the information would be passed on to (even though confidentiality was guaranteed).
- Many victims of racism felt there was no value in reporting the crime as there would likely be no outcome or change as a consequence of reporting.
- Additional resources were required.

# International best practice

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The International Covenant on Civil and Political Rights safeguards the right of all people to non-discrimination and equality, as do other international human rights instruments and treaties.

Yet every single day, LGBTI people around the world are targeted as victims of hate-fueled violence. Criminalising hate conduct is increasingly internationally accepted as a way to effectively deal with targeted violence.<sup>22</sup>

In July 2018, the UN Independent Expert on Sexual Orientation and Gender Identity recommended that all countries enact hate crime legislation with aggravated sentencing clauses, to adopt hate speech legislation, and to hold perpetrators to account – including political or religious leaders.<sup>23</sup>

The ODIHR's *Hate Crime Laws: A Practical Guide* highlights the importance of hate crime laws to:

- send an important symbolic acknowledgement that hate crime is taken seriously;
- increase public awareness;
- mandate law enforcement agencies to focus efforts on determining motive;
- ensure victims can see that the law is properly applied, and to argue their case where proper procedures are not followed; and
- facilitate more accurate data collection on hate crime.<sup>24</sup>

## **(a) Substantive offence**

Some countries have chosen to introduce a substantive, separate 'hate crime' offence (e.g. the Czech Republic). A substantive offence usually has greater visibility, makes it easier to collect hate crime data and fulfils an important symbolic function. However, police investigators and prosecutors may feel more reluctant to use a specific hate crime offence where the prejudice motivation is built into the offence, particularly without sufficient training on indicators of motive.

## **(b) Aggravated sentencing clause**

Most jurisdictions have introduced aggravated sentencing clauses which increase the penalty for any criminal offence which was motivated by prejudice (e.g. Victoria). While aggravated sentencing clauses are easier to incorporate into existing criminal laws and apply to a wide range of crimes, courts may decide not to apply the sentencing provision and the application of the clause may not be on the public record (which reduces its symbolic impact).

## **(c) Combination of both substantive offence and aggravated sentencing clause**

Countries can adopt a range of provisions – including both a substantive offence and an aggravated sentencing clause – as the US and UK have done. However, for legislation to be effective, it needs to be supported by guidelines (including detailed lists of hate crime indicators), policies, information, resources and training to ensure police officers identify hate crimes in practice.

# Legislative responses

Hate conduct, hate speech and hate crimes require tailored responses in recognition of their discriminatory nature and significant impact on a person's sense of safety.

The serious psychological consequences differ in each case, and should not be underestimated.

There is concern that existing laws and policies may not effectively deter or combat prejudice motivated crime in practice. In addition, current legal protections against prejudice motivated crime and the limited protection provided by sentencing provisions cannot provide effective early intervention or general deterrence of crimes that target the LGBTI community.

## *Sentencing Act 1991 (Vic)*

*The Sentencing Act 1991 (Vic)* requires a court to consider whether a crime was motivated by hatred or prejudice towards a particular group of people in sentencing an offender. In practice, very few cases in Victoria have applied this section, and generally it has been considered in relation to racial prejudice.

Proving prejudice motivation in the courts is difficult as prosecutors have not always raised the provision as a consideration in sentencing and there has been judicial reluctance to find that a crime was motivated by hate or prejudice.<sup>24</sup> This is partly the case where there are multiple or complex motivations involved, difficulties in establishing proof 'beyond reasonable doubt' and where courts hold the view that prejudice was the motivation only in the absence of an alternative motive.<sup>25</sup>

## *Equal Opportunity Act 2010 (Vic)*

*The Equal Opportunity Act 2010 (Vic)* (EOA) provides protections from unlawful discrimination, harassment and victimisation on the basis of various attributes in specific areas of public life.<sup>26</sup>

The EOA makes it unlawful to discriminate against people on the basis of their sex, sexual orientation or gender identity unless an exemption applies.

Generally public activity on the street is not within the scope of the EOA. The With Respect report recommended amending the EOA to include broad anti-harassment provisions to target 'conduct that offends, humiliates, intimidates, insults or ridicules another person' based on protected attributes, with limited exceptions.<sup>27</sup>



## *Racial and Religious Tolerance Act 2001 (Vic)*

*The Racial and Religious Tolerance Act 2001 (Vic) (RRTA)* was enacted to prevent racial and religious vilification which denigrates groups of people because of their racial or religious practices or beliefs.<sup>28</sup>

The RRTA provides that a person must not engage in conduct which 'incites hatred against, serious contempt for, or revulsion or severe ridicule of' a class of persons on the basis of their actual or perceived race or religion. There are also provisions which make it an offence to intentionally engage in conduct which is likely to incite hatred against a person because of their actual or perceived race or religion, or which threatens physical harm, or incites others to threaten physical harm, for this reason.

