

The Legal Treatment of Gendered Hate Speech in Australia

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Abstract

In her paper *The Legal Treatment of Gendered Hate Speech in Australia*, Kylie Weston-Scheuber examines the concept of hate speech as a harm against women and explores reasons for the invisibility of gendered hate speech in public and legal discourse. She analyses gendered hate speech as a form of both individual harm and harm that affects women as a group.

Weston-Scheuber pays particular attention to the role of ideology in relation to gendered hate speech and hate crimes and the relationship between ideology in a gender context and ideology as understood in the context of terrorism offences and incitement of terrorist violence.

The examination of gendered hate speech encompasses recent examples from the Australian and overseas contexts, including the recent rise of the so-called “Incel” movement and cyberbullying.

She examines civil and criminal hate speech laws from various Australian jurisdictions, noting the almost universal absence of proscription of hate speech on the basis of gender. This includes an examination of various models of “hate crime” laws in Australia, and their capacity to encompass substantive crimes motivated by gender hatred or prejudice.

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Gendered hate speech is not a phenomenon that is discussed widely in Australia. It has been discussed in a small number of academic articles and scholarly works in the Australian context,² and is occasionally encompassed within broader forms of hate speech or hate crime, but is rarely the subject of specific legislative prohibition.

Language is regularly used to oppress women and control their behaviour, but in its most extreme form, it constitutes gendered hate speech, which is a weapon in the arsenal of those motivated by masculinist ideology. Just as in law terrorism is defined by the ideological motivation of its perpetrators, gendered hate speech is often motivated by masculinist ideology and therefore may appropriately be classified as terrorism for certain strategic and legal purposes.

In this paper, I begin by examining the concept of hate speech as a harm against women both as individuals and as women qua women. I explore reasons for the invisibility of gendered hate speech in public and legal discourse.

I examine civil and criminal hate speech laws from all Australian jurisdictions, noting the almost universal absence from them of the proscription of hate speech on the basis of gender. This includes an examination of various models of “hate crime” laws in Australia and their capacity to encompass substantive crimes motivated by gender hatred or prejudice.

I examine recent examples of gendered hate speech from the Australian and overseas contexts, including the recent rise of the “Incel” movement and cyberbullying.

I then examine the role of ideology in relation to gendered hate speech and hate crimes, and its relationship with ideology as understood in the context of terrorism offences and incitement of terrorist violence. I explore the capacity of gendered hate speech in its extreme forms to be included within the Australian legal definition of terrorism.

Finally, I consider the arguments for the specific legislative prohibition of gendered hate speech, and the potential for legislation to raise awareness of the issue of gendered hate speech in Australia.

I . Definition of Hate Speech

The legal definition of hate speech that applies in most Australian jurisdictions is a public act inciting hatred, serious contempt or ridicule of a person based on a specific ground. I have defined gendered hate speech elsewhere as including 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.³

² Many of the articles discussing gendered hate speech are cited here, but they also include Anjalee de Silva, “Words CAN harm us: The need for gender vilification provisions in Victorian law” (2014) 88(8) *Law Institute Journal* p 40.

³ Kylie Weston-Scheuber, “Gender and the Prohibition of Hate Speech” (2013) 12(2) *QUT Law and Justice*

This definition excludes much of the gendered hate speech to which women are regularly subjected in the private sphere. For example, the use of hate speech in a domestic violence context is a common phenomenon.⁴ While this may on occasion be taken into account as criminal behaviour,⁵ it is not recognised as hate speech within the legal definition because it lacks a public aspect.

The definition also does not include gendered epithets that are not part of a broader discourse that incites hatred, serious contempt or ridicule on the basis of gender. Within the definition that I use, the use of gendered slurs such as “slut” or “bitch” for example, without more, would not constitute hate speech.⁶ In this respect, my analysis differs from those of others who adopt a broader definition of gendered hate speech or “gendered slurs”.⁷

This is not to take issue with those who utilise a broader definition of gendered hate speech or to deny the harm that the use of gendered slurs or insults inflict on women both individually and as a group. Use of gendered slurs can cause psychological harm and emotional distress, and have the effect of silencing women and reducing their participation in public and social life.

Rather, I choose to use this definition of gendered hate speech to allow a point of comparison with hate speech that is currently prohibited under Australian law (such as hate speech based on religion or race), which provides a platform for analysing why hate speech that meets the same criteria on the basis of gender is not similarly proscribed under Australian law.

Legal definitions of hate speech in Australia have tended to be fairly restrictive. As set out below in Section IV, hate speech legislation almost uniformly requires proof of an incitement to hatred, serious contempt or ridicule.

In New South Wales, the legislative provision prohibiting homosexual vilification has been considered and the Court of Appeal has found that it is not sufficient that the public act in question conveys hatred towards, serious contempt for, or serious ridicule of a homosexual person; it must be capable of inciting those reactions in an

Journal 139-40.

⁴ James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses*, Northeastern University Press, Boston, 1999, 82.

⁵ For example see *R v Mabb* [2017] NSWDC 225 where the offender was convicted of using a carriage service to menace, harass or cause offence for the following message left for his former partner: “I’m going to kill you you fucking cunt. Take this to the police, I don’t give a shit, you’re fucking dead for what you’ve done you fucking cunt of a woman and I am going to fucking get you. I tell you what, I’m going to fucking kill you, you bitch.”

