

WEstjustice

Mr Josh Bull, MP and Ms Sheena Watt, MP
Co-Chairs, Anti-Racism Taskforce

By email: antiracism.taskforce@dffh.vic.gov.au

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Victoria's Anti-racism Strategy – legal and justice sector consultation

WEstjustice welcomes the opportunity to provide written feedback to the Victorian Anti-Racism Taskforce in relation to the development of Victoria's Anti-Racism Strategy (Strategy).

WEstjustice is a community legal centre servicing the Western suburbs of Melbourne. This encompasses six local government areas and a population of approximately 900,000 people.

Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, a growing Aboriginal and Torres Strait Islander community, and people of many faiths and no faith. It is also a community engaged in high levels of casual and low-income work and thus highly vulnerable to the adverse effects of the pandemic in 2020 and 2021.

We provide free legal advice, representation, education, community development, advocacy and policy across four impact areas: youth, employment and equality law, family violence and family law, and economic injustice. We work in partnership with our local communities to design and deliver services that are integrated into the places they already go.

WEstjustice believes in a fair and just society where the law and its processes do not discriminate against people from First Nations communities and migrant and refugee backgrounds at higher risk of social exclusion and poverty. We are strongly supportive of all measures that will be taken to eliminate structural and institutional racism, particularly in the justice and education systems and within the employment context.

We consider that the Strategy is an opportunity to:

1. acknowledge the existence of systemic and institutional racism (direct and indirect) and the impact it has on our community, particularly for Aboriginal and Torres Strait Islanders and newly arrived refugees and migrants
2. set expectations for the elimination of racism in all parts of society and arms of government in Victoria, and require clear statements from them that racism is unacceptable and will not be tolerated
3. develop a transparent accountability (outcomes based) framework for government and business that sets out the key drivers of racism to be identified and key life outcome indicators to be assessed, measured, publicly reported on, and remediated
4. promote changes to legislation and policy which put consideration and elimination of racism at the forefront of decision-making, particularly in the criminal justice sector
5. improve access to justice through anti-vilification legislative reform and equipping independent regulators to take proactive action to investigate and prosecute race discrimination, vilification and victimisation, and

6. prioritise community engagement, training, funding for community legal centres, and partnerships with community organisations to ensure there are clear pathways available for individuals to access support and legal advice.

We acknowledge that this will be a difficult, ongoing and large piece of work that requires buy in from all facets of the Victorian Government and a genuine commitment to firstly acknowledging that racism exists within the system and must be eliminated.

The approach being taken to address gender inequality and sexual harassment should be viewed as precedents for how a dedicated Anti-Racism Strategy and accountability framework can work in practice, relying on the positive duty in the *Equal Opportunity Act 2010* (Vic) to eliminate discrimination, sexual harassment and victimisation as far as reasonably practicable.

We have outlined below at Appendix A, a written summary of our feedback provided at the consultation held on 17 December 2021, with additional references and reports listed for further information.

In addition, we strongly recommend to the Taskforce the anti-racism report by Victoria University in partnership with Wyndham City Council – [All in this together: A community-led response to racism for the City of Wyndham](#) – and the Wyndham Roadmap which proposes a structure and pathway towards a local support service network to meet the needs of those experiencing racism.¹

We also recommend to the Taskforce the report from Monash University in partnership with the Harmony Alliance [Migrant and refugee women in Australia: The safety and security study](#), the first national study of migrant and refugee women focused on women's safety and security. The report explores issues relating to racism and victimisation and criminal justice, including attitudes towards police, procedural justice, trust and community engagement.²

If the Taskforce would like more information about any WEstjustice projects or programs described below, or information about how we work closely with our community to co-design and deliver place-based free legal services, we would be more than happy to meet to discuss.

Please contact us by email at jennifer@westjustice.org.au or anoushka@westjustice.org.au.