Currently, the protections in the RRTA are limited to race and religion and do not extend to perceived or actual sexual orientation, gender identity or sex characteristics.

In 2010, the former Attorney-General Rob Hulls commissioned retired judge, Geoffrey Eames, to inquire into whether existing civil and criminal laws adequately deal with conduct motivated by hatred or prejudice because of an identity characteristic of the victim. The final report is yet to be released by the Victorian Government.

Photo: Adam Marcucci

# Protections from hate speech

All states and territories prohibit hate speech on the basis of race but not all provide protections for LGBTI people.

Victoria does not have specific laws which outlaw hate speech on the basis of sexual orientation, gender identity or sex characteristics. Inadequate protections from hate speech targeting LGBTI people sends the message that intolerance and prejudice are not taken seriously.

Anti-vilification laws necessarily restrict some people's right to free speech to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety.

Criminal sanctions for vilification have a high threshold to appropriately deter discriminatory speech and conduct that damages community cohesion and safety. This allows for the expression of information or ideas that are offensive, unpopular, shocking or disturbing – but nonetheless lawful – to adequately protect free speech in a democratic society.

In addition, vilification laws typically include reasonable exemptions for fair media reporting, privileged communications, and public acts done reasonably and in good faith for academic, artistic, religious instruction, scientific or research purposes or other purposes in the public interest, including discussion or debate.

## Existing protections from hate speech in Australia<sup>29</sup>

	Federal	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Lesbian	✗	✓	✓	✗	✓	✗	✓	✗	✗
Gay	✗	✓	✓	✗	✓	✗	✓	✗	✗
Bisexual	✗	✓	✗	✗	✓	✗	✓	✗	✗
Trans	✗	✓	✓	✗	✓	✗	✓	✗	✗
Intersex	✗	✓	✗	✗	✗	✗	✓	✗	✗

## Crimes Act 1958 (Vic)

Currently, there is no standalone substantive offence of 'hate crime' under which an offender can be charged in Victoria. The majority of serious crimes are contained in the *Crimes Act 1958* (Vic) and can be used to charge offenders for LGBTI prejudice motivated crime.<sup>30</sup>

For example, the definition of stalking to include bullying behaviour empowers police officers to charge offenders for threats, 'abusive or offensive' words or acts, and any other behaviour reasonably expected to cause physical or mental harm (including self-harm) or to make someone afraid for their safety. This provision can be used to charge individuals for LGBTI prejudice motivated abuse or harassment which may not satisfy the thresholds for other offences.

## Personal Safety Intervention Orders Act 2010 (Vic)

*The Personal Safety Intervention Orders Act 2010* (Vic) was enacted to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats.<sup>31</sup>

There are provisions in the Act which can be used to combat LGBTI prejudice motivated crime. For example, the definition of stalking is the same as under the *Crimes Act 1958* (Vic) and includes threats, abusive or offensive words or acts and other acts which cause harm and fears for personal safety. The Act also provides that harassment includes a course of conduct that is 'demeaning, derogatory or intimidating'.

## Summary Offences Act 1966 (Vic)

There are also provisions within the *Summary Offences Act 1966* (Vic) which regulate relatively minor crimes. For example, section 17 of the Act makes it unlawful for a person to engage in obscene, indecent, threatening language or behaviour in a public place. The penalty for this crime is generally a fine issued by Victoria Police. In addition, public transport authorised officers can also issue infringement notices / fines for offensive language on public transport under equivalent public transport laws and regulations.

Although this definition does not explicitly relate to the LGBTI community, this provision empowers police officers to fine or charge an individual for using 'profane indecent or obscene language or threatening abusive or insulting words', which would apply to prejudice motivated language relating to a person's sexual orientation, gender identity or sex *characteristics*.

# Recommendations for reform

Hate speech, hate conduct and hate crime all require coordinated, holistic and collaborative responses. Our communities need multiple reporting and recording tools to reflect the different needs of the victim (e.g. around privacy or capability such as computer literacy).