⁶ Other writers who incorporate a requirement of some form of aim to incite hatred or denigration of women include Lillian Donna, “A thorn by any other name: sexist discourse as hate speech” 18(6) *Discourse & Society* 719-740.

⁷ See for example Richardson-Self: “Woman-Hating: On Misogyny, Sexism and Hate Speech” (2017) 33(2) *Hypatia* (adopting a “disparages, silences, maligns, humiliates” component to gendered hate speech) and Alexander Brown (2017) “What is Hate Speech? Part 1. The Myth of Hate” 36 *Law and Philosophy* 419-468 (distinguishing a “general concept” of hate speech from the “legal concept”).

ordinary member of the class to whom the act is directed or to the likely audience.⁸

Although I consider commentary that incorporates broader definitions of gendered hate speech, I therefore utilise the definition outlined above in my discussion below.

II. Hate Speech as Harm Against Women

The harm principle, that is the principle that only conduct that causes harm to others should be regulated, underlies the common law.⁹ In order for something to be the object of legal regulation, therefore, there must be recognition that it causes harm.

While sexual harassment is not synonymous with gendered hate speech, experiences of sexual harassment may include experiences of gendered hate speech.¹⁰ In the most recent survey by the Australian Bureau of Statistics, more than 50 percent of women aged 18 or over reported having experienced sexual harassment in their lifetime.¹¹

Gendered hate speech is frighteningly common in the online domain. In 2015, the United Nations Broadband Commission released a report showing that 73 percent of women and girls worldwide had been exposed to online violence.¹²

In Australia, a survey of 3,000 people aged 18 to 54 found that one in five women overall, and two out of five women aged 18 to 19 had been targeted for digital sexual harassment.¹³

Women in the public domain, such as journalists and politicians, are particular targets for online abuse. A 2016 survey by the Women in Media group in Australia found that 41 percent of female journalists were being harassed, bullied or trolled online.¹⁴

⁸ *Sunol v Collier and Anor (No 2)* [2012] NSWCA 44 at [41]; cited in *Stevens v Hancock* [2015] NSWCADAT 126.

⁹ John Stuart Mill, *On Liberty* (Penguin, 1974), 68. For discussion of the influence of the harm principle see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, (Lawbook Co, 3rd ed, 2010) 57-9.

¹⁰ Experiences of sexual harassment included the following, which may also constitute experiences of gendered hate speech: receiving indecent phone calls, texts, emails or post; inappropriate comments about the person's body or sex life; distributing or posting pictures or video of the person, which are sexual in nature, without their consent; and exposing the person to pictures or material that are sexual in nature and which the person did not wish to see.

¹¹ Australian Bureau of Statistics, 4906.0 – Personal Safety, Australia, 2016, Experience of Sexual Harassment (2017).

¹² The Broadband Commission for Digital Development Working Group on Broadband and Gender (2015). *Cyber violence against women and girls: A world-wide wake-up call*, <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf>, p2.

¹³ A Powell and N Henry (2015) “Digital harassment and abuse of adult Australians: A summary report”, Tech & Me Project, RMIT University, available at: <https://research.techandme.com.au/wp-content/uploads/REPORT_AustraliansExperiencesofDigitalHarassmentandAbuse.pdf>, 1-2.

¹⁴ Media Entertainment and Arts Alliance, “Australian Media still a Blokesworld in 2016” (6 June 2016)

Hate speech affects both the individuals targeted and the members of the group with which they identify, which increases the vulnerability and sense of victimisation of that group.¹⁵ Hate speech makes a “truth claim” about the inferiority of the target of the speech, which serves to reinforce and recreate the victim’s position of inequality.¹⁶ The effects that it produces in targets include fear, being silenced and altering behaviour in order to avoid being the target of hate speech.¹⁷

Women do not need to be the direct targets of hate speech in order to be harmed by it. Just as women moderate and alter their behaviour in response to violence and its perceived threat,¹⁸ women who witness acts of hate speech, or otherwise learn about them (e.g. in the media) are aware of their own potential to be victims as women. In this way, hate speech can impact women’s willingness to speak publicly, and may have a silencing effect.¹⁹

Australian law recognises the harm caused by speech that incites hatred, severe contempt or ridicule of a person based on particular attributes through its regulation of hate speech based on, in particular, race, but also other categories such as sexuality and transgender status. Racist hate speech is prohibited in some form in every Australian state and territory. Yet as will be seen below, the same recognition is not afforded to harm caused by gendered hate speech, given the absence of its regulation in most Australian jurisdictions.

III. The Invisibility of Gendered Hate Speech in Australia

Despite its prevalence, gendered hate speech is not easily recognisable as hate speech.²⁰ The impression that it is a problem associated with other countries is reinforced by the ad hoc nature of sex discrimination complaints in Australia.²¹

One of the reasons for the invisibility of gendered hate speech is its ubiquity. The frequent usage of gendered hate speech in many forms allows it to blend into society in a way that makes it seem, if perhaps rude or unpleasant, also banal and “just the

cited in Jane (2017) 17.

