

Ms Nicole Shackleton
Law School
La Trobe University
Bundoora Victoria 3086 Australia

[REDACTED]
[REDACTED]
[REDACTED]

19 December 2019

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

RE: Inquiry into Anti-vilification Protections

Dear Committee Manager,

We are writing to you regarding the invitation by the Legislative Assembly Legal and Social Issues Committee for public submissions concerning the *Inquiry into Anti-Vilification Protections*.

Please find attached our submission to the Inquiry, which addresses the possible extension of anti-vilification legislation in Victoria to protection against Gendered Hate Speech. In our submission we provide the following recommendations to strengthen anti-vilification protections in Victoria:

1. Parliament should introduce legislation to protect against Gendered Hate Speech.
2. To protect against co-opting of anti-Gendered Hate Speech legislation, Parliament make it clear that the purpose of anti-vilification laws is to protect against historically marginalised groups.
3. Sufficient powers be granted to relevant agencies to compel social media companies and other internet platforms to release information to law enforcement agencies for the purpose of investigating a complaint.
4. Education programs for the police and other organisations be implemented to minimise the risk of these laws being used to over-police already marginalised communities.

We commend the Parliament for commencing this Inquiry, noting the importance of anti-vilification laws as a means to protect civic contribution and the safety of all Victorians.

We look forward to hearing the outcome of the Inquiry. We are available for further comment if required.

Yours faithfully,

Ms Nicole Shackleton, Dr Laura Griffin, and Ms Danielle Walt.

Submission to the Inquiry into current anti-vilification laws, their possible expansion, and/or extension of protections beyond existing classes by the Legislative Assembly Legal and Social Issues Committee (Victoria)

December 2019

Submitted by:	Ms Nicole Shackleton , PhD Candidate, School of Law, La Trobe University, Melbourne, Australia, LLB (Hons), BIntRel. Email: [REDACTED] Dr Laura Griffin , Lecturer, School of Law, La Trobe University, Melbourne, Australia, PhD, LLB (Hons), BA. Email: [REDACTED] Ms Danielle Walt , Project Manager and Policy Consultant, JD, BSocSci (Criminal Justice) Monash University
Sent by eSubmission:	Committee Manager Legislative Assembly Legal and Social Issues Committee Parliament House, Spring Street East Melbourne VIC 3002
Contact:	Ms Nicole Shackleton

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EXECUTIVE SUMMARY

OVERVIEW:

This submission identifies a range of key issues associated with Gendered Hate Speech (GHS), detailing the nature and impact of its harms. It outlines why current protections against GHS are insufficient and not fit for purpose, and why legislative reform is required. It makes recommendations to address the current limitations in anti-vilification laws.

KEY ISSUES:

This submission identifies the following key issues for consideration:

1. GHS causes significant harm to individuals and wider society, impacting people's health, wellbeing, and safety, and restricts participation in civic life. These harms are well documented by previous research:
 - Harm to the victim may include psychological harm, economic detriment, health impacts, and restricted civic participation.
 - Harm to wider society includes contributing to gender-based violence (GBV), harm caused to other marginalised groups who experience similar or overlapping bias as a result of hate speech proliferation, harm to wider society as a result of restricted civic participation, economic burdens as a result of discrimination, and compounding harms for those who have other attributes that are targeted for discrimination.
2. Laws can be used to combat GHS. However, as anti-hate speech laws in Australia are currently inadequate, law reform is needed. Current protections for GHS are piecemeal, often rely on interpretations of legislation not designed for this purpose, and do not reflect current understandings of the impact of GHS and GBV.
3. There are risks to law reform, including:
 - Reforms being developed that have little to no impact or fail to provide both a regulatory *and* symbolic function.
 - Selective enforcement.
 - Assuming an 'equal playing field', whereby laws are drafted too broadly to cover all groups, rather than marginalised groups at risk of harm.
 - Use of these laws by majority groups to silence minority complainants.
 - Failure to reflect the intersectional nature of oppression, and how multiple vulnerabilities may compound one another.

Parliament can protect against these risks by actively shaping the ways in which law reforms are understood and operationalised by the individuals and institutions through which they will work. See our recommendations below.

RECOMMENDATIONS:

To address these issues, this submission makes the following recommendations:

Recommendation 1: Parliament should introduce legislation to protect against GHS. This could be done in one of several ways, including -

- a. ‘Gender’ be added as a protected attribute to existing anti-vilification protections (both civil and criminal) in Victoria under the *Racial and Religious Tolerance Act 2001* (Vic).
- b. ‘Gender’ to be added as a protected attribute to any new formulation of anti-vilification legislation introduced at the conclusion of the Inquiry.
- c. Parliament introduces anti-GHS legislation that is victim-focused. This would be modeled after s18C of the *Racial Discrimination Act 1985* (Cth), and would protect against GHS which occurs in public, that is ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’ another person or a group of people based on their gender, or perceived gender. This law would be civil and could be inserted into the *Equal Opportunity Act 2010* (Vic). In line with other powers under the *Equal Opportunity Act 2010* (Vic), the Victorian Equal Opportunity and Human Rights Commissioner would have the power to mediate complaints concerning GHS.

Recommendation 2: To protect against co-opting of anti-GHS legislation, such legislation should make it clear that its purpose is to protect against historically marginalised groups. This could be through inclusion of a legislative provision which states that the purpose of the legislation is to protect historically marginalised groups. This purpose should also be clearly set out in both the second-reading speech and explanatory memorandum.

Recommendation 3: Sufficient powers be granted to the Victorian Equal Opportunity and Human Rights Commissioner, the Victoria Police, and other relevant investigative agencies or tribunals to compel social media companies and other internet platforms to release information to law enforcement and other investigative agencies for the purpose of investigating, mediating and prosecuting a complaint.

Recommendation 4: Programs be designed, funded and implemented to educate the public, media, government departments and police about changes to the law that are designed to protect against GHS. For example, education programs could be run by the Victorian Equal Opportunity and Human Rights Commission or Government Departments. Education programs should incorporate ideas around the purpose of these laws and which types of complaints are appropriate for criminal prosecution. This would minimise the risk of these laws being used to over-police already marginalised communities.

I. INTRODUCTION

Federal and Victorian laws do not adequately address Gendered Hate Speech (GHS), particularly considering the extensive use of GHS on social media and other online forums.¹ Hate speech directed against women is ‘so pervasive and insidious that it is a normalised feature of everyday public discourse’ in Australia.² In particular, young women aged between 18 - 24 are more likely to be targeted by GHS.³ In order to address the current gap in the law and protect against GHS, Victoria’s anti-vilification laws should be extended to include gender as a protected attribute.

On 12 September 2019, the Victorian Legislative Assembly Legal and Social Issues Committee (the Committee) received terms of reference from the Legislative Assembly to conduct an inquiry into current anti-vilification laws, their possible expansion, and/or extension of protections beyond existing classes (the Inquiry).⁴ Our submission considers the following terms of reference:

3. Interaction between the Act and other state and Commonwealth legislation;
4. Comparisons in the operation of the Victorian Act with legislation in other jurisdictions;
5. The role of state legislation in addressing online vilification;
7. Any evidence of increasing vilification and hate conduct in Victoria;
8. Possible extension of protections or expansion of protection to classes of people not currently protected under the existing Act.

Our submission to the Committee is based on both previous research we have undertaken in the area of GHS, and current research by Ms Shackleton.

