

# SOME ARE MORE EQUAL THAN OTHERS? DIGNITY, DIFFERENCE AND VILIFICATION

BRUCE BAER ARNOLD AND WENDY BONYTHON\*

*Vilification is expression that objectifies a group and serves to harm, most saliently through reducing the participation in public life by members of that group. This article critiques the Australian anti-vilification regime, arguing that it is both appropriate and feasible for governments to foster individual and collective flourishing through coherent restrictions on hate speech. The article suggests that such restriction are founded on a respect for human dignity rather than merely a concern for public order. This respect invokes both statements by politicians that signal the community's disdain for vilification on the basis of gender and sexual orientation rather than merely traditional restrictions regarding vilification in relation to ethnicity and religious affiliation. Australia can develop a progressive and coherent regime that provides consistency across jurisdictions whilst accommodating concerns regarding free speech.*

---

\* Dr Bruce Baer Arnold teaches equity, intellectual property and new technology law at the University of Canberra. His current research centres on regulatory incapacity and capture regarding high technology. He has written widely on data protection and privacy. Dr Wendy Bonython teaches and researches in torts and medical law at Bond University. A cross- disciplinary researcher with a PhD in molecular medicine, her research focusses on regulation and liability associated with medical devices, practitioners, services and institutions.

## CONTENTS

I	INTRODUCTION.....	34
II	VULNERABILITY AND ERASURE.....	35
III	LOOKING BEYOND THE PRIVILEGED CATEGORIES.....	38
IV	DIGITAL PLATFORMS.....	42
V	A FREEDOM TO COMMUNICATION BUT NOT TO HARM.....	45
VI	CONCLUSION.....	46

## I INTRODUCTION

Parents often advise that ‘sticks and stones may break your bones, but names will never hurt you’. This folk wisdom builds resilience amongst children but is at odds with the reality that expression on occasion does cause – and is intended to cause – harm. Vilification is expression that objectifies a group, contrary to the dignity of individuals within that group and the respect for diversity that is inherent in international human rights frameworks. It is expression that is intended to injure, most saliently through reducing participation in public life for members of the targeted group. It is contrary to the fundamental principles of equality, democratic pluralism and respect for individual dignity at the heart of the protection of human rights.<sup>1</sup> It is antithetical to community consciousness and reparation of historic wrongs, signalled in 2020 by Australia’s Black Lives Matter protests. It is not defensible simply as a matter of opinion or tradition. As such, it is legitimately restricted by law that serves to deter the incitement of violence and signals the wrongfulness of hatred.

This article offers a perspective on Australia’s incoherent vilification regime,<sup>2</sup> through the lens of the Victorian Parliament’s inquiry into said state’s Racial & Religious Tolerance Act.<sup>3</sup> In doing so, it complements other scholarship about #MeToo, contention at the Commonwealth and state levels regarding religious freedom, and self-regulation by digital platforms such as Facebook, Twitter and YouTube. It suggests that incoherence in

---

<sup>1</sup> *Cottrell v Ross* [2019] VCC 2142, [98] (Kidd CJ).

<sup>2</sup> Katharine Gelber and Luke McNamara, ‘Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided’ (2016) 39(2) *University of New South Wales Law Journal* 488.

<sup>3</sup> *Racial and Religious Tolerance Act 2001* (Vic).

Australian law both should and can be addressed without disproportionately inhibiting the implied freedom of political communication, invading the private sphere or creating a ‘lawyer’s picnic’. Part II identifies the incoherence of Australian vilification law, a matter of inconsistency and omissions that should be addressed to reduce substantive harms. Part III considers the Victorian regime, highlighting the need to address omissions in protection against vilification. Part IV discusses the scope for regulation of online vilification in Victoria, highlighting the need for greater responsibility on the part of digital platform operators. Part V then considers vilification in relation to Australia’s implied freedom of political communication, construed as a freedom to communicate but not harm. It argues that restriction of vilification is constitutionally permissible. Part VI offers a conclusion: systematic statute law changes in all jurisdictions alongside leadership by politicians.