¹⁵ Kathryn Gelber (2002) *Speaking Back: the Free Speech Versus Hate Speech Debate*, John Benjamins, Chapter 4.

¹⁶ Gelber (2002) pp 71-2.

¹⁷ Laura Beth Nielsen (2002) “Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech” 58(2) *Journal of Social Issues*, pp 265-280.

¹⁸ Marguerite Angelari (1997) “Hate Crime Statutes: a Promising Tool for Fighting Violence against Women” in K Maschke (ed) *Pornography, sex work and hate speech*, Garland Publishing, 405-48, 428-30.

¹⁹ See also in this regard the examples of harm cited below from Jane (2017).

²⁰ Thornton notes that sex discrimination is more ‘conceptually elusive’ than race discrimination: Margaret Thornton (1990) *The Liberal Promise*, Oxford University Press, 62.

²¹ Margaret Thornton, “Can we Feminise Human Rights” in Margaret Thornton (ed) (2010) *Sex Discrimination in Uncertain Times*, ANU E Press 319, 321-4.

way things are”.

Its diversified use also contributes to its invisibility. Gendered epithets based on the feminine are sometimes used in relation to men (e.g. the term “you old cunt” is sometimes used as a term of endearment by men towards other men). This has the effect of obscuring the gendered nature of the language.

Further, gender-based insults may be perceived as targeting the individual women to whom they are directed rather than women as a group. Women are not seen to be “interchangeable” in the way that, for example, members of a minority racial group are recognised as interchangeable.²² This is especially the case in relation to gendered slurs that target perceived or imagined attributes of women in particular relating to their sexual behaviour e.g. slut/whore.

Such terms are commonly used against women in a diverse range of settings and frequently have nothing to do with perceived sexual promiscuity.²³ However, they create the impression that the object is being targeted not as a woman but for being a particular type of woman.

The issue is further complicated because, unlike racist hate speech which typically is based on hatred or contempt for all members of a particular race, those who use gendered hate speech would often not claim to hate or have contempt for all women (though there are certainly examples of that). Gendered hate speech then becomes a means of attempting to assert control over women who fail to behave in a way that complies with the speaker’s ideology about acceptable behaviour for women.

The invisibility of gendered hate speech becomes striking when used in the context of another form of hate speech, for example racist hate speech. In 2016, an Australian chiropractor pleaded guilty to using a telecommunications service in an offensive manner for posting offensive comments about Aboriginal senator Nova Peris on his Facebook page. Amongst other comments was this: “Nova F*** off. You were only endorsed by Juliar [a reference to former Australian Prime Minister Julia Gillard] (sic) because you were a black cunt. Go back to the bush and suck on witchity grubs and yams. Stop painting your f***ing face with white s*** in parliament.”²⁴

The focus in the media, and in Peris’s response, was on the racist component of the attack. The use of the word “cunt”, the gendered aspect of the attack, went

²² Marguerite Angelari, “Hate Crime Statutes: a Promising Tool for fighting violence against women” in Karen Maschke (ed) *Pornography, sex work and hate speech* (Garland Publishing, 1997) 405.

²³ Kylie Weston-Scheuber, “Gender and the Prohibition of Hate Speech” (2013) *QUT Law and Justice Journal*, 145.

²⁴ “Man who abused Nova Peris on Facebook gets eight month suspended sentence”, ABC News, 5 July 2016, <<http://www.abc.net.au/news/2016-07-05/man-who-abused-nova-peris-on-facebook-gets-suspended-sentence/7568912>>; Matt Taylor, “Central Coast chiropractor pleads guilty to vile racist attack against Nova Peris”, Daily Telegraph, 21 June 2016, <<https://www.dailytelegraph.com.au/newslocal/central-coast/central-coast-chiropractor-pleads-guilty-to-vile-racist-attack-against-nova-peris/news-story/eb93248f0acc03c45531af0c53bf2ccd>>.

unremarked. “Cunt”, it seems, is only ever recognised as problematic when prefaced by a term that turns it into a racist epithet.²⁵

The effect of the invisibility of gendered hate speech is that the harm that it causes is ignored or trivialised. Unlike racist hate speech, there is little legislation directed at gendered hate speech, and therefore it is largely unregulated within Australian society, as the following section demonstrates.

IV. Legislative Treatment of Gendered Hate Speech in Australia

In Australia, federal and state laws proscribe in certain circumstances speech that has the effect or intention of inciting hatred, or of insulting or intimidating persons or groups with certain characteristics. It is noteworthy that very few of these laws refers to sex or gender. This reflects the social invisibility of gendered hate speech referred to above.

At a federal level, the Commonwealth Criminal Code creates offences of urging violence against groups, and urging violence against members of groups. Subsection 80.2A(1) creates an offence where a person intentionally urges another person or group to use force or violence against a ‘targeted group’, intending that force or violence will occur, the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion, and the use of force or violence would threaten the peace, order and good government of the Commonwealth. Subsection (2) contains a mirror provision with the exception that there is no requirement for a threat to the peace, order and good government of the Commonwealth. Section 80.2B contains similar provisions relating to individuals of targeted groups, rather than the groups themselves.

