

Racial and Religious Vilification in Victoria under the Civil Law

Racial and religious vilification is the incitement of hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons on the grounds of their race or religious belief or activity: *Racial and Religious Tolerance Act 2001* (Vic) ss 7 and 8

The key elements are:

A public act	By a person	incites hatred against, serious contempt for, revulsion or severe ridicule of a person or class of persons	on the ground of (causation)	racial or religious belief or activity	Exceptions
Section 12(1) of the RRTA provides that a person does not contravene section 7 or 8 if they establish that the person engaged in the conduct in circumstanc	A person includes a corporation as well as an individual or natural person. ⁱⁱⁱ	<p>The test for unlawful vilification under the RRTA focuses exclusively on the effect of conduct on the particular audience that was exposed to it – that is, whether a third party was incited to hatred or other relevant emotions.^{iv}</p> <p>The motivation of the respondent is not relevant to determining whether the conduct was</p>	<p>Under the RRTA, the court or tribunal must be satisfied the respondent engaged in conduct that incited hatred or other relevant emotion ‘on the ground of’ the race or religious belief or activity of a person or a group of persons.^{xiii}</p> <p>The respondent’s motive for engaging in conduct is</p>	<p>‘Race’ includes colour; descent or ancestry; nationality or national origin; ethnicity or ethnic origin.</p> <ul style="list-style-type: none"> - National origin is acquired and fixed at birth.^{xviii} - Nationality is a matter of citizenship and a person may acquire different nationalities 	<p>Section 11 provides that a person does not contravene section 7 or 8 if the person establishes that the person’s conduct was engaged in reasonably and in good faith:</p> <ul style="list-style-type: none"> (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for – <ul style="list-style-type: none"> (i) any genuine academic, artistic, religious or scientific purpose; or (i) any purpose that is in the public interest; or (c) in making or publishing a fair and accurate report of any event or matter of public interest.