## II VULNERABILITY AND ERASURE

Australian law, as a manifestation of a settler state, has traditionally privileged some communities, denied the dignity of others and reinforced community norms that are at odds with the respect due to every individual as a person. This is evident in the history of overtly racist mass media alongside the White Australia policy and in the historic denial of sexual citizenship to people with a same-sex orientation; for example, the criminalisation of male same sex activity and law around personal relationships. Vilification affects social and therefore legal understandings of cognitive difference.<sup>4</sup> Australia’s vilification and erasure is also evident in systemic discrimination on the basis of gender. It has resulted in an expression that objectifies particular communities on the basis of ethno-religious affinity, sexuality and gender. This expression might be a matter of discrimination in employment, disparagement in teaching or statements by politicians, desecration of graveyards or places of worship, and graffiti that denigrates the targeted community as ‘un-Australian’, innately inferior, dishonest, violent, lawless and unclean. It is broader than an express incitement to violence, such incitement being addressed under common and statute law.<sup>5</sup>

---

<sup>4</sup> Bruce Baer Arnold et al, ‘It Just Doesn’t ADD Up: ADHD/ADD, The Workplace and Discrimination’ (2010) 34(2) *Melbourne University Law Review* 349.

<sup>5</sup> See eg, *Crimes Act 1900* (NSW) s 93Z.

This pernicious objectification is an erasure of individuality and of rights on the basis that denigration is a social norm unrestricted by law. Vilification has not yet been addressed through a justiciable Bill of Rights enshrined in the national Constitution, a ‘grundnorm’ that is essentially silent about human rights and the vulnerability identified by theorists such as Martha Fineman.<sup>6</sup> The Constitution importantly addresses the expression of vilification in two ways. The first, perhaps most recognised by rights scholars, is the narrow implied freedom of political communication.<sup>7</sup> The second is the scope for shaping some expression through the Commonwealth’s powers regarding external affairs (salient for Australia’s commitment to human rights protection through adherence to international rights agreements), alongside telecommunications and corporation powers relevant for regulating digital platforms.<sup>8</sup> States and territories have statutes that refer to human rights but this law is inconsistent, often restricted to discrimination relating to a specific attribute and often silent on vilification.<sup>9</sup> We are all formally equal before the law as citizens,<sup>10</sup> but some are less equal than others and, in other words, more vulnerable to the harms associated with vilification.<sup>11</sup>

This inequality is a matter of both vulnerability and legal incoherence: differences in legal recognition of and remedies for vilification on the basis of jurisdiction, exacerbated by uncertainties regarding common law protection of free speech.<sup>12</sup> Expression that serves to harm, particularly that is intended to harm,<sup>13</sup> has come to be addressed in two ways.

---

<sup>6</sup> Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1, 9.

<sup>7</sup> See eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See also, Nicholas Aroney, ‘The Constitutional (in) Validity of Religious Vilification Laws: Implications for Their Interpretation’ (2006) 34(2) *Federal Law Review* 287; Rex Tauati Ahdar, ‘Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law’ (2007) 26 *University of Queensland Law Journal* 293.

<sup>8</sup> *Australian Constitution* s 51(i), (v), (xx), (xxix), (xxxvii).

<sup>9</sup> See generally *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld). See especially *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA).

<sup>10</sup> Wendy Bonython and Bruce Baer Arnold, ‘Freedom of Speech Under the Southern Cross—It Arrived and Departed by Sea?’ (2018) 107(2) *The Round Table* 203.

<sup>11</sup> Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251, 267; Martha Albertson Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4(3) *Oslo Law Review* 133.

<sup>12</sup> Dan Meagher, ‘Is There a Common Law ‘Right’ to Freedom of Speech?’ (2019) 43(1) *Melbourne University Law Review* 269.

<sup>13</sup> *Toben v Jones* [2002] FCAFC 158; *Executive Council of Australian Jewry v Scully* [1998] 79 FCR 537.

The first is the articulation of human rights through over-arching statutes in only three jurisdictions: Victoria, the Australian Capital Territory and Queensland.<sup>14</sup> These enactments are in practice advisory rather than offering strong remedies for vilification, such as a fine or requirement for public apology. They are, however, a valuable basis for public critique of specific anti-discrimination statutes and policies; for example, contributions to the inquiry by the Victorian Parliament's Legislative Assembly Legal & Social Issues Committee into the State's *Racial & Religious Tolerance Act*, discussed in Part III below.<sup>15</sup>

The second way involves an incoherent patchwork of anti-discrimination enactments at the national, state and territory levels that only peripherally deal with speech. This patchwork embodies the demarcation of responsibilities between the different jurisdictions, with some (such as New South Wales) providing a statutory response to vilification that is more positive than efforts of the Commonwealth and their state peers.