In 2005, the Anti-Terrorism Act (No 2) introduced an earlier version of s 80.2 and also amended the definition of ‘seditious intention’ in the Crimes Act 1914 (Cth) to include ‘an intention to promote feelings of ill-will or hostility between different groups’ including groups of all types, races, religions, political interests and nationalities.²⁶

The purpose of the 2005 amendments was to expand the scope of prohibition of the incitement of terrorism.²⁷ The offences referred to above do not refer to the use of force against a group or individual on the basis of sex or gender, and there was no reference to sex or gender in the reports or debates leading to the introduction of

²⁵ I have made this point previously in Kylie Weston-Scheuber, ‘Why the Silence on Johns Dropping the C Bomb?’, *National Times*, 21 June 2010, <<https://www.smh.com.au/politics/federal/why-the-silence-on-johns-dropping-the-c-bomb-20100621-yrwb.html>>. See also Adrian Howe, ‘Every Time you said “Penis”’: (Men’s) Violence, Victim Advocacy and Impermissible Speech’ (2010) 25 *Australian Feminist Studies* 209-222, 216.

²⁶ Amendment to *Crimes Act 1914* (Cth) s 30A which was repealed in 2010.

²⁷ Weston-Scheuber (2013) 134-5.

the legislative amendments.²⁸

In terms of civil legislation, Australia has separate pieces of legislation that variously prohibit forms of racial discrimination, sex discrimination, disability discrimination and age discrimination. Despite discussions carried on five years ago with a view to consolidating the various discrimination Acts,²⁹ this has not occurred.

The Racial Discrimination Act 1975 (Cth) prohibits racial vilification (ss 18B-18F), while the *Sex Discrimination Act 1984* (Cth) contains no comparable provisions. The racial vilification provisions prohibit conduct that is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people” where the perpetrator engages in the conduct either because the target/s is or are of a particular race, colour, or national or ethnic origin, and the conduct is engaged in “otherwise than in private”. This latter concept is defined as causing words, sounds or images to be communicated to the public, or the conduct takes place in a public place, or in the sight or hearing of people who are in a public place.

By contrast, the sexual harassment provision in the Sex Discrimination Act is aimed at unwelcome sexual conduct in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. While sex discrimination thus defined is certainly harmful and worthy of prohibition, the absence of a provision as broadly defined as the racial vilification provision is noteworthy. There will be many examples of conduct that is likely to offend, insult, humiliate or intimidate women that does not incorporate conduct of a sexual nature or unwanted sexual contact, and therefore is not caught by the sexual harassment provision, although such conduct has sometimes been found to constitute sexual harassment based on a broad reading of the provision.³⁰

While gendered hate speech has been the subject of actions for sexual harassment,³¹ the absence of a vilification provision similar to that for racial vilification in most states and territories is indicative of the invisibility of gendered hate speech in Australian society.

State and territory legislation throughout Australia prohibits hate speech in various forms, both in civil and criminal provisions. All states and territories have some form of legislation prohibiting hate speech on the basis of race.³² As noted above, in most

²⁸ Weston-Scheuber (2013) 135.

²⁹ Exposure Draft Human Rights and Anti Discrimination Bill 2012 (Cth).

³⁰ See for example *Grain Corp Operations Limited v Markham* (2003) EOC 93-250, where the words “fucking slut” and “fucking bitch” were regarded as of a sexual nature and sexual harassment.

³¹ For example in *Brosnahan v Ronoff* [2011] QCAT 439, a transgender person was referred to as a “faggot” and having her “dick in a jar” during an attack on her property; this was found to constitute both sexual harassment under the Qld provisions and also “vilification on the grounds of gender identity”, however there is no Qld provision prohibiting vilification on the ground of gender *per se*.

³² *Discrimination Act 1991* (ACT) 67A, *Criminal Code Act 2002* (ACT) s 750; *Anti-Discrimination Act 1977* (NSW) ss 20B-20D; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act*

jurisdictions this requires a public act inciting hatred, serious contempt or severe ridicule of a person who has, or is believed to have, certain (racial) attributes. In addition to this requirement, most of the criminal provisions incorporate some requirement of threatening physical harm towards the person, or their property, or inciting others to threaten harm.³³

Other grounds including HIV/Aids status and disability are covered in some states and territories. Discrimination on the grounds of gender identity or transgender status rather than gender is prohibited in New South Wales and Queensland.³⁴ New South Wales and Queensland also prohibit homosexual vilification.³⁵

The only jurisdictions in which hate speech is prohibited on the basis of gender are Tasmania and the Australian Capital Territory. Section 17 of the Anti-Discrimination Act (Tas) is a civil provision that prohibits conduct that offends, intimidates, insults, humiliates or ridicules a person based on a number of grounds, including gender, in circumstances where a reasonable person would have anticipated the conduct would have that effect. However, section 19, which prohibits the incitement of hatred, contempt or ridicule, applies only to incitement against groups defined by race, religion, disability and sexual orientation, not gender.

Section 750 of the ACT Criminal Code contains an offence of serious vilification, which is constituted by the intentionally carrying out of a threatening act where the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on various grounds, which include gender identity. The act must be done other than in private. “Threatening act” means an act carried out by the person only if the person (a) by the act, intentionally threatens physical harm toward, or toward any property of, the person, or members of the group mentioned (which includes “gender identity”); or (b) is reckless about whether the act incites others to threaten the harm.