In 2018, we published the academic journal article ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’.⁵ In this article we found that GHS causes harm in numerous ways, including silencing women and preventing them from participating in civil society. GHS also perpetuates gender-based violence (GBV), as sexist and misogynist language reinforces strict gender norms. We argued that because the harmful nature of vilification *is* recognised by laws that protect against other forms of hate speech, the failure (of *all* Australian jurisdictions) to legislate against GHS signals to society that women are legitimate objects of hostility and marginalisation. Accordingly, we recommended legislating

¹ See, eg, The Australia Institute, *Trolls and polls – the economic costs of online harassment and cyberhate* (Research Report, 28 January 2019)

<https://www.tai.org.au/sites/default/files/P530%20Trolls%20and%20polls%20-%20surveying%20economic%20costs%20of%20cyberhate%20%255bWEB%255d_0.pdf> 2 - 3.

² Tanya D’Souza et al, ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’ (2018) 41(3) *UNSW Law Journal* 939, 939.

³ See, eg, Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Palgrave MacMillan, 2017) 172.

⁴ See ‘Terms of Reference’, *Legislative Assembly Legal and Social Issues Committee Inquiry into Anti-Vilification Protections* <<https://www.parliament.vic.gov.au/lisic-la/article/4332>>.

⁵ D’Souza et al (n 2). This was accompanied by an article in *The Conversation*: Laura Griffin and Nicole Shackleton, ‘The Gender Gap in Australia’s Hate Speech Laws’ *The Conversation* (online) 20 August 2018 <<https://theconversation.com/the-gender-gap-in-australias-hate-speech-laws-100158>>.

to protect against GHS, to encourage women's participation in public discourse without (or at least with a lessened) fear of being attacked.

Our submission also includes additional information which expands on some themes from our article. Some of this information originates from Ms Shackleton's ongoing PhD research. Ms Shackleton is investigating how Australian law regulates (or fails to regulate) GHS. As part of her research, Ms Shackleton has conducted interviews with 20 participants. These included women who had been targeted by GHS, as well as experts, policy makers and lawyers who have knowledge of how the law operates with respect to GHS in Australia.

The remainder of our submission is broken into several parts:

- **Part II** analyses possible legal definitions of GHS.
- **Part III** examines the direct and indirect harms caused by GHS. This section also discusses the effects of online technologies on the harms caused by GHS.
- **Part IV** analyses how GHS is (or is not) addressed within the Australian legislative framework.
- **Part V** outlines important risks and issues pertinent to law reform to protect against GHS.
- **Part VI** provides recommendations to the Committee to address the issues identified and strengthen anti-vilification laws in Victoria.
- **Part VII** makes some concluding remarks.

The submission has two attachments:

- **Appendix A** is a table outlining anti-hate speech laws in Australia. This table is updated from information provided in our 2018 article.
- **Appendix B** is our article 'Harming Women with Words' as it was published in 2018.

II. DEFINING GENDERED HATE SPEECH

As discussed in our article (Appendix B) currently there is no settled definition of GHS, either in literature, legislation or the common law.⁶ This may be because there has been limited research on GHS in Australian law. In addition, there may be no settled definition of GHS because all hate speech, regardless of the targeted group, occurs on a spectrum. In the late 1990s, Nielsen conducted field research examining racist and sexist hate speech in public. Her data shows that 'sexist hate speech' ranges from humiliating and insulting 'compliments' to 'implied sexual threats' which were sometimes accompanied by violence.⁷ The fact that GHS

⁶ See D'Souza et al (n 2) 954–61.

⁷ Laura Nielsen, 'Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech' (2002) 58(2) *Journal of Social Issues* 265, 271-2.

occurs on a spectrum makes it difficult to define, and even more difficult to produce a legal definition.⁸

In our article, we analysed current Australian approaches to legislating against hate speech. We found that the most common form of anti-hate speech legislation in Australia targets ‘vilification’ and is concerned with whether the conduct ‘incites hatred against, serious contempt for, or severe ridicule’ of a person or class of persons based on a protected attribute. This is the approach adopted in the *Racial and Religious Tolerance Act 2001* (Vic). Section 7(1) states that ‘[a] person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.’⁹

The only definition of GHS found in literature reflects s 7 of the *Racial and Religious Tolerance Act* – it defines GHS as ‘encompass[ing] at least gender-based epithets used against women in the presence of others that have the capacity to incite hatred, serious contempt, or ridicule on the basis of gender.’¹⁰ This type of definition could be considered ‘community-focused’, as it is concerned with the harm caused to public order, rather than harm caused to the individual targeted by the hate speech.¹¹

As an alternative, a ‘victim-focused’ definition of hate speech focuses on the direct harm caused to the victim.¹² For example, s 18C of the *Racial Discrimination Act 1975* (Cth) (*RDA*) prohibits racist hate speech that is ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group people.’¹³ The scope of s 18C was narrowed in *Eatoock v Bolt* in 2011, to ‘mischief that extends to the public dimension’.¹⁴ This means that for conduct to fall within section 18C, the speech must be ‘more serious than mere personal hurt’, and must be ‘not merely injurious to the individual, but ... injurious to the public interest and relevantly, the public’s interest in a socially cohesive society’.¹⁵ This interpretation of the threshold of harm brings s18C more in line with the ‘community-focused’ definition, ‘in that it is less concerned with the effect caused to the victim, and more concerned with how the speech impacts on the public.’¹⁶ Nevertheless, attempts to limit the definition of racist hate speech in s 18C of the *RDA* in 2014 demonstrate that using a ‘victim-focused’ definition of

⁸ D'Souza et al (n 2) 958.

⁹ See also *Crimes Act 1900* (NSW) s 93Z(1): ‘A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence’.

¹⁰ Kylie Weston-Scheuber, ‘Gender and the Prohibition of Hate Speech’ (2012) 12(2) *QUT Law & Justice Journal* 132, 140, cited in Tanya D'Souza et al, ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’ (2018) 41(3) *UNSW Law Journal* 939, 958.

¹¹ D'Souza et al (n 2) 958.

¹² *Ibid* 959.

¹³ *Racial Discrimination Act 1975* (Cth) s 18C(1)(a).

¹⁴ *Eatoock v Bolt* (2011) 197 FCR 261, 324 [263].

¹⁵ *Ibid*.

¹⁶ D'Souza et al (n 2) 960.

hate speech in legislation is controversial.¹⁷ One reason for this may be that ‘those not routinely subjected to hate speech are often unaware of the serious harm it can cause.’¹⁸

III. UNDERSTANDING THE HARMS OF GENDERED HATE SPEECH

In our article, we canvassed some of the harms caused by hate speech in general, and GHS in particular.¹⁹ We argued that GHS has a number of negative effects, on both the original target(s) and the wider community. Additionally, GHS has a disproportionate impact on women in general, and certain groups of women in particular.

Hate speech, like other forms of hate crime, has consequences beyond the original target. Indeed, it is argued that it has a rippling effect, which spreads harm from the initial target(s) into their immediate community and other excluded groups, and then into the community as a whole.²⁰ Hate speech is ‘prejudice enacted through speech’,²¹ and it indicates contempt and ridicule for the individual target, and the group or groups to which they are perceived to belong.²² Hate speech therefore has the ability to silence marginalised voices and cause them to withdraw from public discussion.²³

Previous research on the impacts of racist hate speech identified two different types of harms caused by hate speech – constitutive harms, which are caused by the saying of the hate speech, and consequential harms, which occur because of the hate speech.²⁴ Constitutive harms are

¹⁷ In 2014, Tony Abbott and George Brandis, then the Prime Minister and Attorney General of Australia respectively, led a push to change s 18C of the Racial Discrimination Act. See, eg, Emma Griffiths, *Brandis Defends ‘Right to Be a Bigot’* (24 March 2014) ABC News <<https://www.abc.net.au/news/2014-03-24/brandis-defends-right-to-be-a-bigot/5341552>>. In 2016, Attorney General Brandis wrote to the Parliamentary Joint Committee on Human Rights asking the Committee to consider whether the operation of the *RDA* imposed unreasonable restrictions on freedom of speech in Australia. See Parliamentary Joint Committee on Human Rights, Parliament of Australia, ‘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)’ (2018) The Committee was not able to make any recommendations about changes to s 18C of the *RDA*, as there was a variation on opinion between the Committee members. On 30 March 2017, the Senate blocked the Government’s (then led by Malcolm Turnbull) changes to s 18C of the *RDA*. See Katharine Murphy, ‘Senate Blocks Government’s Changes to Section 18C of Racial Discrimination Act’ *The Guardian Australia* (online) 30 March 2017 <<https://www.theguardian.com/australia-news/2017/mar/30/senate-blocks-governments-changes-to-section-18c-of-racial-discrimination-act>>.

