

Committee Manager
Legislative Assembly
Legal and Social Issues Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

9 December 2019

Inquiry into Anti-Vilification Protections

Dear Committee,

We welcome the opportunity to submit to the inquiry into current anti-vilification laws in Victoria. We are scholars working with the Allens Hub for Technology, Law and Innovation (‘the Allens Hub’) — an independent community of scholars based at UNSW Sydney. As a partnership between Allens and UNSW Law, the Allens Hub aims to add depth to research on the diverse interactions among technology, law, and society. The partnership enriches academic and policy debates and drives considered reform of law and practice through engagement with the legal profession, the judiciary, government, industry, civil society and the broader community. More information about the Allens Hub can be found at <http://www.allenshub.unsw.edu.au/>. Our submissions reflect our views as researchers and are not an institutional position.

In this submission, we focus on:

- Item 1:** The effectiveness of the *Racial and Religious Tolerance Act 2001* Act;
- Item 3:** Interaction between the Act and other state and Commonwealth legislation;
- Item 5:** The role of the state in relation to anti-vilification laws and the importance of retaining and expanding the scope of such laws; and
- Item 6:** Legal issues that may affect law enforcement approaches to detecting and prosecuting online offending.

Item 1: The effectiveness and under-inclusiveness of the *Racial and Religious Tolerance Act 2001*

The proposed amendments to the *Racial and Religious Tolerance Act 2001* (the ‘Principal Act’) in the *Racial and Religious Tolerance Amendment Bill 2019* (the ‘Bill’) begin with a change to its title to ‘The Elimination of Vilification Act’ through section 4 of the proposed Bill. This shift in language, from ‘tolerance’ to ‘anti-vilification’, sends out a strong message that Victoria intends to expand the limited scope of the Principal Act to address the conduct that constitutes vilification.

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Vilification plays an important role in sustaining a social climate which contributes to harm to specific social groups.¹ Of specific concern is the potential of vilification to erode aspects of ‘dignity’ of individuals, especially in contexts that are already marked by hierarchies based on identity such as racism and religion-based discrimination. The other related concern is vilification’s potential impact on eroding ‘assurance’ i.e. creating a sense of deep insecurity, where individuals and communities feel threatened and fear for their physical safety and security.² Vilification has the potential of diminishing a person’s civic status, even when it does not have state or community backing.³

In this regard, widening the scope of the state legislation to include (in addition to race and religious belief or activity) other protected characteristics, such as gender, disability, sexual orientation, gender identity or sex characteristics is important to ensure the effectiveness of anti-vilification laws. We particularly welcome the inclusion of category of ‘gender’ in the proposed Bill, given that many Australian hate speech laws – both state and Commonwealth currently fail to explicitly address the problem of hate speech against women.⁴ This is especially important given the prevalence of sexist speech and harassment online,⁵ which not only contributes to undermining women’s voices online, but also reinforces the views of women as legitimate objects of hostility and contributes to other forms of gender-based harm and violence.⁶ Similarly, the inclusion of other categories signals that hate speech online against LGBTI Victorians will not be accepted, and this is very important given the unique difficulties that LGBTI communities encounter online in exercising their rights to privacy, freedom of expression and association online. Hub researcher Dr. Monika Zalnieriute has discussed these challenges in detail in her work on LGBTI rights online.⁷

Item 3: Interaction between the Act and other state and Commonwealth legislation

The interaction and relationship between the expanded *Principal Act* and other state and Commonwealth legislation is noteworthy in this regard. We suggest that the explicit inclusion of additional categories, and in particular that of ‘gender’, will lead the efforts in Australia to explicitly address hate speech against women, and also will bring it in line with the Australian anti-discrimination laws which do entail protections based on ‘sex’ or ‘gender’.⁸

Despite the harm it causes, it is not clear whether gendered hate speech is currently covered in anti-vilification laws in most Australian jurisdictions.⁹ In the state laws that do criminalise hate speech on the basis of ‘gender identity’, but not explicitly ‘gender’ or ‘sex’ – and this includes NSW, Queensland and the ACT – it is not unclear whether ‘gender identity’ applies only to individuals under the so-called trans umbrella, or also covers women. Scholars have raised doubts that these laws would apply to hate

¹ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2014).