Yours sincerely



Jennifer Jones
Legal Director
Employment and Equality Law



Anoushka Jeronimus
Legal Director
Youth Law

¹ Mario Peucker, Thomas Clark & Holly Claridge, *All in this together: A community-led response to racism for the City of Wyndham* (Victoria University, 2021) 58-61.

² Marie Segrave, Rebecca Wickes & Chloe Keel, *Migrant and refugee women in Australia: The safety and security study* (Monash University, 2021) 45-57.

APPENDIX A – SUMMARY OF CONSULTATION FEEDBACK

1. Key policy issues and strategies

Key policy, structural and systemic issues that underpin or reinforce racism and discrimination can be divided into three groups:

- Recognition and understanding of structural and systemic racism
- Sector specific concerns, particularly with pre-emptive and predictive policing, and
- Access to an effective and timely remedy under both civil and criminal law.

1.1. Recognition and understanding

Within the justice sector,³ there is a lack of recognition of the existence of structural and systemic discrimination, as well as a lack of awareness of what constitutes racism and race discrimination and the harm that it can cause to the individual and their community. This may be due to lack of regular, formal, mandatory training on how to overcome unconscious bias or identify and address racism and bias within policy and decision-making as well as a failure to review long-standing systems and procedures that do not account for the needs of a diverse public and throw up ongoing language and cultural barriers.

The existence and harms of structural and systemic discrimination in relation to our Aboriginal and Torres Strait Islander communities has begun to be formally understood in the legal and justice sector and the need for a collectivist approach to eliminate it. However, we are yet to see this knowledge and acceptance expanded to include newly arrived migrants and those from refugee backgrounds (typically those from non-white and/or non-Christian countries).

It is important that the Strategy requires justice and legal sector decision-makers (including law enforcement) to publicly acknowledge the existence of all forms of racism and be accountable for taking proactive steps to address it within their systems, policies and processes. This means acknowledging and committing to a zero-tolerance approach to structural racism, racial vilification, as well as direct and indirect discrimination based on race.

1.2. Sector specific concerns

There are specific criminal law concerns we wish to draw to the attention of the Taskforce, particularly relating to practices which appear on their face to be racially neutral but have a disproportionate impact on communities of colour. As detailed in our September 2021 [Submission for the Inquiry into Victoria's Justice System](#), these concerns are:

- Overrepresentation of Aboriginal and Torres Strait Islander children and children from culturally and linguistically diverse backgrounds (CALD) in the youth justice system and out of home care, and particularly overrepresentation of children from the West metro region. For example, in 2020, more than a third of young people in custody were from culturally and linguistically diverse communities, with African-Australian youth making up a significant proportion of that number.⁴
- The high numbers of youth, in particular Aboriginal and Torres Strait Islander youth and CALD youth, who are on remand and not released on bail, potentially as a result of a lack of awareness or consistency in police bail decision-making discretion at

³ When we refer to the justice sector in this submission, we include agencies such as Victoria Police, the Courts and Courts Services Victoria, the Office of Public Prosecutions, Child Protection (Department of Families, Fairness and Housing), and Youth Justice and Corrections (Department of Justice and Community Safety).

⁴ Angus Woodward and Anoushka Jeronimus, Submission 141 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System*, 20 September 2021, 4 ("*WJ Submission for the Inquiry into Victoria's Criminal Justice System*"), referring to 'How understanding one statistic became Dr Stephane Shepherd's life's work', *Life Matters* (ABC Radio National, 17 February 2021, 9.27am) <<https://www.abc.net.au/radionational/programs/lifematters/how-understanding-one-statistic-became-stephane-shepherd%E2%80%99s-life/13158830>>

station level.⁵ The *Children, Youth and Families Act 2005* (Vic) sets out a presumption of a child being released on summons, to avoid unnecessary remand.⁶ However, from our experience, this is not regularly adhered to by police.