¹⁸ D’Souza et al (n 2) 959.

¹⁹ See *ibid* 961–8.

²⁰ Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45(4) *American Behavioral Scientist* 626, 629, cited in Tanya D’Souza et al, ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’ (2018) 41(3) *UNSW Law Journal* 939, 961.

²¹ Katharine Gelber, *Speech Matters: Getting Free Speech Right* (University of Queensland, 2011) 83.

²² Bhikhu Parekh, ‘Is There a Case for Banning Hate Speech?’ in Michael Herz and Peter Molnar (ed), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University, 2012) 37, 44.

²³ Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, 2002) 24.

²⁴ Katharine Gelber and Luke McNamara, ‘Evidencing the Harms of Hate Speech’ (2015) 22(3) *Social Identities* 324, 325.

harms caused directly to the individual target of hate speech.²⁵ Concerning GHS in particular, there are a number of direct, personal and serious impacts of GHS.²⁶ Women targeted by GHS often feel intimidated, scared and threatened, and these feelings may lead to silence.²⁷ Specifically concerning online sexual harassment, of which GHS is a subset, women targeted are likely to suffer significant psychological impacts, including anxiety, depression, and social withdrawal, as a result of being targeted online.²⁸ These examples highlight that GHS directly and significantly affects women's health, and their ability to participate in civil society.

Empirical research from Ms Shackleton's PhD research supports the argument that GHS causes direct, personal and serious harm to those who are targeted. In particular, several female journalists from Ms Shackleton's research discussed the emotional and psychological impact of GHS. As one commented:

“So I mean, there's ... big impacts across gendered hate speeches. Like, there are the emotional impacts on you and I, and the psychological impacts, there [is] the fact that we lose time and effort and money, so financial impacts and all that, and then there's the biggest structural stuff that allows it to happen over and over and over again.”

This quote also highlights the economic or financial impact of GHS. Although this was not discussed in our 2018 article, research concerning the economic impact of online abuse has recently emerged. In January 2019, The Australia Institute published *Economic Costs of Online Harassment and Cyberhate*, which reported that cyberhate or online harassment (of which GHS is a subset) impacted the ability to work or earn an income for 28 percent of targeted individuals.²⁹ Using survey data, the Australia Institute estimated that ‘Australians have born[e] a total cost of \$330 million from ... online harassment and cyberhate: \$62 million in medical costs and \$267 million in lost income.’³⁰

Another type of harm caused by hate speech – consequential harm – concerns the indirect effects of the hate speech on wider society.³¹ This may include encouraging negative stereotypes, prejudice or hostility, which can lead to further harmful conduct, including violence.³² Specifically concerning GHS, one of the most troubling consequential harms is the perpetuation of GBV.³³ Linguistics has long established that language not only reflects social norms and attitudes, but also shapes them.³⁴ Accordingly, the misogynist and sexist language of GHS not only reflects traditional beliefs about masculinity and femininity; it also has the

²⁵ Ibid.

²⁶ D'Souza et al (n 2) 962–3.

²⁷ Nielsen (n 7) 273.

²⁸ Powell and Henry (n 3) 179.

²⁹ The Australia Institute (n 1) 9.

³⁰ Ibid 10.

³¹ Gelber and McNamara (n 24) 325.

³² Ibid; Parekh (n 22) 41.

³³ D'Souza et al (n 2) 963.

³⁴ See especially, Mary Talbot, *Language and Gender* (Polity Press, 2nd ed, 2010) ch 7. See also Jennifer Coates (ed), *Language and Gender: A Reader* (Blackwell, 1998); Jane Sunderland, *Language and Gender: An Advanced Resource Book* (Routledge, 2006).

ability to reinforce these beliefs. Multiple reports by government agencies, anti-violence organisations and the Australian Human Rights Commission have linked traditional views about gender roles, male dominance and low-level support for gender equality with GBV.³⁵ The Victorian Royal Commission into Family Violence also found a definite link between traditional beliefs about gender roles and language, and GBV.³⁶ Recognising the connection between GHS and GBV creates a strong imperative for law reform to address GHS in Australia.

To expand on the analysis from our article, the link between GHS and GBV has been eloquently addressed by the Supreme Court in three criminal cases (by the same trial judge) involving the murder of women by a male perpetrator. In one case, the judge explicitly identifies that language which ‘dehumanises women, blames them for male violence [and] normalises the abuse of male power ... contributes to the creation of circumstances in which a woman may be violently harmed or killed’.³⁷ This is a clear recognition of the harms of GBV. In the same case, the judge identified that the law is looked to for ‘protection from men who would act on disrespectful, contemptuous and misogynistic views and opinions about women’,³⁸ and stated that the court must ‘unequivocally denounce’ crimes that involve these attitudes towards women.³⁹ In three separate cases, the judge recognised that courts perform an important educative function of ‘positively influencing how the community, and especially men, value, respect, and treat women’.⁴⁰

These cases explicitly identify the tangible link between GHS and GBV, and the role of the court in punishing the offender and protecting women. In addition, the Victorian Supreme Court has ‘repeatedly emphasised the need to condemn family violence in line with community expectations’ and ‘increased community disquiet over violence by males towards partners’.⁴¹ It is clear that courts are increasingly attuned to the pervasiveness of violence against women within the community and, on many occasions, have strongly condemned male perpetrators of violence. The courts, including the High Court of Australia, have also emphasised the duty of

³⁵ See, eg, VicHealth, ‘Preventing Violence Before It Occurs: A Framework and Background Paper to Guide the Primary Prevention of Violence against Women in Victoria’ (Resource 1, State Government Victoria, 2007) 34; Elizabeth Broderick, Cassandra Goldie and Elena Rosenman, ‘Gender Equality Blueprint’ (Report, Australian Human Rights Commission, 23 June 2010) <<https://www.humanrights.gov.au/our-work/sexdiscrimination/publications/gender-equality-blueprint-2010>>; Our Watch, *Australia’s National Research Organisation for Women’s Safety and VicHealth*, ‘Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and Their Children in Australia’ (Report, Our Watch, 2015); cited in, Tanya D’Souza et al, ‘Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech’ (2018) 41(3) *UNSW Law Journal* 939, 964–5.

³⁶ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 6, 5.

³⁷ *DPP v Smith* [2018] VSC 684 (16 November 2018) [28] (Bell J).

³⁸ *Ibid* [30].

³⁹ *Ibid*.

⁴⁰ *DPP v Paulino (Sentence)* [2017] VSC 794 (21 December 2017) [33] (Bell J); *DPP v Turner* [2017] VSC 358 (23 June 2017) [33] (Bell J); *Ibid*.