There are a number of steps which can be taken to reduce the incidence of prejudice motivated crime into the future. In addition, outstanding recommendations from previous With Respect, Coming Forward and With Respect Awareness Project reports should be fully implemented.<sup>32</sup>

## Recommendation 1

The Victorian Government should:

- 1.1 Fund broad public awareness campaigns and strategies to change deep-seated negative attitudes to LGBTI people (e.g. No To Homophobia campaign).
- 1.2 Fund independent third party reporting centres for LGBTI community members at multiple sites across Victoria to report prejudice motivated conduct, as seen in New York, and work in partnership with police to improve reporting rates and support for victims.
- 1.3 Develop a best practice community based third party reporting form, incident capture system, mobile website or app to assist LGBTI and other community organisations to collect all relevant information and assist with third party reporting to police where requested.
- 1.4 Ensure specialist support for LGBTI young people experiencing prejudice motivated online bullying is available through existing mental health support services.
- 1.5 Fund longitudinal research into the cumulative impact of prejudice motivated conduct on health outcomes for the LGBTI community.
- 1.6 Fund further research and improve data collection methods and policies of all government agencies, including Victoria Police, to ensure accurate information on the prevalence of prejudice motivated conduct is available.
- 1.7 Implement recommendations 166 to 169 arising from the Royal Commission into Family Violence.

# Community resources and support

Education about support for LGBTI victims of prejudice motivated conduct and crime is important for rebuilding a sense of community safety and ensuring individuals are fully supported to recover from incidents of prejudice motivated crime.

Resources and information for the LGBTI community will provide a sound basis for identification and reporting of prejudice motivated conduct in all its forms across the community.

## Recommendation 2

The Victorian Government should fund the following recommendations to be implemented by LGBTI and community organisations:

- 2.1 Develop educational resources for LGBTI people about the mental health impact of experiencing prejudice motivated incidents and harassments (including 'on the street' or online harassment which do not constitute criminal offences) and mental health supports available.
- 2.2 Develop and distribute an information resource through LGBTI community networks which provides information to LGBTI victims of prejudice motivated crime about what conduct constitutes an offence and how they can access LGBTI specific support as a victim of crime.
- 2.3 Develop and distribute a protocol for referring informal reports from LGBTI and other community organisations, developed in partnership with Victoria Police, with guidelines on information which should be provided and relevant contact details.
- 2.4 Consider developing an online reporting tool to report 'on the street' or online harassment to ensure these incidents are reported and clustering or increases in prejudice motivated incidents reported to Victoria Police.



## Recommendation 3

Victoria Police should, in collaboration with relevant agencies and LGBTI community organisations:

- 3.1 Make training and information on LGBTI-related prejudice motivated crime available to all members of Victoria Police, particularly for police officers at stations in rural and regional areas without a dedicated GLLO.
- 3.2 Ensure databases can record sex and gender outside 'male' and 'female' categories for gender diverse people and allow for additional categories to be recorded as an attribute for prejudice motivated conduct.
- 3.3 Develop an information resource or short guide for police officers when entering data relating to LGBTI-related prejudice motivated conduct (e.g. including brief information on gender identity, including the key information which must be entered and consistent codes for ensuring data integrity).
- 3.4 Ensure databases can cross-reference and disaggregate data relating to prejudice motivated crime (e.g. allowing for multiple motivations to be recorded, and identifying features of the victim to be collected).
- 3.5 Implement the recommendations from La Trobe University's *2018 Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians* report.
- 3.6 Strengthen the role of GLLOs within Victoria Police and take further steps to promote LGBTIQ+ inclusive practice within the organisation.

# Justice reform

## Recommendation 4

The Victorian Government should:

- 4.1 Introduce a Hate Crimes Act which introduces a substantive hate crime offence, and protections from vilification (i.e. hate speech) and public harassment (i.e. hate conduct) on the basis of sexual orientation, gender identity and sex characteristics.
- 4.2 Publicly release the findings of the Eames Review.
- 4.3 Re-introduce greater enforcement powers to VEOHRC which were removed in 2011, in recognition of the fact that a significant barrier to the reduction of discrimination against LGBTI people is the reliance on individuals to enforce the law.
- 4.4 Conduct a review into the following:
  - (a) amending privacy legislation that restricts the exchange of information between different agencies, bodies and organisations to allow appropriate data sharing between agencies to provide a specialised response;
  - (b) lowering the standard of proof for prejudice motivation in serious criminal offences; and
  - (c) a new offence for prejudice motivated public threats or violence.
- 4.5 Develop best practice guidelines for information collection relating to prejudice motivated crime.