“Gender identity” refers to the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to designated sex at birth. This encompasses discrimination on the basis of both gender and transgender status.³⁶

The offence of serious vilification carries a penalty of 50 penalty units. As at the

1996 (SA) ss 4-6 and *Civil Liability Act 1936* (SA) s 73; *Racial and Religious Tolerance Act 2001* (Vic) ss 7-12, 24-25; *Criminal Code Act* (WA) ss 77-80D.

³³ *Criminal Code Act 2002* (ACT) s 750; *Anti-Discrimination Act 1977* (NSW) ss 20D; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) s 24(1) (but contrast s 24(2) which does not contain the requirement of threatening harm, or inciting others to threaten harm), and compare the more broadly defined offences in *Criminal Code Act* (WA) ss 77-80D.

³⁴ *Anti-Discrimination Act 1977* (NSW) s 38S; *Anti-Discrimination Act 1991* (Qld) s 124A.

³⁵ *Anti-Discrimination Act 1977* (NSW) s 49ZT; *Anti-Discrimination Act 1991* (Qld) s 124A.

³⁶ Compare *Anti Discrimination Act 1991* (Qld) s 131A which specifically refers to transgender/intersex identity.

time of writing, searches of case databases generated no results for any prosecutions in the ACT for “serious vilification” (on any ground).³⁷

Some jurisdictions also allow for hate motivation to be taken into account on sentencing for ordinary criminal offences such as assault. In Western Australia, there is an increased maximum penalty for offences motivated by hatred, and in New South Wales, Victoria and the Northern Territory hate motivation is an aggravating factor to be taken into account on sentencing.³⁸

While there are few examples of the model being used in relation to crimes motivated by gender-based hatred, in *R v ID*, Nicholson DCJ considered gender hatred to be an aggravating factor in sentencing two offenders who broke into a unit and committed serious sexual assaults upon a woman:³⁹

It was submitted that neither type of offence was motivated by hatred for or prejudice against any group to which the offenders did not belong ... I am satisfied beyond reasonable doubt there was a gender based prejudice which can best be expressed as a lack of understanding of and respect for the role and position of women in our community. Women are not to be viewed as menial objects whose feelings, sensitivities, do not matter, nor as objects available for random and non consensual sexual defilement.

There are other more general offence and legislative provisions that may also be utilised to prosecute those who engage in gender vilification. In 2016, Zane Alchin was prosecuted for the offence of using a carriage service to menace, harass or cause offence over gendered vitriol he posted on Facebook including the statement, “You know the best thing about a feminist, they don’t get any action so when you rape them it feels 100 times tighter”.⁴⁰

Alchin was responding to an earlier series of posts where his friend Chris Hall copied the Tinder profile of a woman by the name of Paloma Newton onto his Facebook page mocking her for being sexually provocative. Hall’s network posted degrading comments about Newton, including that she deserved to be raped. When Newton’s friends retaliated, including by bringing the post to the attention of Hall’s employers resulting in his dismissal, it generated a storm of misogynist hate speech, in-

³⁷ Searches carried out on the ACT Supreme Court website and Austlii (by reference to ACT Supreme Court, ACT Court of Appeal and ACT Magistrates Court).

³⁸ *Criminal Code* (WA) ss 80I, 313, 317, 317A, 338B, 444; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2)(daaa).

³⁹ *R v ID* [2007] NSWDC 51 (25 January 2007) [50]. For discussion of this case see Gail Mason and Andrew Dyer, ‘A Negation of Australia’s Fundamental Values: Sentencing Prejudice Motivated Crime’ (2013) 36 *Melbourne University Law Review* 871, 878-881.

⁴⁰ The offence of using a carriage service to menace, harass or cause offence is found in s 474.17 of the *Criminal Code Act 1995* (Cth) and carries a maximum penalty of three years’ imprisonment.

cluding Alchin's post.⁴¹

Alchin was convicted in a Sydney Magistrates Court and sentenced to a 12 month good behaviour order, with the Magistrate who sentenced him reportedly describing Ms Newton's Tinder profile as "of a sexual nature" and "inflammatory".⁴² In this case, even though the criminal law was available and utilised to prosecute a perpetrator of gendered hate speech, the reported parts of the sentencing judgment focus on excuses for the offender's behaviour and minimisation of the harm to the victim.

In summary, there are a limited number of laws in Australian jurisdictions by which gendered hate speech can be prosecuted or the subject of legal action through civil provisions. This is by way of contrast with racist hate speech, which is expressly prohibited in all states and territories and at the federal level. This leaves a disturbing lacuna in the Australian legislative context for the regulation of, in its most extreme form, harmful speech that threatens or incites violence against women.

V. Contemporary Manifestations of Gendered Hate Speech in Australia

While gendered hate speech occurs in the real world, the rise of the internet and more recently social media has created new platforms for those who engage in gendered hate speech. The nature of online communication allows those who engage in gendered hate speech online to do so from behind a cloak of anonymity and often without fear of repercussion or identification.