⁴¹ *Kalala v The Queen* (2017) 269 A Crim R 1, 6 [3(iii)], 18 [59]. See also *Felicite v The Queen* (2011) 37 VR 329, 333 [20]; *The Queen v Kilic* (2016) 259 CLR 256, 266–67 [21]; *DPP (Vic) v Dalgliesh* (2017) 262 CLR 428, 447 [56]–[57]; *Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) [53]–[54], [57] (Neave JA and Kyrou AJA); *Filiz v The Queen* [2014] VSCA 212 (11 September 2014) [23] (Maxwell P and Redlich JA); *DPP v Meyers* [2014] VSCA 314 (4 December 2014) [45] (Maxwell P, Redlich and Osborn JJA); *DPP v Browning* [2016] VSCA 153 (4 July 2016) [93], [112] (Weinberg, Whelan and Kaye JJA).

the state to afford protection to victims of violence, the need for sentencing practices to align with community and societal attitudes, and to vindicate the human dignity of the victim.⁴²

As already done by courts in Victoria and at the federal level, Parliament should recognise the connection between GHS and GBV, and accordingly, introduce legislation to address GHS in Australia.

There are particular groups in society that are more likely to be targeted by others based on their gender or perceived gender.⁴³ It appears that those women who step out of traditional gender roles,⁴⁴ or enter traditionally masculine spaces, are more likely to be the targets of GHS.⁴⁵ For example, the final report by the Senate inquiry into the *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* discussed the relentless online abuse directed towards female journalists in Australia.⁴⁶ Since the publication of our article, research by Amnesty International investigating abuse against women on Twitter found that ‘the public nature of journalism and the dependency of journalists on social media platforms to report the news or express opinions about current affairs makes female journalists prime targets for targeted violence and abuse.’⁴⁷ This finding is further supported by research conducted in 2019 by Gender Victoria.⁴⁸ Their report, *Don’t Read the Comments: Enhancing Online Safety for Women Working in the Media*, also states that freelance journalists are particularly vulnerable to harms associated with GHS because they often work at home and without access to professional support services.⁴⁹ Not only does this exacerbate emotional and psychological harms, but the precarious nature of freelance journalism also intensifies the financial impacts of GHS.⁵⁰

⁴² *Munda v The State of Western Australia* (2013) 249 CLR 600, 620 [54]–[55]. See also *Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) [53]–[54], [57] (Neave JA and Kyrou AJA); *R v Earl* [2008] VSCA 162 (25 August 2008) [23] (Nettle and Ashley JJA, Mandie AJA); *R v Hester* [2007] VSCA 298 (29 November 2007) [19] (Chernov, Vincent and Neave JJA); *DPP v Muliaina* [2005] VSCA 13 (2 February 2005) [21] (Winneke P, Charles and Chernov JJA).

⁴³ Anastasia Powell and Nicola Henry, ‘Technology-Facilitated Sexual Violence Victimization: Results from an Online Survey of Australian Adults’ [2016] *Journal of Interpersonal Violence* 1, for a detailed analysis of the prevalence and nature of different forms of TFSV.

⁴⁴ Hannah Mason-Bish, ‘Beyond the Silo: Rethinking Hate Crime and Intersectionality’ in Nathan Hall et al (eds) *The Routledge International Handbook on Hate Crime* (Routledge, 2014) 24, 29; D’Souza et al (n 2) 954–6.

⁴⁵ Powell and Henry (n 3) 169–70.

⁴⁶ See, eg, Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 7 March 2018, 12 (Van [Vanessa] Badham, Media Section Vice President, Media, Entertainment & Arts Alliance), quoted in Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, ‘Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying’ (2018) [2.43].

⁴⁷ ‘Toxic Twitter: Triggers of Violence and Abuse Against Women on Twitter’, *Amnesty International* (Research Report, 18 December 2018) chap 2 <<https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-2/#topanchor>>.

⁴⁸ Gender Victoria, *Don’t Read the Comments: Enhancing Online Safety for Women Working in the Media* (Report, 21 October 2019) 10: ‘The prevalence of gender-based abuse can affect women journalists and media workers disproportionately because of how much of their work takes place in public online spaces.’

⁴⁹ *Ibid* 13.

⁵⁰ *Ibid*.

These findings are supported by Ms Shackleton's PhD empirical research:

“it's really, really, really difficult for number one, freelance journalists, because I find that say you're a woman who writes a lot about gender equality, that is not a position with any newspaper ... so you write about the most harrowing or difficult stuff, and yet you have the least protection because you're paid \$300 to write an article, and then you have nothing to do with the organisation that ... commissioned it. So there's no follow up. I don't have access to employee assistance; I don't have any follow up with the boss, or a colleague. You're totally on your own and it's really important to realise that that harms women's economic security as well.”

“I would definitely have written a lot less after incidents, pile-on incidents ... because my confidence is damaged; I feel conscious of reputational harm; I'm worried about audience backlash because as soon as I write something again, that's another opportunity for them to harass me.”

“It's like omnipresent threats that make you feel that you cannot live a good life and you cannot have a job and you cannot be free in the world to go about your business, but you are scared all the time. Lots of women are silenced online because of this. Lots of women do lose their jobs. Lots of women do have their reputations wrecked online and aren't able to get another job. Lots of women do get PTSD from this stuff. So, it's very very serious, and the economic costs are huge.”

Female advocates who speak out online, whether they are specifically advocating for feminist issues, or social justice issues in general, are also more likely to be targeted by GHS. For example, ‘Yes’ campaigner and LGBTIQ activist Sally Rugg is frequently targeted by GHS in an effort to silence her, and defend the public arena, in this case Twitter, as a territory belonging to men.⁵¹ Further, the same effort to silence women and police traditionally-male-dominated spaces by targeting women with GHS can be clearly seen in Australian politics.⁵² These examples demonstrate that GHS is often used in an attempt to silence women who are employed in public roles, or challenge traditional gender beliefs, either in their advocacy, or by simply daring to enter a space previously reserved for men.

⁵¹ See Mary Ward, “‘If I’ve Got Death Threats, I’ve Probably Said Something Worthwhile’” *The Sydney Morning Herald* (online) 29 August 2018 <<https://www.smh.com.au/lifestyle/life-and-relationships/if-i-ve-got-death-threats-i-ve-probably-said-something-worthwhile-20180828-p50060.html>>. Sally discusses facing online trolls, and receiving death threats during the ‘Yes’ campaign in 2017. Sally also states that ‘[a]ny woman who says anything online faces that type of treatment... And I do specify women because I do think it is very gendered.’ See also D’Souza et al (n 2) 956; Emma A Jane, *Misogyny Online: A Short (and Brutish) History* (SAGE Publications, 2017) 68.

⁵² Jane (n 51) 93–4; Eva Cox, ‘Madonna or Whore; Frigid or a Slut: Why Women Are Still Bearing the Brunt of Sexual Slurs’ *The Conversation* (online) 3 July 2018 <<http://theconversation.com/madonna-or-whore-frigid-or-a-slut-why-women-are-still-bearing-the-brunt-of-sexual-slurs-99292>>; Jenna Price, ‘Misogynists and Nut Jobs: Gillard Stares down Blogosphere’ *The Conversation* (online) 24 August 2012 <<http://theconversation.com/misogynists-and-nut-jobs-gillard-stares-down-blogosphere-9045>>. See also Weston-Scheuber (n 10) 132–3 for a discussion of the abuse directed at Julia Gillard while Prime Minister of Australia.