Incoherence reflects both an emphasis on discrimination in employment/services and a privileging of particular attributes such as religious affinity. It thus remains permissible to engage in misogynistic speech, exemplified by egregious characterisations regarding Julia Gillard, but not to refuse employment or access to services on the basis of gender.<sup>16</sup> Thus, individuals and groups may be targeted through such speech, yet have no legal redress.

Importantly, the legislation features substantial exclusions regarding discrimination by religious entities on the basis of faith. This privileging of faith is the focus of the contentious Commonwealth Religious Freedoms Bills<sup>17</sup> and similar proposals, notably the New South Whale's Religious Freedoms and Equality Bill sponsored by Mark Latham

---

<sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

<sup>15</sup> *Racial and Religious Tolerance Act 2001* (Vic); Legislative Assembly Legal & Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (2020).

<sup>16</sup> Kate Galloway, 'Alan Jones and Contempt for Women in the Public Sphere: Vilification?' (2012) 3 (September) *Women's Agenda*.

<sup>17</sup> Religious Discrimination Bill 2019 (Cth); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth).

and Fred Nile,<sup>18</sup> which can be read as intended to permit the vilification expressed by celebrities such as Israel Folau using the ‘bully pulpit’ of Twitter.<sup>19</sup>

### III LOOKING BEYOND THE PRIVILEGED CATEGORIES

The article began by arguing that vilification is significant and has not yet been coherently addressed under Australian law. This section engages with that incoherence, suggesting governments should consistently provide redress for those who suffer vilification on the basis of gender and sexuality.

The Victorian Parliamentary inquiry at the heart of this article deals with an Act narrowly concerned with racial and religious tolerance, and the lack thereof.<sup>20</sup> It is thus similar to the national *Racial Discrimination Act* that centres on ethno-religious affinity, with people who engage in discrimination often conflating ‘race’ with a specific faith such as Islam.<sup>21</sup> The Victorian statute preceded the state’s landmark Charter of Rights and Responsibilities.<sup>22</sup> It is narrower than anti-discrimination enactments in some Australian jurisdictions, which address vilification on the basis of sexual orientation and disability, thereby excluding some communities from redress.

Tasmania’s *Anti-Discrimination Act* for example includes offences of inciting hatred, serious contempt or severe ridicule of a person or persons on the grounds of race, religious belief or activity, disability and sexual orientation.<sup>23</sup> In New South Wales, the *Anti-Discrimination Act* prohibits vilification,<sup>24</sup> complemented by the State’s Crimes Act. The Discrimination statute in the Australian Capital Territory<sup>25</sup> and Anti-Discrimination statute in Queensland<sup>26</sup> similarly prohibit vilification. The Objects articulated when the Victorian Act was under initial consideration were to:

---

<sup>18</sup> Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW).

<sup>19</sup> Chris Middleton, ‘Wrestling with the Sacking of Israel Folau’ (2019) 29(9) *Eureka Street* 41.

<sup>20</sup> *Racial and Religious Tolerance Act 2001* (Vic) ss 3-4.

<sup>21</sup> *Racial Discrimination Act 1975* (Cth). See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002).

<sup>22</sup> Regarding responsibilities in relation to free expression see, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(3).

<sup>23</sup> *Anti-Discrimination Act 1998* (Tas) ss 17, 19-20.

<sup>24</sup> *Anti-Discrimination Act 1977* (NSW) ss 20B-C, 38S, 49ZT. See also *Burns v Smith* [2019] NSWCATAD 56; *Crimes Act 1900* (NSW) s 93Z.

<sup>25</sup> *Discrimination Act 1997* (ACT) s 67A.

<sup>26</sup> *Anti-Discrimination Act 1997* (Qld) ss 124A, 131A.

- provide a way for the victims of racial and religious vilification to obtain civil redress which is inexpensive and accessible;
- prohibit extreme behaviour that denies the right of Victorians of all racial backgrounds and religious beliefs to participate as equals in the community;
- promote conciliation to resolve civil complaints and be a means of overcoming prejudice and ignorance; and
- strike a balance by prohibiting racial and religious vilification while still ensuring that freedom of expression can be exercised.<sup>27</sup>

As amended, under s 4(1) the Act aims to:

(a) promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy; and

(b) maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons.