- The use of proactive and predictive policing approaches to youth crime detection and offender management which:
 - can be adversely affected by unconscious bias and culturally unsafe practices
 - perpetuate biased and racialised policing by using historical data that may already be affected by racial profiling or data that does not accurately reflect criminal activity e.g. stop and search data where multicultural communities are already over-represented
 - confuse young people about the role of police and whether they can be trusted and increases their contact with the criminal justice system instead of diverting away and out of it, and
 - can actually result in criminalising behaviour that could be dealt with in other ways e.g. meaningful psycho-social support for the young person and their family.
- Culturally incompetent and at times racist attitudes and bias within the police or judiciary, for example making broad statements about attributes or behaviours of certain ethnic groups (including racial stereotypes) during a hearing or sentencing.⁷

WEstjustice understands that Victoria Police are in the process of finalising its Youth Policing Strategy at present. Systemic and structural discrimination must be specifically addressed in this strategy by making proactive changes to youth policing.

1.3. Effective remedy and response

Finally, a key issue that reinforces racism and prevents access to justice for victims of racism and racial discrimination is the lack of access to effective and timely remedies under civil or criminal law. Racism is well-known to be under-reported, meaning that people do not receive support for their experience, and they are unable to access any remedy or respond to the conduct.⁸

If a person is subject to racial abuse, vilification, discrimination or victimisation, they are able to make a complaint directly to the body responsible or lodge a civil claim under the *Equal Opportunity Act 2010* (Vic) (EOA), *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) or bring a race discrimination or racial hatred claim in the federal jurisdiction under the *Racial Discrimination Act 1975* (Cth) (RDA).

However, a person's ability to make an effective complaint relies on their ability to understand the legal tests, self-advocate or find a lawyer to assist, and have the resilience to deal with a complex and lengthy dispute resolution and/or litigation process. Problems with this system of individualised responses to systemic racism include:

- The absence of an authorising environment to be able to raise examples of racism safely directly to an organisation – both for those experiencing it, those advocating for them, or staff members or bystanders/witnesses. For example, lack of complaints policies or procedures, or failure to engage with the complaint or take it seriously.
- Many people are unaware of their rights to bring a complaint and do not know who can assist them or are afraid of seeking help from a lawyer; this is particularly true of newly arrived refugees and migrants, as well as young people.⁹ Conversely there is a chronic

⁵ Australian Institute of Health and Welfare, *Youth justice in Australia 2019-20 - Victoria Fact Sheet*, <<https://www.aihw.gov.au/reports/juv/134/youth-justice-in-australia-2019-20/contents/state-and-territory-fact-sheets/victoria>>; Australian Institute of Health and Welfare, *Youth Justice in Australia 2019–20* (Report, Cat. no: JUV 134, 2021) 18-22.

⁶ *WJ Submission for the Inquiry into Victoria's Justice System* (n 4) 6-8; *Children Youth and Families Act 2005* (Vic), s 345.

⁷ *WJ Submission for the Inquiry into Victoria's Justice System* (n 4) 19-20, referring to Peucker, Clark & Claridge (n 1) 32,34,36.

⁸ Peucker, Clark & Claridge (n 1) 37-40.

⁹ Francesca Lai, *Ignorance is Not Bliss: Report of the Youth Employment Justice Project* (WEstjustice Community Legal Centre, September 2021) 59-60, 82, 86-87.

lack of sustainable resourcing for those organisations (such as community legal centres) to properly assist those individuals to make a complaint.