Finally, our article also analysed the effect of intersectionality on the impact of GHS. We argued that GHS does not have an equal effect on all of those who identify as women.⁵³ As with most forms of discrimination, race, class, ethnicity, religion, disability, sexuality, age, and trans identity are all attributes which affect the likelihood that a particular woman will be targeted by GHS, and the severity of the harm caused. Academic research has found that non-heterosexuals are significantly more likely than heterosexuals to experience online gender and sexuality-based harassment,⁵⁴ and that anonymous online mobs are more likely to attack lesbians and women of colour.⁵⁵ In Australia, the intersectionality between misogyny and other forms of hate or prejudice is evident in the hate speech directed at Indigenous women. For example, Indigenous politician Linda Thorpe stated that, although she was used to being targeted for speaking about issues that were important to her, once she entered Parliament, the hate speech she received took on a ‘gendered nature’.⁵⁶ Further, Indigenous activist Tarneen Onus-Williams received rape threats⁵⁷ and was body-shamed after a speech on Australia Day 2018.⁵⁸ These examples illustrate that GHS cannot be analysed in isolation from other forms of hate speech, as ‘not all women are equally vulnerable to GHS or vulnerable to the same kinds of GHS.’⁵⁹

A. Online Gendered Hate Speech

Our 2018 article did not specifically address the effect of the internet on the prevalence and impact of GHS as it was outside the scope of our research. Nevertheless, any thorough consideration of law reform to address GHS cannot ignore the significance of online technologies, including social media platforms, blogs, video sharing services, and email.

Survey data from Australia and the UK has shown that online GHS is relatively common among adults, with 1 in 5 Australian participants reporting that someone had posted offensive or degrading comments about their gender.⁶⁰ Women, and young women in particular, are disproportionately the targets of GHS online.⁶¹ Attacks on women are also more likely to be sustained, sexualised and violent.⁶²

As discussed above, female journalists, activists and politicians are particularly vulnerable to being targeted with GHS online. Recent research has also highlighted the widespread abuse of

⁵³ D’Souza et al (n 2) 971–2.

⁵⁴ Powell and Henry (n 43) 19.

⁵⁵ Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), cited in Powell and Henry (n 3) 169.

⁵⁶ Nakari Thorpe, ‘Why Are Aboriginal Women in Australia Hit with Racism and Sexual Threats for Sharing Their Views?’ *NITV News* (online) 6 February 2018 <<https://www.sbs.com.au/nitv/nitv-news/explainer/why-are-aboriginal-women-australia-hit-racism-and-sexual-threats-sharing-their-views>> cited in D’Souza et al (n 2) 971.

⁵⁷ Thorpe (n 56).

⁵⁸ Tim Blair, ‘Burn Baby Burn: Oz Day Inferno’ *The Daily Telegraph* (online) 27 February 2018 <<https://www.dailytelegraph.com.au/blogs/tim-blair/burn-baby-burn-oz-day-inferno/news-story/5af13786c0ae3020f1d650a3f3280028>> cited in D’Souza et al (n 2) 971.

⁵⁹ D’Souza et al (n 2) 972.

⁶⁰ Powell and Henry (n 3) 172.

⁶¹ *Ibid.*

⁶² The Australia Institute (n 1) 2.

female athletes and sportswomen online. In April 2019, Plan International released a snapshot analysis, comparing commentary concerning sportswomen with commentary related to sportsmen in Australia.⁶³ The research found that ‘sportswomen attracted more than three times the number of negative comments than sportsmen’.⁶⁴ Twenty-three percent of all negative commentary was sexist, 20 percent was belittling of the athlete’s sporting ability, and 14 percent was sexual in nature.⁶⁵ The report also drew a link between the online abuse of sportswomen and the lower participation of girls and women in sports, the silencing of women and restriction of their involvement in public life, and harm to mental health and performance.⁶⁶

Australian female athletes have themselves written and spoken about the negative impacts of GHS against sportswomen.⁶⁷ The most prominent recent example of online gendered abuse of a female athlete was the GHS directed at AFLW star Taylor Harris after the publication of a photo of Harris on the 7AFL Facebook page in March 2019.⁶⁸ Although many were quick to condemn the abuse, Harris stated that the trolling was ‘sexual abuse on social media’⁶⁹ and that it made her feel uncomfortable in her workspace.⁷⁰

The use of GHS in an attempt to silence women and prevent them from participating in civil society (and sport) is not a new phenomenon. There is research examining the prevalence and effects of GHS dating back to the 1990s.⁷¹ However, this does not mean that online GHS is merely a continuation of offline GHS, or a ‘recognisable crime committed in a completely different way.’⁷² Rather, traditional conceptions of the criminal law have limited hope of confronting harms caused by online environments.⁷³ Failing to recognise the distinctive features of the internet – such as the ability to communicate across vast geographical distances, to a large number of people instantaneously, to ‘pile on’ a target, and for a user to hide their identity – would be to ignore the distinct and specific harms caused by GHS online.⁷⁴ Such

⁶³ *Snapshot Analysis: Social media commentary of women athletes and male athletes* (Report, 18 April 2019) <<https://www.plan.org.au/-/media/plan/images/learn/who-we-are/blog-media-images/2019/240419-snapshot-analysis/plan-international-australiasnapshot-analysis-social-media-commentary-of-sportswomen-and-sportsmenfin.pdf?la=en&hash=4261B77794F748501C28E716B4E2D97F748E7146>>.

⁶⁴ *Ibid* 2.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 3–4.

⁶⁷ Darcy Vescio, ‘Words Reflect More on Trolls’, *Herald Sun* (Melbourne, 16 February 2019).

⁶⁸ See Patrick Wood and James Maasdorp, ‘Tayla Harris say trolls’ social media comments on AFLW photo were ‘sexual abuse’, *ABC News Breakfast* (online) 20 March 2019 <<https://www.abc.net.au/news/2019-03-20/tayla-harris-felt-sexually-abused-aflw-photo-trolls-seven/10919008>>.

⁶⁹ *Ibid*.

⁷⁰ Tom Cowie, Yan Zhuang and Simone Fox Koob, ‘Tayla Harris worried for her safety, describes trolling as “sexual abuse”’ *The Age* (online) 20 March 2019 <<https://www.theage.com.au/sport/afl/tayla-harris-worried-for-her-safety-describes-trolling-as-sexual-abuse-20190320-p515y4.html>>.

⁷¹ Jane (n 51) 8. See also Nielsen (n 7).

⁷² Peter N Grabosky, ‘Virtual Criminality: Old Wine in New Bottles?’ (2001) 10(2) *Social & Legal Studies* 243, 243, quoted in Nicola Henry and Anastasia Powell, ‘Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence’ (2015) 21(6) *Violence Against Women* 758, 763.

⁷³ Henry and Powell (n 72) 765.

⁷⁴ Jane (n 51) 56; Powell and Henry (n 43) 2–3.

conceptions of online GHS also result in minimisation of the harm suffered and victim-blaming of those targeted by GHS.⁷⁵

Harms caused by online GHS should be taken as seriously as harms caused by other forms of GBV.⁷⁶ In addition, any attempts at law reform to address GHS need to reflect the distinctive features of the internet and social media platforms, and provide sufficient power and resources to investigative bodies to allow them to thoroughly investigate complaints, whether criminal or civil.

IV. LEGISLATING AGAINST GENDERED HATE SPEECH IN AUSTRALIA

In our article, we examined how GHS is (or is not) addressed within the Australian legislative framework by examining both anti-hate speech laws and anti-discrimination laws at the federal and state/territory levels. Our article included two tables – Table 1 set out legislation prohibiting hate speech in Australia,⁷⁷ whereas Table 2 set out anti-discrimination legislation.⁷⁸ We have attached an updated table outlining anti-hate speech laws in Australia (Appendix A) as some legislation has changed since the publication of our article.