On introduction of the Act, it was characterised as including ‘communications that malign, abuse or seriously derogate other people or groups of people because of their racial background or religious beliefs and practices’, accordingly encompassing ‘intimidation, damage to property, graffiti and expressions of hatred or contempt by messages over the internet’. The expectation was that the legislation would prohibit extreme conduct that promote and urge the strongest feelings of revulsion, hatred or dislike of a person or group on the ground of the racial background or religious beliefs and practices of that person or group.<sup>28</sup>

In considering incoherence, it is important to recognise that vilification is a matter of harm rather than offended sensibilities. The harms attributable to vilification on the basis of ethnicity and/or faith are evident in expression targeting other attributes. The narrow

---

<sup>27</sup> Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2001, 1619 (John Pandazopoulos).

<sup>28</sup> Parliament of Victoria, *Parliamentary Debates*, Legislative Council, 7 June 2001, 1215 (Monica Gould).

coverage of the Victorian Act thus represents omissions that are inconsistent with the coverage of the *Charter*.<sup>29</sup> Saliiently, the *Charter* does not identify Victorians as somehow less worthy of respect and thereby, appropriately denies protection from harm on the basis of gender (highlighted by the #MeToo movement), physical/mental difference, sexual orientation or other attributes outside ethno-religious identity.

The Act is currently silent about sexuality, for example same-sex orientation. Despite removal of civil disabilities through the decriminalisation of male same-sex activity and changes to superannuation and marriage laws, being – or merely perceived as being – gay or lesbian still results in violence and/or denigration on the part of both individuals and some institutions.<sup>30</sup> The Victorian Parliament in 2016 apologised for past criminalisation of consensual gay activity, with the Premier condemning:

[L]aws that criminalised homosexuality in this state; laws which validated hateful views, ruined people's lives and forced generations of Victorians to suffer in fear, silence and isolation ... represented nothing less than official, state-sanctioned homophobia ...

And we wonder why, Speaker – we wonder why gay and lesbian and bi and trans teenagers are still the target of a red-hot hatred.

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

These laws did not just punish homosexual acts, they punished homosexual thought. They had no place in a liberal democracy. They have no place anywhere. The Victorian Parliament and the Victorian Government were at fault. For this we are sorry ... we are so sorry; humbly, deeply sorry.<sup>31</sup>

To address incoherence, we might expect a similar apology in all Australian jurisdictions rather than silence about a historic denial of dignity. Criminalisation historically signalled that 'homosexual thought' and deed was wrong and properly condemned. In 2020,

---

<sup>29</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Final Report, 2015). See also, Department of Justice and Community Safety, *Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act (2015)*.

<sup>30</sup> The reference to institutions is deliberate, given the likelihood that the proposed Commonwealth Religious Freedoms regime will enshrine discrimination on the part of some aged care, health, employment, and other service providers.

<sup>31</sup> Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2016, 1937 (Daniel Andrews).



condemnation is still evident in vilification, often most viscerally experienced by the young and members of unsupportive religious communities, some of which medicalise difference by endorsing 'gay conversion therapy'.<sup>32</sup> Amendment of the Act is an opportunity for the Victorian Parliament to give effect to the apology and reflect recognition among most Australians that an individual is not somehow less of a person and deserving of less respect in law merely because of that person's sexual orientation.

Reinforcing dignity requires uniform legislation across Australia to address incoherence, consistent with judgments in jurisdictions which have addressed vilification on the basis of sexuality<sup>33</sup> and with unheeded law reform proposals.<sup>34</sup> Bathurst CJ in *Sunol v Collier* commented that:

... seeking to prevent homosexual vilification is a legitimate end of government. A law seeking to prevent the incitement of such conduct appears compatible with the maintenance of the constitutionally provided system of government. It does not seem to me that debate, however robust, needs to descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons.<sup>35</sup>

Legislation in Victoria and elsewhere should further proscribe vilification on the basis of gender, in particular misogynistic hate speech. The #MeToo movement over the past two years has highlighted vilification on the basis of gender, including expression targeting women, intersex and transgender people. It is a matter of harming women and other people with words – a harm on which Australian law is disquietingly silent and is perpetuated by indifference on the part of media organisations and the controllers of digital platforms such as Facebook. A cogent recent analysis thus commented:

In Australia, gendered hate speech against women is so pervasive and insidious that it is a normalised feature of everyday public discourse. It is often aimed at silencing women, and hindering their ability to participate effectively in civil society. As governmental bodies have recognised, sexist and misogynist

---

<sup>32</sup> See *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) ss 8-9. See also *Health Legislation Amendment Act 2020* (Qld) s 28. This practice is banned in two Australian jurisdictions.