- A reluctance to take any action because individuals believe they cannot prove their case, they are afraid of legal processes and authority, or they experience deep pain in reliving traumatic events. Many suffer psychological injury as a result of racism or discrimination, and this can often prevent them from seeking legal assistance too.¹⁰
- The legal tests for racial discrimination under the EOA and RDA require the conduct to have taken place in an area of public life (such as employment, provision of goods and services, education). The onus is on the victim to prove the conduct of the perpetrator was unlawful, which can often be difficult.
- Public conduct un-related to an area of public life, including between private citizens, could be caught by Victorian anti-vilification laws or the racial hatred provisions of the RDA. Again, the legal tests are complex and difficult to prove. For example, racial vilification under the RRTA is defined as “conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, another person or class of persons” that is undertaken on the ground of race.¹¹ In this sense, the focus is on the impact the conduct has on *other* people, not the victim.
- Civil claims are usually focussed on remedying the harm or loss to the individual. Where a person achieves financial settlement rather than proceeding to final hearing, this could be subject to a non-disclosure agreement so they cannot share their experiences and doesn't often lead to systemic change within an organisation unless this is explicitly negotiated as part of settlement (such as changes to policy or training).
- Fear of retaliation is a key reason why many people do not complain about racism, whether they are experiencing it or witnessing it. The EOA, RRTA and RDA provide protections from victimisation, but these are not often utilised or well-known. There needs to be greater awareness and enforcement of these protections to encourage cultural change and proactive anti-racist behaviours from bystanders or whistle-blowers who call out racist conduct.

Unlike some other jurisdictions outside Australia, there is no independent regulator with powers to investigate all forms of racism, racial discrimination or vilification on its own motion. The Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) has limited investigation powers to investigate systemic discrimination that cannot be resolved via dispute resolution.¹² VEOHRC does not have the power to compel the provision of evidence or enforce outcomes of the investigation, nor does it have the power to assist a complainant with their claim or bring it on their behalf.

A strong independent regulator with powers to investigate and enforce outcomes would be a huge improvement to the civil protections against race discrimination, vilification and victimisation and improve access to justice for multicultural communities experiencing racism.

Finally, a person cannot rely on Victoria Police to prosecute racial vilification as a criminal offence. Serious racial vilification is an offence under the RRTA, punishable by a penalty of up to \$10,904.40 and/or six months imprisonment for an individual, or \$54,522 for a corporation.¹³ However there have only been two successful criminal prosecutions under RRTA in twenty years.¹⁴

¹⁰ Ibid 81-84; Catherine Hemingway, *Not Just Work – WEstjustice Employment Law Project Final Report* (WEstjustice Community Legal Centre, 2016) 211; Liz Morgan, Tarni Perkal and Catherine Hemingway, Submission No. 119 to Parliament of Australia Senate Select Committee, *Temporary Migration*, 30 July 2020, 57-58; Peucker, Clark & Claridge, (n 1) 41, 43-49.

¹¹ *Racial and Religious Tolerance Act 2001* (Vic) s 7(1).

¹² *Equal Opportunity Act 2010* (Vic) pt 9.

¹³ *Racial and Religious Tolerance Act 2001* (Vic) s 24.

¹⁴ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into anti-vilification protections* (March 2021) 150.

In 2021 the Parliament of Victoria conducted an inquiry into racial and religious vilification and found barriers to effective policing and prosecution of racial vilification included the need to obtain consent from the Director of Public Prosecutions before initiating a prosecution, limited awareness and understanding of the RRTA by Victoria Police, the complexity and high threshold of the offences, and the use of alternative criminal offences such as assault under the *Crimes Act 1958* (Vic) or threatening behaviour under the *Summary Offences Act 1966* (Vic).¹⁵ These barriers need to be removed in line with the findings of the Inquiry before the criminal law is effectively protecting victims of racial hatred, vilification and abuse.

More information on the concerns regarding barriers to making racial discrimination complaints, in the context of refugee and migrant workers and young multicultural workers, can be found in the following WEstjustice submissions and publications:

- [Ignorance is NOT Bliss: Report of the Youth Employment Justice Project](#) (2021) pp58, 68, 73
- [Not Just Work: WEstjustice Employment Law Project Final Report – Part 2](#) (2016), pp211-215, and
- [Submission to the Senate Select Committee on Temporary Migration](#) (2020), made jointly with South-East Monash Legal Service and JobWatch, pp57-59.