A. Anti-hate speech laws in Australia

In our article, we analysed anti-hate speech legislation in both the federal jurisdiction, and in each State and Territory. From our analysis, we found that gender is not a protected attribute in *any* jurisdiction.⁷⁹

Most jurisdictions in Australia have legislation prohibiting hate speech based on a variety of characteristics, including race, religion or sexuality.⁸⁰ Generally, this legislation prohibits ‘vilification’ (see above discussion), which is primarily defined as conduct that incites hatred against, serious contempt for, or severe ridicule of a person or class of persons based on a particular attribute.⁸¹ Most jurisdictions, including Victoria, include both civil and criminal anti-hate speech laws. However, Western Australia only has criminal vilification laws, and Tasmania only has civil vilification laws. The Northern Territory is a notable exception as it currently has no legislative protection against vilification on any grounds.

⁷⁵ Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014) 74–8.

⁷⁶ Jane (n 51) 765.

⁷⁷ D’Souza et al (n 2) 948.

⁷⁸ Ibid 951.

⁷⁹ Ibid 945–54.

⁸⁰ See **Appendix A**.

⁸¹ Section 67A of the *Discrimination Act 1991* (ACT) and ss 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic) also include conduct that incites repulsion of a person or class of persons based on race or religion. Sections 76–9 of the *Criminal Code Compilation Act 1913* (WA) include conduct that is intended to increase animosity towards a racial group or a person as a member of a racial group. ‘Animosity towards’ is defined in s 76 as ‘hatred of or serious contempt for’.

All jurisdictions (except for the Northern Territory) prohibit racial vilification in some form. Religious vilification is addressed in Victoria, New South Wales, the Australian Capital Territory, Tasmania and Queensland. Hate speech based on sexuality (stated as either homosexuality, sexual orientation or sexual activity) is prohibited in New South Wales, the Australian Capital Territory, Queensland and Tasmania.

When we turn our attention to the prohibition against different forms of GHS, protection becomes even more piecemeal. Vilification based on ‘gender identity’ is prohibited in New South Wales, the Australian Capital Territory and Queensland. Although the definition of ‘gender identity’ varies somewhat between jurisdictions, in the most common definition (in New South Wales and the Australian Capital Territory) it is defined as ‘the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.’⁸² This broad definition may be interpreted to cover GHS targeted at cis women, but it was not explicitly intended to do so (being a modification of the previous terminology of ‘trans gendered’).⁸³ Other than intersex status vilification – which is only addressed in New South Wales and the Australian Capital Territory, this is the extent of anti-vilification laws directly addressing GHS in Australia.

There are prohibitions in federal criminal law that could loosely be categorised as anti-vilification laws. Sections 80.2A and 80.2B of the *Criminal Code* prohibit the urging of violence, or use of force, against a group or an individual member of a group respectively based on race, religion, nationality, national or ethnic origin or political opinion.⁸⁴ However, these laws are perhaps better categorised as laws of sedition, as they require any offending hate speech to ‘threaten the peace, order and good government of the Commonwealth’.⁸⁵ Analysis of reforms of these provisions in 2005 makes it clear that the expansion of the scope of these laws was intended to prohibit the incitement of violence.⁸⁶ Nonetheless, despite the well documented correlation between GHS and GBV, arguably a phenomenon that threatens the peace and order of Australia, gender is again conspicuously absent from these provisions.

B. Anti-discrimination legislation in Australia

As summarised in Table 2 in our article, Gender is recognised as a characteristic worthy of protection in anti-discrimination legislation across Australia.⁸⁷ Although definitions vary

⁸² *Crimes Act 1900* (NSW) s 93Z(5); *Discrimination Act 1991* (ACT) Sch Dictionary.

⁸³ NSW, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 41–4 (Mark Speakman). During the second reading speech, the Attorney-General stated that the legislation updated ‘existing terminology of “homosexual” and “transgendered” with “sexual orientation” and “gender identity” to reflect modern terminology’, 42.

⁸⁴ *Criminal Code Act 1995* (Cth) ss 80.2A, 80.2B.

⁸⁵ See Simon Bronitt and James Stellios, ‘Sedition, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror”’ (2006) 30(3) *Melbourne University Law Review* 923, 925–8.

⁸⁶ *Criminal Code* s 80.2, as amended by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 12; *Ibid*.

⁸⁷ See D’Souza et al (n 2) 950–4.

slightly between jurisdictions, generally, discrimination is unfavourable, or less favourable, treatment of a person based on a protected attribute.⁸⁸

Unlike anti-vilification legislation, gender (or sex) is a protected attribute in *all* anti-discrimination legislation across Australia. This clearly demonstrates that both Parliament and the community recognise the ongoing problem of gender discrimination.

However, this does not mean that legislation to address GHS is not necessary. This is because the important protections provided by anti-discrimination legislation only extend to certain circumstances. There are variations across the different jurisdictions, but generally the legislation addresses discrimination in the course of employment, partnerships, education, and the provision of goods, services and accommodation.⁸⁹ Accordingly, '[anti-]discrimination legislation is aimed at the decision-making processes of institutional actors and protecting individuals from unfair treatment by such actors.'⁹⁰ This means that interactions between individuals outside such institutional contexts – including most online GHS – fall outside the protections of anti-discrimination legislation.

C. Miscellaneous provisions

In our article, we also discuss other laws that may address specific instances of GHS, such as harassment, assault, stalking or cyberbullying.⁹¹ For example, existing offences in the Commonwealth *Criminal Code* which criminalise the use of the internet to 'menace, harass or cause offence' could address certain types of GHS.⁹² GHS may also take the form of incitement to rape, or death threats, which are prohibited in most jurisdictions.⁹³ Additionally, in Victoria, 'Brodie's Law' was enacted in 2011, extending the crime of stalking to include publishing material online with the intention of causing 'physical or mental harm to the victim, including self-harm'.⁹⁴ The Office of the eSafety Commissioner also has the power to investigate complaints about cyberbullying, some of which may be classified as GHS, but only when the content is targeted at an Australian child.⁹⁵

⁸⁸ See *ibid* 950.

⁸⁹ See, eg, *Sex Discrimination Act 1984* (Cth) pt II divs 1–2.

⁹⁰ D'Souza et al (n 2) 953.

⁹¹ *Ibid* 946.

⁹² *Criminal Code Act 1995* (Cth) s 474.17. But see Gail Mason and Natalie Czapski, 'Regulating Cyber-Racism' (2017) 41(1) *Melbourne University Law Review* 284, 304–6. Mason and Czapski critique the usefulness of s 474.17 as an avenue for redress for online vilification, as the conduct in question must reach a high threshold of seriousness and the standard of the 'reasonable person' is not settled in law.

⁹³ See, eg, *Crimes Act 1958* (Vic) s 43 'Threat to Commit a Sexual Offence', s 20 'Threats to kill'; *Crimes Act 1900* (NSW) s 80G 'Incitement to Commit Sexual Offence'; Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of the Criminal Law' (2016) 25(4) *Social & Legal Studies* 397, 410.

⁹⁴ *Crimes Act 1958* (Vic) s 21A. The *Crimes Amendment (Bullying) Act 2011* (Vic) s 3(2)–(3) updated the definition of stalking to include conduct that is intended to cause 'physical or mental harm to the victim, including self-harm'. See also 'Bullying – Brodie's Law' *Department of Justice and Community Safety Victoria* (web page) <<https://www.justice.vic.gov.au/safer-communities/crime-prevention/bullying-brodies-law>>.

⁹⁵ *Enhancing Online Safety Act 2015* (Cth) s 15. See also 'Our legislative functions', *eSafety Commissioner* (web page) <<https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions>>.

