T R A N S C R I P T

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Anti-Vilification Protections

Melbourne—Wednesday, 24 June 2020

(via videoconference)

MEMBERS

Ms Natalie Suleyman—Chair
Mr James Newbury—Deputy Chair
Ms Christine Couzens
Ms Emma Kealy
Ms Michaela Settle
Mr David Southwick
Mr Meng Heang Tak

WITNESS

Dr Bruce Baer Arnold, Assistant Professor, CELTS Fellow and Juris Doctor Program Director, Canberra Law School, University of Canberra.

The CHAIR: I declare open the Legislative Assembly Legal and Social Issues Committee public hearing for the Inquiry into Anti-Vilification Protections in Victoria. Please ensure mobile phones have been switched to silent and the background noise is minimised.

I acknowledge the traditional owners of the land on which we are meeting. I pay my respects to their elders past and present and the Aboriginal elders of other communities who may be here today.

All evidence taken at this hearing is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to provisions of the Legislative Assembly standing orders. Therefore the information you provide during the hearing is protected by law. However, any comments repeated outside the hearing may not be protected. Any deliberate false evidence or misleading evidence to the committee may be considered a contempt of Parliament.

I now welcome Dr Bruce Arnold to provide evidence to the committee. You will have up to 10 minutes, followed by questions from committee members. Welcome, Dr Arnold.

Dr ARNOLD: Good morning. I will not waste your time with a long introductory statement. I would like to preface my testimony by indicating that the two submissions that you have got are co-authored. My name is Dr Bruce Baer Arnold, I am an academic and I teach law at the University of Canberra, and I am co-authoring with Dr Wendy Bonython, who is an associate professor in law at Bond University.

In terms of the statement, if I have the committee's permission to proceed, last year the Premier said:

> … we wonder why so many people are still forced to drape their lives in shame.

The committee's hearings today are an opportunity to ask why so many people are still forced to drape their lives in fear. The hearings are an opportunity to encourage the government and more broadly society in Victoria and elsewhere to remove that fear. Our submissions suggest that Victoria can reduce fear that is attributable to hate. Vilification is a matter of unrestrained hate. It is a matter of harm. Social media platforms do have the scope to restrict vilification. They should be responsible. They should do so. Victoria's vilification regime should be extended to address vilification regarding gender, sexuality and other attributes beyond ethnoreligious affinity. Such an extension is overdue, it is consistent with the Victorian charter and it is achievable. Thank you.

Ms COUZENS: In your submission you discuss the need for national leadership on online vilification. In your view what is the role of the commonwealth and state governments as well as the private sector, such as social media companies, in dealing with online vilification?

Dr ARNOLD: I think we all need to step up. The commonwealth is particularly important because the commonwealth, under the national constitution, has the power regarding telecommunications. It also has power regarding corporations. Victoria I think has a significant role, firstly in updating Victorian legislation, and secondly in sending a message both to Victorians and the rest of Australian society that vilification is not appropriate, and then following that up by working with the other governments so that we have a coherent regime across Australia.

Ms COUZENS: Do you have any ideas on what that might look like?

Dr ARNOLD: As I flagged in the submissions, we need education. We need fairly positive statements—and this is one area where the Victorian government I think is to be commended—statements by ministers saying, 'Look, this simply isn't permissible, it simply isn't appropriate', statements by ministers and for that matter statements by, if you like, lower level members of Parliament and members of the opposition: 'To be Australian is not to be hateful', 'Be conscious', 'Harm is not acceptable in Australian society'. And we should expect—and I think in many ways it is disappointing that we do not see this in parts of the mainstream media—say, corporate leaders and leading media figures to say, 'Yes, this is not right'.

I think it is deeply concerning that we have expressions of what many people would regard as hate speech—misogynistic vilification—coming from media commentators such as Alan Jones, people with what used to be called a bully pulpit. For that matter we see behaviour among senior judges, senior corporate figures that I think most people would regard as deeply hateful—appalling. The controversy that we have at the moment with claims regarding what appears to be serial misbehaviour on the part of a former High Court justice, it is admirable that he has been called out on this, but the overall message to women, gay people in Australia, trans people, people with cognitive difference, people who are autistic, aspie—whatever—should be that you should not be vilified but if someone does vilify you, you should have scope to do something about this.

And at a fairly practical level—please stop me if I am rambling—we need more than law. Ultimately law functions as a communications mechanism. It is a signal. It embodies social values. But to make it work we need people to step up and we need resourcing. A problem—and it is at a national level; it is not just in a particular jurisdiction—is that people who have legitimate complaints tend not to approach, if you like, human rights bodies or other bodies because they have a sense that nothing will be done, and often nothing will be done because of under-resourcing in those agencies rather than because the agencies have, if you like, no legal power.