Gendered hate speech online is a world-wide phenomenon. The examples that I refer to here are not restricted to the Australian experience.

Emma Jane, who has written a ground-breaking book on the phenomenon of online misogyny, uses the terms "gendered cyberhate", "gendered e-bile" and "cyber VAWG (violence against women and girls)" to refer to material that is directed at girls or women, that involves abuse, death threats, rape threats, and/or sexually violent rhetoric, and that involves the internet, social media platforms or communications technology.⁴³

Jane writes that when women go online, men deliver them the message "GTFO" or "Get the fuck out". In her book, she cites numerous examples of online gendered hate speech, a few of these being:

- "fuck off you boring slut ... I hope someone slits your throat and cums down

⁴¹ For a discussion of the case see Emma Jane: "Feminist Digilante Responses to a Slut-Shaming on Facebook", *Social Media and Society*, April-June 2017, 1-10.

⁴² Melanie Kembrey, "Sydney labourer Zane Alchin sentenced for harassing women on Facebook", *Sydney Morning Herald*, 29 July 2016, < <https://www.smh.com.au/national/nsw/sydney-man-zane-alchin-sentenced-for-harassing-women-on-facebook-20160729-gqg818.html>>.

⁴³ Emma Jane (2017) *Misogyny Online*, Sage Publications 7.

- your gob”;
- the online abuse directed at Caroline Criado-Perez who campaigned against the all-male line-up for British bank notes, including “kiss your pussy goodbye as we break it irreparably”;
 - the threats directed at Criado-Perez’s supporter, MP Stella Creasy, including, “You better watch your back ... I’m gonna rape your ass at 8pm and put the video all over the internet”;
 - message sent to Emma Jane by email: “You should have a good arse fuck lasting two hours every day. That would set you right! You look like a tart desperate for cock or maybe you think you’re cool or funky? All feminists should be gangraped to set them right. Plus work in a hore (sic) house for a year or so. Women had never had voting right thru history of man-kind. And should not have it now either”;
 - Paul Elam (A Voice for men): “we are coming for you. All of you. And by the time we are done you will wax nostalgic over the days when all you had to deal with was someone expressing a desire to fuck you up your shopworn ass (2011).⁴⁴

In particular, rape threats are a recurring theme in online gendered hate speech. Emma Jane describes these as the ‘go-to’ response for men who disagree with what a woman says or dislike the way a woman looks.⁴⁵ While many “rape threats” might be dismissed as empty rhetoric, Jane cites examples of women being targeted in very real physical terms. For example, Kathy Sierra was targeted by online trolls after writing a post in support of those who moderated comments on their sites.

Jane reports that Sierra received hundreds of rape and death threats, was the subject of images doctored to depict her being choked, had her address and social security number circulated, as well as false reports of her being a sex worker and battered wife, and was bombarded by material, causing her to disappear from the online domain for years.⁴⁶

Jane’s book also includes stories of women who have been the victim of online attacks publishing their addresses and inviting others to go to their house and rape them. In one case she reports, this resulted in a woman being raped in her home after a former partner posted her address and the message, “Need an aggressive man with no concern or regard for women”.⁴⁷

⁴⁴ Emma Jane (2017) 1-2, 19.

⁴⁵ Emma Jane (2017) 3.

⁴⁶ Emma Jane (2017) 25-26.

⁴⁷ Emma Jane (2017) 57.

The Incel movement

“Incel” is a term used to describe a group of (predominantly) men who are “involuntarily celibate”. There are two well-known recent examples of violence committed by Incels. In 2014, Elliott Rodger killed six people plus himself and injured 14 others in California. In May this year, in Toronto Canada, Alek Minassian ploughed his vehicle into a crowd killing 10 people. Both were self-professed members of the Incel movement.

Incels believe that they are denied sex due to their physical attributes and not being attractive to women. They use the terms “Chads” and “Staceys” to refer to conventionally attractive men and women whom they believe have no trouble in partnering and having sex.⁴⁸

Associated with the Incel movement is loathing for women, particularly on the basis of sexual activity. Elliot Rodger had posted prior to his attack about an incel overthrow of feminist domination.⁴⁹ He uploaded a video to YouTube about retribution against attractive women who would not have sex with him and the men they would sleep with.⁵⁰

Last year, social media site Reddit banned the Incel community after a series of posts entitled “all women are sluts”, “proof that girls are nothing but trash that use men” and “reasons why women are the embodiment of evil”.⁵¹

Before carrying out his van attack, Minassian posted the following on Facebook: “Private (Recruit) ··· Infantry 00010, wishing to speak to Sgt 4chan please. C23249161” and hailing the commencement of the “Incel rebellion”.

Incel sites are often associated with discussion of rape fantasies, and drawing on the obsession with sexual accessibility of women, support of a state-distributed girlfriend program and outlawing of multiple partners.⁵²

While some may dismiss the incel movement as a group of lonely men who are misunderstood, the attacks carried out by Rodger and Minassian illustrate the potential for gendered hate speech to be accompanied by acts of violence. In the following section, I suggest that when gendered hate speech is accompanied by acts or threats

⁴⁸ For a discussion of the Incel movement see Eleanor Robertson, “The Rise of ‘Incels’”, *The Saturday Paper*, 5-11 May 2018.