These laws are inadequate and incapable of dealing with many forms of GHS. For example, not all GHS is directed towards a particular individual. It may instead may be directed at women generally, or particular types of women (for instance lesbians, women of colour, feminists or trans-women).⁹⁶ This type of GHS has been found on men’s rights or anti-feminist or Incel websites.⁹⁷ These types of GHS are not consistently prohibited in Australia.

In addition, even if a specific incident of GHS is addressed by an existing offence or civil law, there are significant barriers that must be overcome before these laws can be enforced. Most importantly, the police or other prosecuting or investigative agency must be able to identify the person who has used GHS. In the era of the internet, where many users of social media platforms, gaming sites and chat rooms are able to remain anonymous, this can be a very difficult task. Accordingly, for laws against GHS to be effective, police and investigative agencies must have sufficient powers to access information. This may include powers to apply to a court or tribunal for an order compelling social media companies and other online platforms to hand over relevant information. In addition, Parliament should work closely with social media companies, as an essential line of defence against GHS, to ensure that platforms have strong policies against GHS and that policies are effectively enforced.

Finally, as we argued in our article, there is symbolic importance in recognising the specific harms caused by GHS by legislating to protect against this type of behaviour. Forcing women who are subjected to GHS to rely on existing piecemeal provisions which address particular forms of GHS misrecognises or overlooks the phenomenon of GHS itself, and its harms as a form of hate speech against a particular demographic group.

V. RISKS ASSOCIATED WITH LAW REFORM

As discussed in previous sections, law reform to address GHS would be a significant change in most jurisdictions in Australia. It is important to consider the risks of such reform, especially given the absence of any constitutionally protected right to freedom of expression (beyond an implied right of political communication) in Australia.⁹⁸

The first risk is that such reforms may have little or no impact – that they would not be enforced and would not be used to address the harms caused by GHS. This is a significant risk given the low enforcement rates of existing hate speech laws in Australia.⁹⁹ However, hate speech laws do not simply fulfil a regulatory function: they also have symbolic power. Symbolic objectives,

⁹⁶ Powell and Henry (n 3) 170.

⁹⁷ See eg, Emma Jane, ‘Stacys, Brads and “reverse rape”’: Inside the terrifying world of “incels”’, *ABC News Opinion* (online) 27 April 2018 <<https://www.abc.net.au/news/2018-04-27/incels-inside-their-terrifying-online-world/9700932>>; Powell and Henry (n 3) 170–1.

⁹⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁹⁹ See Nicole Asquith, ‘The governance of denial: Hate crime in Australia and New Zealand’ in Nathan Hall et al (eds) *The Routledge International Handbook on Hate Crime* (Routledge, 2014) 174, 184. See also previous research which indicates that anti-hate crime laws in Australia are rarely used: See, eg, Hagar Cohen and Scott Mitchell, ‘Hate crime laws rarely used by Australian authorities, police figures reveal’ *ABC News Background Briefing* (web page) 3 May 2019 <<https://www.abc.net.au/news/2019-05-03/hate-crimes-rarely-prosecuted-in-australia/11055938>>.

like the denunciation of prejudice and the recognition of harms suffered by particular social groups, have been recognised as a key value of such laws.¹⁰⁰ Even if infrequently enforced, laws against GHS would therefore still communicate a strong message that such speech is immoral and inappropriate in Australian society.

Another risk is that laws against GHS may only be selectively enforced, in troubling or harmful ways. This is particularly a risk where the legislative provisions set out protections on the basis of a particular kind of difference (such as race or gender), which can be read as offering protections to all social groups (that is, *all* races and genders) equally. While this ‘symmetry’ may formally reflect the ideal of equality of different social groups before the law,¹⁰¹ it can produce problems in the operation of hate crime laws, including anti-vilification laws. Such an approach has also been critiqued for the way it falsely assumes an ‘equal playing field’, based on a dehistoricised and depoliticised view of social relations.¹⁰²

If laws against GHS were applicable to men in the same way as they are to women or other genders, this would ignore the role of such speech in GBV, patriarchal subjugation and misogyny. Feminist analysis and debate in public spheres – whether online, through the media, or elsewhere – raises awareness of the connections between gender and violence. Such debate and activism often attract the defensiveness, anger and hostility of men, as illustrated in the many examples of GHS we discuss in this submission and in our article. The risk is therefore that laws against GHS could be used by men to silence such debates, for instance regarding toxic masculinity or male violence. If not carefully framed, these laws could even be used to silence women’s narratives of victimisation and misogyny such as in the #MeToo movement, or to challenge government reports and campaigns which address GBV. More than a mere side-effect or unexpected co-opting, such a ‘misfire’ of hate speech laws would directly undermine the very aims of these reforms.¹⁰³

Internationally, we see that hate crime protections have often been ‘used against minority and/or vulnerable groups by majority complainants’.¹⁰⁴ In the Australian context, this was demonstrated in the case of *Police v A Child*,¹⁰⁵ where a 16-year-old Aboriginal girl was the first person to be charged under WA’s hate crime provisions, for calling a 19-year-old woman a ‘white slut’ during a physical attack.¹⁰⁶ This was despite the relevant incitement provisions having been introduced as a response to violence and vandalism by the Australian Nationalist Movement against racialised minorities.¹⁰⁷ While the racial vilification charges were dismissed

¹⁰⁰ See Gail Mason, ‘The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-motivated Crime’ (2014) 23(3) *Social & Legal Studies* 293, 295-6.

¹⁰¹ *Ibid* 297.

¹⁰² Emma K Russell, ‘Punishment in a “Tolerant Society”’: Interrogating hate crime law reform discourse’ (2017) 26(3) *Griffith Law Review* 315, 320.

¹⁰³ Mason (n 100) 297.

¹⁰⁴ Asquith (n 99) 182.

¹⁰⁵ (Kalgoorlie Children’s Court, Magistrate Auty, 14 September 2006) [unreported].

¹⁰⁶ See David Weber, ‘WA court dismisses charge over racial insult’ *ABC Local Radio* (Radio National, 15 September 2006) <<https://www.abc.net.au/am/content/2006/s1741596.htm>>.

¹⁰⁷ See Gail Mason, ‘Hate Crime Laws in Australia: Are they achieving their goals?’ (2009) 33(6) *Criminal Law Journal* 326, 331–2.

– a decision endorsed by then Attorney-General Jim McGinty – it was not because the purpose of the legislation was to protect racial minorities rather than ‘white’ Australians.¹⁰⁸ Similarly, the case of *McLeod v Power*¹⁰⁹ involved a civil complaint by a white correctional officer at a prison against an Aboriginal visitor. Again, the complaint was ultimately unsuccessful, but not because the relevant legislative provisions were interpreted as intended to protect members of racial minorities.¹¹⁰

These cases demonstrate the danger of symmetry in hate crime laws – whether they be criminal or civil provisions – being interpreted as protecting all groups equally, rather than in the context of social inequality and subjugation which led to their initial introduction. Social groups with greater resources, awareness of laws, confidence and sense of entitlement to pursue disputes and enforce their legal rights, are more likely to pursue legal protection and to access the legal system to their advantage. Unless the social justice concerns behind such laws are foregrounded and kept visible, this means that they are in danger of being co-opted by more powerful social groups, to silence minorities.

The cases discussed above also illustrate another danger regarding hate speech laws, given the different ways in which social groups interact with legal processes and institutions. In particular, they both involve the over-policing of Indigenous individuals and communities.¹¹¹ This remains an important consideration where legal reforms, despite their progressive aims, reflect an expansion of state intervention and punishment into previously unregulated spheres of social life:

researchers cognisant of the structural conditions of settler colonialism have traced how punitive ‘law and order’ drifts in criminal justice policy in Australia typically target and most severely disadvantage Aboriginal and Torres Strait Islander peoples.¹¹²

This dynamic extends to other racialised minorities in Australian society, as demonstrated by Gail Mason’s review of discretionary sentencing laws which are intended to address hate or prejudice in crime:

In approximately two thirds of the cases in the study, the offenders, all of whom were male, came from racial or religious minority, refugee or non-English-speaking immigrant backgrounds (e.g. Aboriginal, Lebanese, Sunni Muslim,

¹⁰⁸ Rather, it was that the laws were said to be intended to deal with severe abuse, rather than ‘petty name-calling’: see Weber (n 106).