<sup>33</sup> See, e.g. *Passas v Comensoli* [2019] NSWCATAP 298; *Burns v Smith* [2019] NSWCATAD 56; *Sunol v Collier (No 2)* [2012] NSWCA 44; *Thurston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

<sup>34</sup> Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (Consultation Report, 2011).

<sup>35</sup> *Sunol v Collier (No 2)* [2012] NSWCA 44, 66 [52].

language perpetuates gender-based violence by contributing to strict gender norms and constructing women as legitimate objects of hostility. Thus, gendered hate speech, like other forms of hate speech, produces a range of harms which ripple out beyond the targeted individual.<sup>36</sup>

The harmful nature of vilification is recognised by various Australian laws that prohibit or address other forms of hate speech. Nonetheless, gendered hate speech is glaringly absent from most of this legislation. We argue that by failing to address gendered hate speech, Australian law permits the marginalisation of women and girls, and actively exacerbates their vulnerability to exclusion and gender-based harm.<sup>37</sup> Importantly, although religious affinity might be obfuscated or invisible and ethnicity is often indiscernible, gender is typically more intractable. If Australian legislatures are going to signal and deter the inappropriateness of vilification around ethnicity and faith they should, on the basis of principle and consistent with international human rights frameworks, address vilification that embodies disrespect for over half of the population – a historically vulnerable class. One response has been the Reason Party's 2019 'Elimination of Vilification' Bill to 'stop trolling in its tracks' by extending the Victorian Act to cover hate speech based on 'gender, disability, sexual orientation, gender identity and sex characteristics'.<sup>38</sup>

#### IV DIGITAL PLATFORMS

Vilification may be a matter of face-to-face slurs or communication in 'old media'. Increasingly, it occurs through digital platforms such as Facebook, Twitter, and YouTube. A coherent response requires action by the operators of those platforms. The scope for that action has been highlighted in the current pandemic. Vilification is unhealthy. It injures individuals rather than merely the body politic.<sup>39</sup> This observation is pertinent because all jurisdictions in Australia have responsibilities regarding health and take

---

<sup>36</sup> Tanya D'Souza et al, 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' (2018) 41(3) *University of New South Wales Law Journal* 939.

<sup>37</sup> See *ibid.*

<sup>38</sup> Racial and Religious Tolerance Amendment Bill 2019 (Vic); See also Victoria, *Parliamentary Debates*, Legislative Council, 28 August 2019, 2725 (Fiona Patten).

<sup>39</sup> See eg, Toby Lea, John de Wit and Robert Reynolds, 'Minority Stress in Lesbian, Gay, and Bisexual Young Adults in Australia: Associations with Psychological Distress, Suicidality, and Substance Use' (2014) 43(8) *Archives of Sexual Behavior* 1571; William Leonard, Anthony Lyons and Emily Bariola, 'A Closer Look at Private Lives 2: Addressing the Mental Health and Wellbeing of Lesbian, Gay, Bisexual, and Transgender (LGBT) Australians' (Australian Research Centre in Sex, Health & Society, La Trobe University, 2015).