² Robert Mark Simpson, ‘Dignity, Harm, and Hate Speech’, (2013) 32 *Law and Philosophy* 701.

³ Ibid.

⁴ Tanya D’Souza et al, ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’ [2018] UNSWLJ 32; (2018) 41(3) *UNSWLJ* 939

⁵ Anastasia Powell and Nicola Henry, ‘Technology-Facilitated Sexual Violence Victimization: Results From an Online Survey of Australian Adults’ (2019) 34 *Journal of Interpersonal Violence* 3637.

⁶ Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Springer 2017).

⁷ Monika Zalnieriute, ‘Digital Rights of LGBTI Communities: A Roadmap for Dual Human Rights Framework’, in Wagner, B. et al (eds), *Research Handbook on Human Rights and Digital Technologies* (Elgar 2019); Monika Zalnieriute, ‘The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective,’ in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks* (Routledge 2017).

⁸ D’Souza et al, above n 4.

⁹ Ibid.

speech against women on the basis of their gender alone.¹⁰ Victorian efforts to explicitly include ‘gender’ in the protected categories therefore are important and will prove an example for other states and Commonwealth legislation.

Item 5: The role of the state legislation in addressing online vilification

We believe that the governments – both at the state and federal level – as well as the private actors should play a significant role in addressing online vilification. In this regard, it is paramount that private actors should bear legally binding human rights obligations to ensure that individuals can exercise their fundamental rights in the digital age.¹¹ As Hub researcher Monika Zalnieriute has argued, because ‘the global policy-making capacity and influence of non-state actors in the digital age is rapidly increasing, the protection of fundamental human rights by private actors becomes one of the most pressing issues in Global Governance.’¹²

However, the role of state legislation is of crucial importance in securing digital rights and addressing online vilification too. Importantly, Victorian anti-vilification legislation has an expressive function – they signal to affected groups that society takes the harm of hate speech seriously even if a section of its citizenry does not. This expressive role is symbolic in value but is crucial in sending out a message through the enactment of state law that regulating vilification matters.¹³ State regulation of online also plays an educative function in signalling that society finds such speech acts unacceptable.¹⁴ Widening the scope of the state legislation to include other protected characteristics sends out a message that the state is concerned about a wider range of groups targeted by conduct that constitutes vilification. The message that this amendment sends to the citizenry is especially important in the context of the debate around vilification online targeting protected characteristics under the Principal Act.

Online hate speech – which is one form of vilification online - has characteristics which distinguish it from offline hate speech.¹⁵

These include:

- Volume, or the sheer magnitude of content online. For example, Facebook reported to have 100,000 content related decisions per month that were being reviewed under the German Networks Enforcement Act, 2018 (NetzDG) that penalizes online speech deemed illegal under domestic German law.¹⁶
- Acceleration, or the speed with which content is circulated online. Content has the potential to go viral and the response time for state authorities to address any potential impact of such speech has reduced dramatically.¹⁷ Virality is a specific mode of transmission linked to what

¹⁰ Ibid.

¹¹ Monika Zalnieriute, ‘From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN’ (2019) 21 *Yale Journal of Law and Technology* 278.

¹² Ibid.

¹³ Sarah Sorial, ‘Hate Speech and Distorted Communication: Rethinking the Limits of Incitement’ (2015) 34 *Law and Philosophy* 299, 320.

¹⁴ Ibid. See also Katherine Gelber and Luke McNamara, ‘The Effect of Civil Hate Speech Laws: Lessons from Australia’, (2015) 49(3) *Law and Society Review* 631.

¹⁵ Wolfgang Schultz, ‘Regulating Intermediaries to Protect Privacy Online: The Case of the German NetzDG’, Discussion Paper Series 2018-01, Humboldt Institut für Internet und Gesellschaft (HIIG), 3.

¹⁶ Ibid.

¹⁷ Ibid.

the theorist Manuel Castells termed information capitalism,¹⁸ based on the logic of contagion and repetition,¹⁹ and involving key nodes through which speech is transmitted.