<p>es that may reasonably be taken to indicate that the parties to the conduct desire to be heard or seen only by themselves. Further s 12(2) provides that subsection (1) does not apply in relation to conduct in any circumstances in which parties to the conduct ought reasonably to expect that it may be heard or</p>	<p>offensive^v, i.e. it is unnecessary to prove that the vilifier intended to incite hatred. It is also unnecessary to prove anyone was actually incited.^{vi}</p> <p>The word 'incites' should be interpreted in accordance with its plain and ordinary meaning – to urge, spur on, stir up, animate or stimulate.^{vii} It carries the connotation of 'inflame' or set alight'.^{viii}</p> <p>The terms 'hatred', 'serious contempt', 'severe ridicule' and revulsion are interpreted in accordance with their ordinary meaning and the vilifier need only</p>	<p>irrelevant to this determination.^{xiv}</p> <p>The phrase 'on the ground of race' does not refer to the ground that caused the alleged inciter to act.^{xv}</p> <p>It refers to the ground on which people exposed to the alleged inciter's words were incited to hatred or other relevant emotion against another person or group.^{xvi}</p> <p>That is, there must be a causal link between the grounds on which an audience was incited to have the requisite degree of ill-feeling towards others and the race or religious belief of those people (rather than</p>	<p>over the course of their lives.^{xix}</p> <ul style="list-style-type: none"> - 'Ethnic origin' includes groups such as Jews in Australia; Sikhs in the UK and Gypsies in the UK.^{xx} <p>Religious 'belief or activity' means holding or not holding a lawful religious belief or view and engaging in, not engaging in or refusing to engage in a lawful religious activity.</p> <p>The term 'religion' is not defined in the RRTA and no single legal definition of the term has been developed.</p>	<p>Section 11(2) provides that for the purpose of section (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising. Section 11(2) was added to the RRTA after the decision in <i>Fletcher v Salvation Army</i> [2005] VCAT 152, in which VCAT found a genuine religious purpose may include asserting that a particular religion or no religion was the 'true way' and any other way is false: [9].^{xxi}</p> <p>Reasonably and in good faith</p> <p>In <i>Catch the Fire Ministries Inc v Islamic Council of Victoria Inc</i> (2006) 15 VR 207, Justice Nettle considered that whether conduct was engaged in 'reasonably' must be assessed according to the objective standard of a reasonable person who is a member of an open and just multicultural society (that is, a 'moderately intelligent' and 'tolerant' society).^{xxii}</p> <p>Justice Nettle further held that whether conduct was 'in good faith' will depend on whether the respondent's subjective honest belief was that the conduct was necessary or desirable to achieve a genuine academic, artistic, religious or scientific purpose: [92].^{xxiii}</p> <p>Genuine academic, artistic, religious or scientific purpose</p> <p>In <i>Catch the Fire Ministries Inc v Islamic Council of Victoria Inc</i> (2006) 15 VR 207, Justice Nettle stated that the question to be asked is whether a person's conduct was engaged in</p>
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<p>seen by someone else.</p> <p>This means that all racial vilification is unlawful, no matter where it occurs, unless the person who performed the conduct intended it to be private.ⁱ</p> <p>In <i>Bennett v Dingle</i> [2013] VCAT 1945, [34], it was held that where something was said 'in full view', in 'quite some</p>		<p>produce one of those responses from an ordinary member of the community.^{ix}</p> <p>The vilification provisions are directed at conduct that is likely to 'generate strong and negative passions in the ordinary person', such as where persons are so affected that violence may result.^x</p> <p>It is necessary to consider the effect of the words or conduct on an 'ordinary' member of the class to which it is directed, taking into account the circumstances in which the conduct occurs.^{xi}</p> <p>To determine whether conduct 'incites' for</p>	<p>between the race or religious belief of the target group and the respondent's grounds or reasons for acting).^{xvii}</p>	<p>In <i>Church of the New Faith v Commissioner of Pay-Roll Tax</i> (Vic) (1983) 154 CLR 120 (<i>Scientology Case</i>), Mason CJ and Brennan J held that for the purposes of the law, the criteria for religion are twofold:</p> <ol style="list-style-type: none"> 1. belief in a Supernatural Being, Thing or Principle; and 2. the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of 	<p>reasonably and in good faith, for a genuine academic, artistic, religious or scientific purpose [89].</p> <p>Fair and accurate report of any event or matter of public interest</p> <p>Section 11(1)(c) of the RRTA is identical to section 18D(c)(i) of the <i>Racial Discrimination Act 1975</i> (Cth) ('RDA').</p> <p>In <i>Creek v Cairns Post Pty Ltd</i> (2001) 112 FCR 352, the Federal Court considered defamation law provides useful guidance on the meaning of a 'fair and accurate report' for the purposes of section 18D(c) of the <i>RDA</i>. For a comment to be fair in defamation law it 'would need to be based on true facts' and '[w]hat is saved from a requirement of accuracy is the comment, which is tested according to whether a fair-minded could hold that view and that it is genuinely held': [32].</p> <p>Whether the specific facts that are relied upon as the basis of a comment are true is relevant to the assessment of whether this exception can be relied on: <i>Eatock v Bolt</i> (2011) 197 FCR 261.</p>
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<p>high voice', in a public park, where 'there were other people in the vicinity, although they may not have been very close by', it was not intended to be said privately.ⁱⁱ</p>		<p>the purposes of the RRTA, the conduct must be assessed 'as a whole'.^{xii}</p>		<p>any immunity, privilege or right conferred on the grounds of religion.</p> <p>The High Court held the beliefs, practices and observances of the Church of Scientology constituted a religion for the purposes of the Pay-Roll Tax Act 1971 (Vic).</p> <p>This case has been applied in a number of other cases in relation to the interpretation of anti-discrimination and migration legislation.</p>	
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ⁱ Neil Rees, Simon Rice and Dominique Allen 'Australian anti-discrimination and equal opportunity law' (The Federation Press, 3rd ed, 2018) 734.

ⁱⁱ Ibid.

ⁱⁱⁱ Ibid.

^{iv} Victorian Equal Opportunity & Human Rights Commission 'Victorian Discrimination Law' (2nd ed, [file:///Users/kristinmacintosh/Downloads/Victorian Discrimination Law 2ndEd-Full.pdf](file:///Users/kristinmacintosh/Downloads/Victorian%20Discrimination%20Law%202ndEd-Full.pdf)) (VEOHRC), 134.

^v Ibid.

^{vi} Rees et al (ni) 734.

^{vii} [Catch the Fire Ministries Inc v Islamic Council of Victoria Inc \[2006\] VSCA 284](#), [14] (Nettle JA), [159] (Neave JA).

^{viii} *Fletcher v Salvation Army* [2005] VCAT 1523, [5].

^{ix} Rees et al (ni) 734.

^x [Fletcher \(nviii\)](#), [5].

^{xi} Rees et al (ni) 734.

^{xii} *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [79] (Nettle JA); [191]-[192] (Neave JA).

^{xiii} Ibid, 137.

^{xiv} Ibid.

^{xv} Ibid; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [160] (Neave JA).

^{xvi} Ibid.

^{xvii} Rees (ni) 735; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [160] (Neave JA).

^{xviii} VEOHRC (n iv)132.

^{xix} Ibid; [Australian Medical Council v Wilson \(1996\) 68 FCR 46 \[75\]](#); *Miller v Mieson* (1991) EOC 92-341.

^{xx} VEOHRC (n iv) 132.

^{xxi} VEOHRC (n iv) 138.

^{xxii} Ibid; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [95]-[96] (Nettle JA).

^{xxiii} VEOHRC (n iv) 138; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, [98] (Nettle JA).