action to restrict expression that is contrary to health, for example claims regarding products and health services. COVID-19 has seen digital platforms publicly commit to an ethic of corporate responsibility, vowing to minimise ‘fake health news’ on their platforms. That commitment reflects increasing community criticism and appears to be an effort to pre-empt regulation by consumer protection and other watchdogs in several jurisdictions, for example by the Australian Competition & Consumer Commission.<sup>40</sup> Action by digital platforms, whose revenue in Australia dwarfs that of the commercial media groups, is significant for two reasons regarding vilification. The first is that the withering of ‘traditional media’, exacerbated by COVID-19, has not been offset by platform operators proactively addressing hate speech. The platforms are, for many people, the dominant provider of news and a source of legitimacy for opinions or values on the basis that users who encounter vilification by their peers are likely to gain a sense that hateful expression regarding objectified communities is normative.<sup>41</sup> The second reason is that action to exclude propagators of harmful health-related expression and to otherwise restrict the dissemination of fake health news, products and services demonstrates that platform operators have the ability to filter what is expressed on their digital platforms. The operators have traditionally resisted regulation, arguing that they are mere conduits unable to restrict expression and should not be required to do so, tacitly because they – along with the overall internet – are a manifestation of a global *lex informatica* founded on United States values regarding free speech.<sup>42</sup>

Given that vilification harms health, action by the platform operators to restrict improper health-related information might be extended to restrict vilification online. Such a restriction would be consistent with the *International Convention on Civil and Political Rights*,<sup>43</sup> the salient global human rights framework, and with the broader body of statute

---

<sup>40</sup> Australian Competition and Consumer Commission, *Digital Platforms* (Final Report, 2019).

<sup>41</sup> Ariadna Matamoros-Fernández, ‘Platformed Racism: The Mediation and Circulation of an Australian Race-based Controversy on Twitter, Facebook and YouTube’ (2017) 20(6) *Information, Communication & Society* 930.

<sup>42</sup> Aron Mefford, ‘Lex Informatica: Foundations of Law on the Internet’ (1997) 5(1) *Indiana Journal of Global Legal Studies* 211; John Barlow, ‘A Declaration of the Independence of Cyberspace’ in Peter Ludlow (ed), *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press, 2001) 27; Thomas Streeter, ‘That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture’ in Andrew Calabrese and Jean-Claude Burgelman (eds), *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49.

<sup>43</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3)(b).

law that limits speech through restrictions in the form of defamation, trade secrets, confidentiality, privacy, tort of malicious falsehood, electoral and other law.<sup>44</sup>

In a liberal democratic state, there is no freedom from being offended, in part because offence is subjective and in part because offence fosters the discourse that is a basis of democracy. Offence or potential offence is, however, very different from the hatred and inducement of fear, anger, violence, or disengagement discussed above. This vilifying expression is legitimately proscribed on a proportionate basis. There is no absolute freedom of expression. Thus, United States' jurisprudence, often misread as at the heart of an online/offline 'anything goes' regime, has for many years restricted what one eminent judge characterised as falsely shouting fire in a crowded theatre with consequential harm.<sup>45</sup> There is increasing Australian case law to the effect that Commonwealth and state/territory courts have authority over what takes place online,<sup>46</sup> albeit recognising that in the absence of coherent international agreements and cooperation by overseas authorities and online service providers it may be difficult to enforce decisions regarding individuals who are located offshore. It is therefore appropriate to encourage platform operators to act responsibly, justifying their social licence.

The recent decision in *Cottrell v Ross* demonstrates that there is scope to address harms emanating online within Victoria.<sup>47</sup> Achievement of a coherent national regime would mean that Victorians who are harmed by vilification emanating from, for example, New South Wales, should be able to look to that state's government or national government for action on behalf of any Australian. An engagement with social media and digital platform providers must involve both the Commonwealth (given its head of power under the national Constitution) and the state/territory governments, alongside more sustained public consultation and care with drafting than that evident in the national Sharing of Abhorrent Violent Material enactment, which failed to address vilification.<sup>48</sup>

---

<sup>44</sup> See the discussion of *Eatock v Bolt* [2011] FCA 1103 in Wendy Bonython, 'Power Failure? The Distracting Effect of Legislation on Common Law Torts' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21<sup>st</sup> Century* (Hart, 2017) 131.

<sup>45</sup> *Schenck v United States*, 249 US 47 (1919).

<sup>46</sup> *Gutnick v Dow Jones & Co Inc* (2002) 210 CLR 575; *Google Inc v Duffy* [2017] SASFC 130.

<sup>47</sup> *Cottrell v Ross* [2019] VCC 2142.

<sup>48</sup> *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth).