The fact that vilification occurs online and often on private social media platforms does not mean that the state legislation should play no role in addressing it. To the contrary, the negative impact implies a duty for a state to act. Such action in relation to online speech need not be independent of legislation that addresses offline vilification.²⁰ However, enforcement may raise different issues, as discussed in the following section.

The sheer volume and virality of vilification online can have a serious impact on the ability of citizens to participate in public discussion, especially those who are already disadvantaged by their race, religious belief or activity, gender, disability, sexual orientation, gender identity or sex characteristics. The proposed amendments are an important move towards addressing these concerns and will bridge the existing gap between the concerns raised around the harmful effects of vilification and the existing law in Victoria.

Item 6: Law enforcement analysis of open source data

As part of a project with the Data to Decisions Co-operative Research Centre and with a range of partners, Lyria Bennett Moses prepared a report on *Using 'Open Source' Data and Information for Defence, National Security and Law Enforcement* (31 August 2018).²¹ The following findings from that report (adapted for the Victorian context) may be of interest in understanding some legal issues around the detection and prosecution of online offending by law enforcement.

- Accessing open source information (such as social media posts) often requires agreeing to social media platforms' terms of use that may be highly restrictive, both prohibiting the use of "personas" by law enforcement agencies and restricting "surveillance" uses of the platform.²²
- Privacy law can apply even in situations where personal data being collected is publicly available or "open source", as in the case of some social media feeds. The *Privacy and Data Protection Act 2014* (Vic) applies to the collection and use of 'personal information' by Victoria Police.²³ While reading a generally available publication (physically or on a computer) does not involve 'collection' of personal information for the purposes of the Act,²⁴ an automated analysis involving the creation of permanent or temporary non-public records of personal information will do so. This means that, subject to exceptions, there are restrictions on collection, use and disclosure as well as requirements around openness and transparency (including reference to this type of data collection in privacy policies).

¹⁸ Manuel Castells, *The Rise of the Networked Society* (Blackwell Publishers 2000).

¹⁹ Jussi Parikka, *Digital Contagions: A Media Archaeology of Computer Viruses* (Peter Lang 2007).

²⁰ Lyria Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *UNSWLJ* 581; A Oboler, 'Legal Doctrines Applied to Online Hate Speech', (2014) *Computers and Law* 9 <http://classic.austlii.edu.au/au/journals/ANZCompuLawJl/2014/4.pdf>

²¹ Copy available on request.

²² For example, Facebook Platform Policy cl 3.1, 5.8; Facebook Community Standards; Twitter's 'Developer Agreement and Policy' cl VII(A)(1).

²³ *Privacy and Data Protection Act 2014* (Vic) s 13(1)(i), subject to s 15.

²⁴ *Privacy and Data Protection Act 2014* (Vic) s 12

- Where material is sought to be used as evidence, agencies will often seek authentication from foreign corporations, such as social media companies. This can require resort to the slow²⁵ mutual legal assistance treaty process and will be subject to the law of the relevant jurisdiction (including, in the US, the First Amendment rights of the hate speaker). There are attempts to introduce easier mechanisms, for example through the US *Clarifying Lawful Overseas Use of Data (CLOUD) Act*, but this may not assist in cases of vilification protected under US law.

These challenges, and others referred to in the report, suggest there may be benefits in clearly articulating a legal framework for law enforcement monitoring of open source data such as social media feeds, including for detection and prosecution of vilification. In addition, it is worth noting the importance of university and NGO research into online hate speech, its nature, detection, and education outreach; and ensuring that this is protected in legislation in Victoria and nationally. All sectors – government, research and NGOs – can then obtain appropriate access to material in order to collaborate on reducing harm.

Yours sincerely,

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[alphabetical]

²⁵ The process takes an average of 180 days and up to 18 months: Council of Europe, Assessment of Budapest Convention MLAT provisions, 2014 at 2.4; AusCERT, Supplementary Submission No 44.2, Questions on Notice from the House of Representatives Standing Committee on Communications, Inquiry into Cyber Crime, item 5.