¹⁰⁹ [2003] FMCA 2 (14 January 2003).

¹¹⁰ Instead, it was primarily on the basis that ‘whiteness’ ‘per se is not ... descriptive of any particular ethnic, national or racial group’: *McLeod v Power* [2003] FMCA 2 (Brown FM at [59]). For an alternative version of this judgment see Katharine Gelber, ‘Commentary on *McLeod v Power*’ in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Bloomsbury Publishing, 2014) 405 and Jennifer Nielsen, ‘*McLeod v Power*’ in Heather Douglas et al (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Bloomsbury Publishing, 2014) 409.

¹¹¹ On the criminalisation of indigeneity and the complex relationship between colonisation/colonialism and hate crime governance, see Asquith (n 99) 174.

¹¹² Russell (n 102) 327–8.

Chinese, Maori, Somalian, Turkish, Italian and Thursday Islander) ... The most common scenarios involved members of one racial/religious/cultural minority targeting the members of another. ... [I]t is concerning that communities who are subject to larger forces of social and economic marginaliation are also over-represented as the perpetrators of prejudice-motivated crime under these laws. ... [T]he repeated application of these laws to offenders from racial, religious and cultural minorities means that not only do these groups bear the brunt of the punishment, they also end up carrying the bulk of the blame for prejudice-motivated crime[.]¹¹³

Any reforms to hate speech laws must attend to the intersectional nature of oppression and discrimination, and the risks that such laws will be used in over-policing already marginalised and criminalised communities. Particularly where discretion is exercised by institutional actors like police and prosecutors, if these risks are not actively mitigated then hate speech laws may simply reproduce and reinforce patterns of over-policing and inequality.

In the context of feminist speech, we can reflect on these dynamics of race and ethnicity to identify a further specific risk – that laws against GHS could be used to silence speech about the connections between gender and racism, colonialism and white supremacy. Above we identified that sensitive and angry men may attempt to use of hate speech laws to shut down journalism and activism about masculinity and violence. Likewise, it is possible that sensitive and upset white women could use these laws to target Indigenous women and other women of colour who draw attention to the role of white women and white womanhood, in colonial violence and white power structures – voices such as Aileen Moreton-Robinson, Celeste Liddle, Eugenia Flynn, and Ruby Hamad.¹¹⁴ Drawing on Hamad’s work in particular, we can characterise this as the risk that laws against GHS will be used as a weaponisation of white women’s tears, against women of colour.¹¹⁵ Again, this would be a misfiring of hate speech laws.

‘Whether the crime laws do misfire ... will depend on a number of variables, including the empirical conditions under which they operate, the manner in which they are applied and the normative statements that flow from their practical application’.¹¹⁶ To avoid such misfiring, it is essential that reforms to hate speech laws emphasise their purpose within the context of social inequity and patriarchy – that laws against GHS are explicitly framed as targeting misogyny and protecting women (or other genders) rather than men. They must also be explicitly framed as intersectional – seeking to recognise the ways in which gender oppression is connected to other forms of oppression such as on the basis of race, Indigeneity, sexuality,

¹¹³ Mason (n 100) 302–3, 306.

¹¹⁴ While white feminist scholars and activists may also explore such themes – see for instance the work of Kyla Schuller or Robin DiAngelo – they are less likely to be targeted or silenced than are women of colour.

¹¹⁵ See especially Ruby Hamad, *White Tears, Brown Scars* (Melbourne University Publishing, 2019) chap 5 ‘When Tears Become Weapons: White Womanhood’s silent war on women of colour’.

¹¹⁶ Mason (n 100) 297 citing Michel Callon, ‘What does it mean to say that economics is performative?’ in Donald Mackenzie, Fabian Muniesa and Lucia Siu (eds) *Do Economists Make Markets? On the Performativity of Economics* (Princeton University Press, 2008) 311.

disability, etc. This framing is essential to guide judicial and other interpretations of any provisions which on their face appear ‘symmetrical’.

Another important strategy is to actively shape the ways in which law reforms are understood and operationalised by the individuals and institutions through which they will work. As Mason has reflected regarding the research on hate crime laws in practice, ‘statutory rules and procedures can be given quite different meanings in the hands of poorly-led police officers, overzealous prosecutors or resistant judges’.¹¹⁷ Training and capacity-building is therefore crucial, so that those institutional actors involved in the application of GHS laws – police, prosecutors, judiciary, and government agencies – are equipped with the tools to operationalise those laws as intended. Without such training, laws risk targeting the wrong kinds of speech and silencing the wrong conversations about gender.

VI. RECOMMENDATIONS

Based on our research, both our article and additional research undertaken by Ms Shackleton, as outlined in this submission, we make the following recommendations to the Committee:

Recommendation 1: Parliament should introduce legislation to protect against GHS. This could be done in one of several ways, including -

- a. ‘Gender’ be added as a protected attribute to existing anti-vilification protections (both civil and criminal) in Victoria under the *Racial and Religious Tolerance Act 2001* (Vic).
- b. ‘Gender’ to be added as a protected attribute to any new formulation of anti-vilification legislation introduced at the conclusion of the Inquiry.
- c. Parliament introduces anti-GHS legislation that is victim-focused. This would be modeled after s18C of the *Racial Discrimination Act 1985* (Cth), and would protect against GHS which occurs in public, that is ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’ another person or a group of people based on their gender, or perceived gender. This law would be civil and could be inserted into the *Equal Opportunity Act 2010* (Vic). In line with other powers under the *Equal Opportunity Act 2010* (Vic), the Victorian Equal Opportunity and Human Rights Commissioner would have the power to mediate complaints concerning GHS.

Recommendation 2: To protect against co-opting of anti-GHS legislation, such legislation should make it clear that its purpose is to protect against historically marginalised groups. This could be through inclusion of a legislative provision which states that the purpose of the legislation is to protect historically marginalised groups. This purpose

¹¹⁷ Mason (n 100) 297.

should also be clearly set out in both the second-reading speech and explanatory memorandum.

Recommendation 3: Sufficient powers be granted to the Victorian Equal Opportunity and Human Rights Commissioner, the Victoria Police, and other relevant investigative agencies or tribunals to compel social media companies and other internet platforms to release information to law enforcement and other investigative agencies for the purpose of investigating, mediating and prosecuting a complaint.

Recommendation 4: Programs be designed, funded and implemented to educate the public, media, government departments and police about changes to the law that are designed to protect against GHS. For example, education programs could be run by the Victorian Equal Opportunity and Human Rights Commission or Government Departments. Education programs should incorporate ideas around the purpose of these laws and which types of complaints are appropriate for criminal prosecution. This would minimise the risk of these laws being used to over-police already marginalised communities.

VII. CONCLUDING REMARKS

The Victorian Parliament should adopt legislation which protects against GHS. By legislating to protect against GHS, Parliament would be demonstrating its commitment to women's safety and equality, both online and offline, and would be adapting to modern approaches to speech, including technologically supported engagement. Parliament would also be demonstrating support for the development of new laws that increase civic and public participation not only for women but for a range of other marginalised groups and would be continuing the trajectory of adopting law reform that improves the lives of Victorians and sets world class standards.