So we need a fairly systematic response to vilification, one that involves law, one that involves, if you like, organisations—government bodies, parliaments, courts, corporations—walking the talk and basically shunning, among other things, expressions of misogyny, expressions of homophobia and expressions of hate on the basis of religion or ethnicity.

Ms COUZENS: Thank you, Bruce, and thank you for your time today.

Mr SOUTHWICK: Thanks, Bruce. I was just wondering where you see Victoria shaping up compared to some of the other states in terms of the laws and, more specifically, what would be some of the things we might be able to learn from some of the other states.

Dr ARNOLD: At the risk of giving MPs a lecture about law, I think you can learn quite effectively from legislation that we have got in other states—so in ACT, for example, it is the *Discrimination Act 1991*, in New South Wales it is the *Anti-discrimination Act 1977*, in Queensland the *Anti-discrimination Act 1991* and in Tasmania the *Anti-Discrimination Act 1998*. I am flagging those statutes because what we see there is an extension beyond religion, an extension beyond ethnicity, an extension that covers, for example, sexuality, covers gender and ideally in future may well cover vilification on the basis of, if you like, what some people have referred to as neurodiversity or cognitive difference—the fact that some people have psychiatric or psychological problems and they are stigmatised. Misogyny is an issue in Australia, and it is something that we could address.

Mr SOUTHWICK: I know you touched on it from the last question, but if you then overlay the legal and the criminal repercussions from some of this behaviour versus the education element of this, where do you kind of draw the line, and what roles, if you like, do we have to ensure that we educate again particularly from people that are acting let us call it from ignorance as opposed to being a serial offender what we do to ensure that those people that are the first-time offender are properly educated?

Dr ARNOLD: Well, I think you can have a fairly nuanced regime. Possibly because I have godchildren, possibly because I am 60-something, I think anti-vilification starts very early. It starts in primary school, if not earlier. You know, communicating to children, communicating to teenagers and to adults, 'Okay, it's not nice behaviour. How would you like it if this was done to you?'; with parents, 'How would you like it if, say, someone was slagging off your daughter or your son, for that matter?'. So, commit, you know. On that basis we need express, clear recognition of anti-vilification strategies in the school curriculum. We need proper resourcing of human rights bodies, equal opportunity bodies, so that they can take action, and they are not necessarily going to take punitive action. People will sometimes change their behaviour once they are alerted, 'Okay, you could get into real trouble with this'. We need appropriate legislation, and again, possibly I am a romantic given that I am fairly old, but we need examples.

It is appropriate for members of Parliament—ordinary members of Parliament rather than just the Premier—to step up and say, 'Okay, this is not right', and I am heartened in many ways by seeing the response among the overall legal profession and members of the public and certainly my students regarding the claims that have

been made about what you would otherwise consider to be an untouchable former High Court justice. People are calling him out, saying, 'This is not appropriate behaviour. It doesn't matter who's doing it. Whether we're talking about a tradie or we're talking about someone at the very top of the legal profession, this is not appropriate', and indeed recognising that there are concerns about similar behaviour across the legal profession.

And regrettably we see homophobic, misogynist, other statements being made by members of Parliament, and indeed at least one member of Parliament in Victoria, in my understanding, has been disaffiliated from the party on the basis of repugnant statements. The expression of those values—which are about power, their concern to harm—should be stigmatised. The person who is expressing those values should be shunned, should be reproved, and therefore that person's behaviour should be changed. Public communication about this example is really important. Some people inevitably will not change. For some people, if you like, their hate will be reinforced. But overall we can make Victoria and Australia a happier, more fruitful, economically productive place by seeking in a number of ways to restrict hate speech—and ultimately let us call it for what it is: it is hate speech.

Mr SOUTHWICK: Thank you very much for that; I appreciate it.

Ms SETTLE: Good morning, and thank you for your presentation. In your submission you talk about contextualising the RRTA's effectiveness in terms of prosecutions. You suggest that it was not ever set up just to churn through prosecutions.

Dr ARNOLD: Yes.

Ms SETTLE: Can you talk to us a bit about whether the prosecutions are an effective gauge? We have heard from other people that talk a lot about how few prosecutions there have been. How might we gauge the effectiveness, if not through prosecutions?