Looking overseas, we can see the 2016 European Union voluntary Code of Conduct on Hate Speech obliges platforms to have set standards to regulate the blocking or removal of undesirable content,<sup>49</sup> reflecting the 2008 European Council Framework Decision on racism and xenophobia and the European Convention on Human Rights.<sup>50</sup> This has been deepened by a growing body of European jurisprudence, for example the recent European Court of Human Rights chamber judgment in *Beizaras v Lithuania*.<sup>51</sup> That jurisprudence is not determinative in Australia, but does offer a benchmark for Australia as a nation with a commitment to fostering the flourishing of all people. This commitment is not at odds with the Australian Constitution and requires law reform.

#### V A FREEDOM TO COMMUNICATE BUT NOT TO HARM

Stanley Fish claims that ‘there is no such thing as free speech’, with someone always having to pay.<sup>52</sup> In embracing notions of a marketplace of ideas and of individual responsibility, some proponents of free expression consider that restrictions on objectification through vilification are unnecessary or outweighed by the benefits derived from robust communication. Submissions to a range of consultations have accordingly argued that restrictions are at odds with Australia’s implied freedom of political communication. In considering those arguments, it is useful to recognise judgments endorsing the proposition that anti-vilification legislation enhances and promotes the implied freedom of communication and more broadly embodies values that the freedom is meant to enable.<sup>53</sup> The notion of an online ‘market place for ideas’ derived from theorisation by Milton, Locke and Mill disregards the inequality of many participants and the reality that vilification either silences minorities within that market place or drives them away. Consistent with the aforementioned statement by Kidd CJ, restrictions on vilification serve to encourage public participation in democratic processes and have not been found by the High Court or Victorian Supreme Court to be

---

<sup>49</sup> European Commission, Information note - Progress on combating hate speech online through the EU Code of conduct 2016-2019 (27 September 2019).

<sup>50</sup> Council of the European Union, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008).

<sup>51</sup> *Beizaras and Levickas v Lithuania* (application no. 41288/15) ECHR.

<sup>52</sup> Stanley Fish, *There’s No Such Thing as Free Speech ... and it’s a Good Thing Too* (Oxford University Press, 1994).

<sup>53</sup> *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72].

contrary to the implied freedom of political communication articulated in, for example, *Australian Capital Television v Commonwealth* and *Nationwide v Wills*.<sup>54</sup> They have similarly not been found to conflict with the Victorian *Charter*.

## VI CONCLUSION

What can be done? Pending establishment of a justiciable Bill of Rights in the national Constitution, each state and territory can systematically enact law that specifically prohibits vilification and is not restricted to ethno-religious hate speech. Given its external affairs power, the Commonwealth could act too. The Australian Human Rights Commission in 2011 noted that:

A federal law would make it clear to all Australians that vilification, and harassment on the basis of sexual orientation and sex and/or gender identity is never acceptable. Unless there is a clear law against it, it is too easy for bigots to feel their actions are justified, when actions based on prejudice and hatred are not, and never can be, just.<sup>55</sup>

More is needed. Within a legal system that respects dignity and fosters wellbeing it is incumbent on politicians to display leadership in giving effect to the civil and political rights of everyone, rather than just privileged communities. Dignity is inextricably associated with agency. We should hold politicians accountable when leaders choose to deny responsibility. Given an increasing democratic deficit, with a growing distrust of politicians as self-interested and unresponsive,<sup>56</sup> ordinary people need to express their dignity by persuading leaders of the need for reform and challenging the objectification that affects less fortunate peers in online/other fora.

---

<sup>54</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>55</sup> Australian Human Rights Commission, *Protection from Vilification and Harassment on the Basis of Sexual Orientation and Sex and/or Gender Identity* (Consultation Report, 2011) 18.

<sup>56</sup> Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from The Australian Electoral Study* (Australian National University, 2019).

## REFERENCE LIST

*A Articles/Books/Reports*

Ahdar, Rex Tauati, 'Religious vilification: confused policy, unsound principle and unfortunate law' (2007) 26 *University of Queensland Law Journal* 293

Aroney, Nicholas, 'The constitutional (in)validity of religious vilification laws: implications for their interpretation' (2006) 34(2) *Federal Law Review* 287

Australian Competition and Consumer Commission, *Digital Platforms* (Final Report, 2019)

Australian Human Rights Commission, *Protection from vilification and harassment on the basis of sexual orientation and sex and/or gender identity* (Consultation Report, 2011)