2. Addressing key policy issues in the Anti-Racism Strategy

To address issues relating to recognition and understanding of racism, we recommend the following measures should be considered:

- All government agencies required to publicly commit to a clear, rights-based anti-racism statement adopting zero tolerance of all forms of racism, which would be required to be practically implemented within the organisations through proactive auditing, monitoring and evaluation.¹⁶
- A whole of government outcomes framework which guides the implementation of the Strategy. This must include the development of key indicators which can be used to undertake proactive audits to identify all forms of racism and race discrimination in the organisation with measures and targets that must be met and publicly reported on.
 - The measures need to be able to align with and speak to other diversity and inclusion obligations and strategies, to ensure consistent data collection and proper integration within the organisation and reduce duplication of reporting.
 - There could potentially be an accreditation process like the Rainbow Tick, to incentivise a “gold star” anti-racism standard.
 - Section 152 of the EOA provides for the preparation of equal opportunity action plans, to improve compliance with the Act. This section is under-utilised and could be relied on in the Strategy as an existing tool to audit, assess, measure, publicly report, and remediate issues relating to systemic and institutional racism.
 - Examples of existing data collection and public reporting of anti-discrimination and equality issues can be seen in the [mandatory compliance reporting](#) for relevant employers under the *Workplace Gender Equality Act 2012* (Cth) (with publication of non-compliant organisations) and the requirement for public sector bodies, universities and local councils to undertake [workplace gender audits](#), develop [Gender Equality Action Plans](#), complete [gender impact assessments](#) and publicly report on their progress, under the *Gender Equality Act 2020* (Vic).

¹⁵ Ibid 156, 167-169.

¹⁶ See e.g. the Australian Parliamentary Joint Committee on Human Rights, in its 2017 Inquiry into Freedom of Speech in Australia, which proposed that ‘leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public’. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry report: Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (February 2017) 49.

- Indicators should consider social/life outcomes for victims (i.e. quality of life, feelings of safety, confidence in understanding rights and making complaints), as well as institutional measures such as recruitment targets, cultural safety and responsiveness measures, anti-discrimination and anti-bias training, changes in policy and procedure (including audits of how those policies and procedures enable or reduce structural or systemic racism), and supply chain / procurement issues.
- Promotion of the positive duty in the EOA as a key existing obligation that requires organisations in the justice sector (and beyond) to eliminate racism as far as reasonably practicable. This should include development by VEOHRC of a statutory guideline under s 148 of the EOA on racism and the positive duty, similar to the recent [Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010](#) (August 2020).

In order to address systemic issues within the criminal justice system for multicultural youth, we refer and re-state our recommendations made in our submission to the [Inquiry into Victoria's Justice System](#).

In addition, there is a need for legislative or policy change in relation to justice sector decision-making, to acknowledge the existence of structural discrimination of first nations and non-white non-Christian minority ethnic groups and consider the impact of structural discrimination on them. It should apply to decisions under the *Bail Act 1977* (Vic), *Sentencing Act 1991* (Vic), the Victoria Police Manual and decisions made by the Director of Public Prosecutions.

This requirement should be similar to, or align with (where applicable), the obligation under s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) for all Victorian public authorities to give proper consideration to human rights in any decision-making and not act incompatibly with human rights.

To address issues with access to an effective remedy and response, we recommend steps be taken to improve the legislative protections against racism and allow for a focus to be taken away from individual enforcement of rights to proactive enforcement by external regulators:

- VEOHRC's powers of investigation should be enhanced to allow for better enforcement of systemic breaches of the EOA and RRTA, without requiring an individual complainant to take action. Enhancement of powers would include reducing the high threshold for commencing and investigation, and introducing powers to compel evidence and issue compliance notices. This would promote systemic remedies such as workplace training, policy development and compliance audits.
- VEOHRC could also be given power to provide advice and direct support to complainants, like the Office of Human Rights Proceedings in New Zealand or the British Equality and Human Rights Commission, and the ability to bring a prosecution of a complaint of discrimination, like the Fair Work Ombudsman can in relation to matters such as under-payments and general protections.
- WorkSafe should be given the mandate to deal with racism in the workplace as a risk to workers' wellbeing and mental health, in the same way that sexual harassment is now being treated.
- The government should implement the recommendations from the Victorian Inquiry into Anti-Vilification laws.