Dr ARNOLD: I think this is one of the great unknowns. In one of the submissions we flagged that what we are really talking about here are known unknowns. No government in Australia, as far as I am aware, has a really strong sense of, if you like, what is working. What we see with prosecutions, with litigation in other jurisdictions—so in New South Wales, for example; New South Wales is probably the jurisdiction where we have had the most action—what we see there I think is it is a way of changing consciousness. It is a way of getting attention that people are, firstly, prepared to take action. As a scholar of regulation this is a big issue in Australia. Many people disengage from, if you like, their rights because they have a sense, 'All right, nothing's going to be done'. It is a huge problem with the national privacy commissioner, for example. People do not complain because they have a sense that nothing is going to happen, and that is partly a matter of culture and that is partly a matter of resourcing.

So seeing people speaking out is important. Seeing prosecution is important. It sends a message to the society at large. It is the sort of thing that is likely to be picked up in the mass media. It is the sort of thing that is likely to be picked up in, say, social media. And I have flagged social media, social platforms if you like, a number of times in the two submissions because we know that platforms such as Twitter and platforms such as Facebook are rapidly superseding traditional media—the tabloids in Melbourne, the sole newspaper in Wagga in New South Wales where I grew up, which I think is down to about seven pages at the moment. People are abandoning traditional media. So an expectation that communication will occur through traditional media I think is overoptimistic.

The value of prosecutions, again, is it is law as a matter of signalling. It is a way of communicating to society at large that this behaviour is not appropriate. As I said, it is a known unknown, we just do not have data about this. But I suspect what we would see is, if we have a broader sense within the community that you do have rights and it is appropriate—it is legitimate, it is feasible—to speak out to assert your rights, the number of complaints would increase. We will not see, however, if you like, floodgates. It is interesting reading both media coverage and *Hansard* from when the Victorian legislation was first introduced. There were claims that the courts would be clogged up, we would have a tidal wave of frivolous litigation and that people should basically just toughen up. We have not seen that flood, and my sense is that we will not see that flood. But it is important to have ultimately some punitive sanction, rather than simply, 'Oh, well, it's okay; you've complained. We're a liberal democratic state. We have free speech, just like our right to bear arms, and it's okay—don't worry. Don't get the courts involved'. There is a value in involving tribunals and courts.

The CHAIR: I just have one more question. You submitted a supplementary submission to the committee on vilifications related to COVID-19.

Dr ARNOLD: Yes.

The CHAIR: Do you have any further comments to add regarding your submission, particularly in relation to your discussion about the response of the digital platform providers to COVID-19 online vilification?

Dr ARNOLD: I will be very quick, because I am conscious not to waste your time—

The CHAIR: You are not wasting our time. Thank you.

Dr ARNOLD: The response of the platforms in relation to COVID is absolutely fascinating. If we look globally over the last 15 years, the major platforms have argued, 'Well, really, we're just a pipeline. We should be immunised from responsibility. All we do is provide a pipe. Any concerns should be addressed to someone who's expressing hate, someone who's engaging in a scam—something like that. We will not intervene, and indeed any intervention would be contrary to our rights under the US free-speech regime'. What we have seen in relation to COVID is—unexpectedly—suddenly they are taking responsibility and they are saying, 'Well, okay, there is a public harm here. There is a serious harm. We will actually start to do filtering. We will unilaterally remove particular expressions'. So this is significant in terms of vilification because it suggests that actually they acknowledge they do have the scope to remove repugnant, misleading, hateful and harmful expression. They do have the technical power and they do have resources.

Possibly because I am 60-something and I have been teaching law for a number of years, my sense is what they are trying to do is they are pre-empting government intervention. In Australia we have work going on with the ACCC. The ACCC has expressed, I think, quite legitimate concern about the behaviour of Facebook and so on. So rather than sort of being forced to do anything, the platforms are stepping up and saying, 'Okay, leave us alone. We'll self-regulate'. It is an interesting approach. I think it is an inadequate approach, but it also signals they are acknowledging that they can actually filter. And why don't we go further? Why don't we require them to more actively address misogynist groups on, say, Facebook, groups that are anti-Semitic, groups that are homophobic? Here I am talking about groups rather than just the occasional deeply repugnant comment. Often we are talking about organised, systematic hate. They have the technology to do that and, I am sorry, they make—I was going to use a rather strong word—large amounts of money. They make large amounts of money, and they pay very little tax. They have the financial resources to put in either software or humans to reduce this. It is definitely within their capability. They should be encouraged, if not required, to do so.

The CHAIR: Thank you very much, Dr Arnold, for submitting today and taking the time. The next steps are that the committee will be deliberating on all submissions and we will be submitting very strong recommendations to Parliament. We will keep you updated with the progress. Thanks again for being here today.

Witness withdrew.