⁴⁹ Tammy Webber and Jennifer Peltz, “Incel Forums ‘one of the most violent areas of the internet’”, *Sydney Morning Herald*, 26 April 2018, <<https://www.smh.com.au/world/north-america/incel-forums-one-of-the-most-violent-areas-of-the-internet-20180426-p4zbo9.html>>.

⁵⁰ Zoe Williams, “Raw hatred’: why the ‘incel’ movement targets and terrorises women”, *The Guardian*, 26 April 2018, <<https://www.theguardian.com/world/2018/apr/25/raw-hatred-why-incel-movement-targets-terrorises-women>>.

⁵¹ Olivia Solon, “Incel: Reddit bans misogynist men’s group blaming women for their celibacy”, *The Guardian*, 9 November 2017, <<https://www.theguardian.com/technology/2017/nov/08/reddit-incel-involuntary-celibate-men-ban>>.

⁵² Emma Jane, “Stacys, Brads and ‘reverse rape’: inside the terrifying world of incels”, ABC News, 27 April 2018, <<http://www.abc.net.au/news/2018-04-27/incels-inside-their-terrifying-online-world/9700932>>; Zoe Williams, “Raw hatred’: why the ‘incel’ movement targets and terrorises women”, *The Guardian*, 26 April 2018.

of violence, its ideological nature warrants its inclusion within the scope of terrorism offences.

VI. The Role of Ideology in Gendered Hate Speech

At its core, gendered hate speech is based on a particular ideology or commitment to a set of ideals. Ideology is “the body of doctrine, myth, and symbols of a social movement, institution, class or large group”.⁵³ In particular, it is a tool used by those who subscribe to masculinist ideology. Although its adherents may not recognise themselves as such, they subscribe to a particular worldview that sees women as inferior to men, and as objects for sexual gratification to be controlled. This is illustrated most clearly in the language used by members of the Incel movement.

This helps to explain why gendered hate speech may be difficult to recognise as hate speech. Unlike racist hatred, which is likely to manifest itself in dislike or distrust of all members of a particular racial group or groups, masculinist ideology is often not overtly based in dislike or distrust of all women, but rather women who do not subscribe to particular social norms. This may explain why gendered hate speech is often targeted at women who are perceived to have infiltrated typically masculine domains or are particularly in the public spotlight such as politicians, journalists and bloggers.⁵⁴

“Terrorism” is a term that, by its legal definition, involves the use of violence combined with an ideological motivation.⁵⁵ Within contemporary legal discourse, as in the media,⁵⁶ “ideology” comes to be associated with fundamentalist Islam.⁵⁷ In contemporary Western society, it is commonly associated with Islamic terrorism, and a motivation to advance the cause of Islam through violent acts.

However, as Millett notes:⁵⁸

However muted its present appearance may be, sexual dominion obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power.

⁵³ *The Macquarie Dictionary and Thesaurus* (1991) 200.

⁵⁴ See Australian Human Rights Commission, “A Conversation in Gender Equality” (March 2017), p 17.

⁵⁵ “Terrorist act” is defined in the Commonwealth Criminal Code as “[a particular act] perpetrated or threat made with the intention of advancing a political, religious or ideological cause and with the intention of coercing or influencing by intimidation a government, or intimidating the public or a section thereof”: *Criminal Code Act 1995* (Cth) s 100.1.

⁵⁶ Dreher notes that racialised framing in the media constructs Islam as an explanation for terrorist activity: Tanja Dreher (2002) “News Media Responsibilities in Reporting on Terrorism” in A Lynch, E McDonald and G Williams (eds) *Law and Liberty in the War on Terror*, Federation Press, 211-20.

⁵⁷ Scott Poynting, Greg Noble, Paula Tabar and Jock Collins (2004) *Bin Laden in the suburbs: criminalizing the Arab Other*, Sydney Institute of Criminology.

⁵⁸ Kate Millett (2000) *Sexual Politics*, 4th ed, First Illinois Paperback, p 25.

Like all ideologies, masculinist ideology is constituted by a shared set of beliefs and understandings common to a group. These include a belief in male superiority and entitlement to control over families, including partners. The doctrine, myth and symbols of masculinist ideology include pornography,⁵⁹ objectification of women, glorification of war and violent sport,⁶⁰ and laudation of physical superiority.⁶¹

Many of those who use gendered hate speech can be perceived as acting with an ideological motivation – a desire to establish or reinstate control over women and a belief that they are entitled to exercise that control forcibly if necessary.⁶² This manifests in both occurrences of domestic violence and in the writings of the Incel movement referred to above.

At least some gendered hate speech, I suggest, meets the indicia of ideological motivation that I have elsewhere identified as reflected in the Australian sentencing judgments for terrorism offences:

1. commitment to a cause;
2. a belief that violence is justified or legitimate in the pursuit of the chosen cause;
3. a degree of planning and premeditation of activities carried out in the interests of the cause; and
4. denigration or blame of the victims of terrorist activity justifying their victimisation.