3. Immediate opportunities to reduce racism and discrimination over the next five years

In addition to the recommendations above, WEstjustice strongly believes that education and empowerment of multicultural communities assists against racism and discrimination.

- Training about racism and discrimination should be embedded into the school curriculum so that young people become aware of their rights as early as possible, and training should also be available in the community to adults who are seeking information about their rights and entitlements.¹⁷
- Training should also be mandatory for government organisations in the justice system, youth justice and legal sector including anti-racism and unconscious bias training incorporated into the workplace.
- Community legal centres must be funded to be able to provide free legal assistance to those experiencing racism.
- Partnerships need to be made between government and community organisations working with multicultural communities, particularly refugees and migrants, and young people, to ensure there are clear pathways available for individuals to access support and legal advice.

Some examples of projects led by WEstjustice that have promoted training, empowerment, social inclusion and anti-discrimination for multicultural communities are:

- The **MyName project**, a unique administrative project targeted at refugee communities from Burma in Melbourne's West (the Karen, Karenni and Hakha Chin peoples) and designed to address issues of systemic advantage and barriers to access to services that they face because of discrepancies in naming conventions. The first MyName project assisted 20 family groups (96 individuals) with name change applications to the Victorian Registry of Births, Deaths and Marriages (BDM) between 2015 and June 2017. Since then, we launched MyName 2.0, partnering with Wyndham Community and Education Centre (WCEC), and there are now 35 additional families (approx. 200 individuals) with pending applications made to the BDM for changes.
- Our **Settlement Justice Partnership**, where WEstjustice partners with settlement agencies MiCare and WCEC to improve settlement outcomes of newly arrived migrant and refugee communities in Melbourne's West. We provide free legal advice across a range of complex civil law issues, such as consumer issues, housing and tenancy, discrimination, employment, insurance and motor vehicle accidents. In doing so, we empower individuals in understanding their rights, accessing legal processes they were otherwise unable to access, and ultimately improving social cohesion.
- In **TARGET ZERO**, WEstjustice and the Centre for Multicultural Youth (CMY) have conceived an ambitious collective impact child and youth crime prevention model designed to eliminate youth criminalisation in Wyndham, Melton and Brimbank, and the overrepresentation of children in out of home care, Aboriginal, African- Australian, Maori and Pasifika and other minority children and young people in the youth justice system. TARGET ZERO will establish frameworks and co-design the interventions with impacted communities and develop protocols to achieve these twin reductions.
- Our **Work Rights and Responsibilities Legal Support Service** is a comprehensive train the trainer program for employment intermediaries and community leaders, complemented by a legal advice service for their clients/. The current iteration provides support to multicultural job seekers through Community Employment Connectors and Victorian African Community Action Plan Employment Brokers.¹⁸ Through this project, workers will be better equipped to self-advocate and resolve disputes, which enables them to find and keep work that is safer, fairer and more secure.

¹⁷ For example, in the workplace context, see Lai (n 9) 40-43

¹⁸ The CEC program aims to support culturally and linguistically diverse (CALD) and young jobseekers facing barriers to entry and re-entry to employment pathways particularly in the wake of the coronavirus (COVID-19) pandemic. VACAP-EBs support community organisations with significant reach into Victoria's African communities to engage and host African community employment brokers. The initiative contributes to increased social and economic inclusion while also assisting Victorian businesses to meet their skills and labour needs.