Barlow, John, 'A Declaration of the Independence of Cyberspace' in Peter Ludlow (ed), *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press, 2001)

Bonython, Wendy and Bruce Baer Arnold, 'Freedom of Speech under the Southern Cross—It Arrived and Departed by Sea?' (2018) 107(2) *The Round Table* 203

Bonython, Wendy, 'Power Failure? The Distracting Effect of Legislation on Common Law Torts' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21<sup>st</sup> Century* (Hart, 2017)

Cameron, Sarah and Ian McAllister, *The 2019 Australian Federal Election: Results From The Australian Electoral Study* (Australian National University, 2019)

Council of the European Union, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008)

Department of Justice and Community Safety, *Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act* (2015)

D'Souza, Tanya et al, 'Harming women with words: The failure of Australian law to prohibit gendered hate speech' (2018) 41(3) *University of New South Wales* 939

European Commission, Information note - Progress on combating hate speech online through the EU Code of conduct 2016-2019 (27 September 2019)

Fineman, Martha Albertson, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251

Fineman, Martha Albertson, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1

Fineman, Martha Albertson, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133

Fish, Stanley, *There's No Such Thing As Free Speech ... And It's A Good Thing Too* (Oxford University Press, 1994)

Galloway, Kate, 'Alan Jones and contempt for women in the public sphere: vilification?' (2012) 3 *Women's Agenda* (3 September 2012)

Gelber, Katharine and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488

Lea, Toby, John de Wit and Robert Reynolds, 'Minority stress in lesbian, gay, and bisexual young adults in Australia: Associations with psychological distress, suicidality, and substance use' (2014) 43(8) *Archives of Sexual Behavior* 1571

Leonard, William, Anthony Lyons and Emily Bariola, 'A closer look at private lives 2: addressing the mental health and wellbeing of lesbian, gay, bisexual, and transgender (LGBT) Australians', (Australian Research Centre in Sex, Health & Society, La Trobe University 2015)

Matamoros-Fernández, Ariadna, 'Platformed racism: The mediation and circulation of an Australian race-based controversy on Twitter, Facebook and YouTube' (2017) 20(6) *Information, Communication & Society* 930

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



Meagher, Dan, 'Is There a Common Law 'Right' to Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269

Mefford, Aron, 'Lex informatica: Foundations of Law on the Internet' (1997) 5(1) *Indiana Journal of Global Legal Studies* 211

Middleton, Chris, 'Wrestling with the sacking of Israel Folau' (2019) 29(9) *Eureka Street* 41

Streeter, Thomas, 'That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture' in Andrew Calabrese and Jean-Claude Burgelman (eds), *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49

Young, Michael Brett, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Final Report, 2015)

#### B Cases

*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

*Beizaras and Levickas v Lithuania* (application no. 41288/15) ECHR

*Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284

*Cottrell v Ross* [2019] VCC 2142

*Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48

*Eatock v Bolt* [2011] FCA 1103

*Executive Council of Australian Jewry v Scully* [1998] FCR 537

*Google Inc v Duffy* [2017] SASFC 130

*Gutnick v Dow Jones & Co Inc* (2002) 210 CLR 575

*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

*Owen v Menzies* (2012) 293 ALR 571

*Schenck v United States*, 249 US 47 (1919)

*Sunol v Collier (No 2)* (2012) 289 ALR 128

*Toben v Jones* [2002] FCAFC 158

### C Legislation

*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW)

*Australian Constitution*

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

*Crimes Act 1900* (NSW)

*Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth)

*Health Legislation Amendment Act 2020* (Qld)

*Human Rights Act 2004* (ACT)

*Human Rights Act 2019* (Qld)

*Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth)

*Racial Discrimination Act 1975* (Cth)

*Racial and Religious Tolerance Act 2001* (Vic)

*Racial and Religious Tolerance Amendment Bill 2019* (Vic)

*Religious Discrimination Bill 2019* (Cth)

*Religious Discrimination (Consequential Amendments) Bill 2019* (Cth)

*Sexuality and Gender Identity Conversion Practices Act 2020* (ACT)

### D Treaties

*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3)(b)

### E Other

Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2001

Victoria, *Parliamentary Debates*, Legislative Council, 7 June 2001

Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2016, 1937

Victoria, *Parliamentary Debates*, Legislative Council, 28 August 2019