## Recommendation 5

The Judicial College of Victoria should:

- 5.1 Update Victorian Court Bench Books to include information about prejudice motivated conduct based on sexual orientation, gender identity and sex characteristics.
- 5.2 Provide training to judicial officers to raise awareness and encourage consistent application of section 5(2)(daaa) of the Sentencing Act 1991 (Vic) and the experiences of LGBTI victims of prejudice motivated conduct.

1 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015).

2 See Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Issues, *With respect: A strategy for reducing homophobic harassment in Victoria - A discussion paper for the consideration of the Victorian Attorney General* (2006); William Leonard, Anne Mitchell, Marian Pitts and Sunil Patel (2008) 'Coming forward: The underreporting of heterosexual violence and same sex partner abuse in Victoria', *Australian Research Centre in Sex, Health & Society* (La Trobe University); [also] Foundation, With Respect Awareness Project (June 2010). The Eames Review's report has not been publicly released.

3 *Sentencing Act 1991* (Vic) s 5(daaa).

4 See OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crime Laws: A Practical Guide* (2009).

5 Saan Ecker & Ebony Bennett, The Australia Institute and National LGBTI Health Alliance, *Preliminary results of the Coping with marriage equality debate survey: Investigating the stress impacts associated with the Australian marriage equality debate during the lead up to the postal survey results announcement* (December 2017).

6 See also, Intersex Human Rights Australia, *New publication "Intersex: Stories and Statistics from Australia"* (February 2016).

7 See e.g. Lynne Hillier, Tiffany Jones, Marisa Monagle, Naomi Overton, Luke Gahan, Jennifer Blackman and Anne Mitchell (2010) 'Writing Themselves In 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people', *The Australian Research Centre in Sex, Health & Society* (La Trobe University); above n 2.

8 Tiffany Jones, 'The needs of students with intersex variations' 16(6) *Sex Education* (2016). See also, Intersex Human Rights Australia website, 'New publication "Intersex: Stories and Statistics from Australia"' (2016) Phoebe Hart – Hartflicker Moving Pictures, 'Orchids: My Intersex Adventure' (2010).

9 William Leonard, Marian Pitts, Anne Mitchell, Anthony Lyons, Anthony Smith, Sunil Patel, Murray Couch and Anna Barrett (2012) 'Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians', *The Australian Research Centre in Sex, Health & Society* (La Trobe University).

10 Australian Human Rights Commission, *Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People* (2012).

11 We note that the Victorian Government and multiple

Government agencies are currently working on implementing the recommendations from the Royal Commission into Family Violence. This report focuses on prejudice motivated crime that is not family violence, in recognition that multiple campaigns and strategies are currently underway to tackle family violence in Victoria, including in LGBTIQ communities. See State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2014-2016) Vol V, 145.

12 Bianca Fileborn, Australian Research Centre in Sex, Health & Society, *LGBTIQ+ experiences of public harassment* (August 2016).

13 Senate Finance and Public Administration References Committee, *Arrangements for the postal survey* (February 2018) 27.

14 - 17 Ibid.

18 Above n 8. See also, National LGBTI Health Alliance, *The Statistics at a Glance* (July 2016) <https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>.

19 Penelope Strauss, Angus Cook, Sam Winter, Vanessa Watson, Danie Wright Toussaint & Ashleigh Lin, Telethon Kids Institute, *Trans Pathways: The mental health experiences and care pathways of trans young people* (2017).

20 William Leonard and Bianca Fileborn, *Policing for SSASGD young Victorians* (2018) La Trobe University: GLHV; ARCSHS.

21 Kate Lahiff, Victorian Equal Opportunity & Human Rights Commission, *Reporting Racism Trial* (August 2016).

22, 24 *Sentencing Act 1991* (Vic) s 5(daaa). See e.g. *Clinton Rintoull v R* [2011] VSCA 245; *DPP v RSP* [2010] VSC 128; *Ian Lionel Gosland v R* [2013] VSCA 269.

23 UN Human Rights Council, 'Report of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (11 May 2018) (UN Doc A/HRC/38/43).

25 Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (2009).

26 *Equal Opportunity Act 2010* (Vic) Part 3.

27 Above n 2.

28 *Racial and Religious Tolerance Act 2001* (Vic) s 7 – 9, 24.

29 *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1996* (NT), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 2010* (Vic), *Equal Opportunity Act 1984* (WA).

30 *Crimes Act 1958* (Vic) s 21A.

31 *Personal Safety Intervention Orders Act 2010* (Vic) s 7.

32 Above n.2.