Courts have drawn particularly on the use of spoken and written propaganda as evidence of terrorism offenders' ideological motivation.⁶³ While Australian culture is saturated with propaganda that excuses or encourages violence against women, including pornography, misogynist language, and violence against women in the media,⁶⁴ the ready availability and ubiquity of its use contributes to its ideological nature

⁵⁹ Andrea Dworkin (1981) *Pornography: Men Possessing Women*, Penguin Books.

⁶⁰ Jennie Ruby (2002) "Untitled" in S Hawthorne and B Winter (eds) *September 11, 2001: Feminist Perspectives*, Spinifex Press, pp 148-50; Cynthia Ensloe (2002) "Untitled" in S Hawthorne and B Winter (eds) *September 11, 2001: Feminist Perspectives*, Spinifex Press, pp 254-9, Richard Ryder (1994) "Violence and the Role of Machismo" in E Stanko (ed) *Perspectives on Violence*, Quartet Books Ltd, 77-89, pp 84-5; Joanne Belknap (1996) *The Invisible Woman: Gender, Crime and Justice*, Wadsworth p 175.

⁶¹ Deborah Cameron and Elizabeth Frazer (1987) *Lust to Kill: A Feminist Investigation of Sexual Murder*, Polity Press, pp 166-9.

⁶² Patrick Parkinson and Juliet Behrens (2004) *Australian Family Law in Context: Commentary and Materials*, 3rd ed, LBC Information Services, p 379.

⁶³ For example in the UK see *Rowe v R* [2007] EWCA 635 and in Australia see *R v Lodhi* (2006) 199 FLR 364 [17], [33], [35], [52] (possession of a "jihadi CD" was key in establishing that Lodhi held a "deeply, fanatical, but sincerely held, religious and worldview based on his faith and his attitude to the extreme dictates of fundamentalist Islamic propositions").

⁶⁴ Michael Flood and Clive Hamilton (2003) *Youth and Pornography in Australia: Evidence on the extent*

being effectively “muted” within legal and popular discourse.

Furthermore, those who use or condone violence against women often express conservative gender-role attitudes and views supportive of use of violence as a means of control.⁶⁵

When one understands that gendered hate speech is a tool of masculinist ideology, then hate speech that advocates or is associated with violence against women fits neatly within the legal definition of terrorism. Thus acts such as the vehicular attack of Alek Minassian in Canada earlier this year, referred to above, can be seen as terrorist attacks.⁶⁶

Equally, promotion of violence against women through encouragement of rape and other acts of violence against women, such as those referred to above, can be re-framed in legal terms as the incitement of terrorism.

Zoe Williams, questioning why incel violence is not classified as terrorism, writes:⁶⁷

I am filled with this unsettling sense that because incels mainly want to kill maim or assault women, they are simply not taken as seriously as if they wanted to kill pretty much anyone else. Doesn't everyone want to kill women, sometimes, is the implication? Or at least give them a fright?

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- of exposure and likely effects*, The Australia Institute, Chapter 3; Michelle Evans (2006) “Censoring Internet Pornography in Australia: a Call for a Civil Rights Approach to address pornographic harms” *University of Western Sydney Law Review* 4; Patricia Eastal (1996) *Shattered Dreams: Marital Violence against Overseas-Born Women in Australia*, Australian Government Publishing Services p 7; Deb Waterhouse-Watson (2007) “All Women are Sluts: Australian Rules Football and Representations of the Feminine” 27 *Australian Feminist Law Journal* 155; Cameron and Frazer (1987) pp 53-5.
- ⁶⁵ James Ptacek (1988) “Why do Men Batter their Wives?” in K Yllo and M Bograd (eds) *Feminist Perspectives on Wife Abuse*, Sage Publications, 133-57; Rhonda Copelon (1993-4) “Recognising the Egregious in the Everyday: Domestic Violence as Torture” 25 *Columbia Human Rights Law Review* 291, pp 334-6; Isabel Marcus (1994) “Reframing Domestic Violence”: Terrorism in the Home” in M Fineman and R Mykitiuk (eds) *The Public Nature of Private Violence*, Routledge, 11-35, pp 22-24; Rebecca Dobash and Russell Dobash (1996-7) “Men’s violence and programs focused on change” 8 *Current Issues in Criminal Justice* 243, p 250; Anne McMurray, Irene Froyland, Duane Bell and David Curnow (2000) “Post-Separation Violence: the Male Perspective” 6(1) *Journal of Family Studies* 89, pp 96-7; Lynne Hillier and Margaret Foddy (1993) “The Role of Observer Attitudes in Judgments of Blame in Cases of Wife Assault” 29(9/10) *Sex Roles* 629.
- ⁶⁶ Others who have described these Incel attacks as terrorism include Jason Wilson, “What do incels, fascists and terrorists have in common? Violent misogyny”, *The Guardian*, 4 May 2018, <<https://www.theguardian.com/commentisfree/2018/may/04/what-do-incels-fascists-and-terrorists-have-in-common-violent-misogyny>>; Jef Rouner, “Incels want Gender Terrorism, not Sex”, Houston Press, 3 May 2018, <<http://www.houstonpress.com/arts/the-myth-that-incels-want-sex-10443838>>; Zack Beauchamp, “Incel, the misogynist ideology that inspired the deadly Toronto attack, explained”, Vox, 25 April 2018, <<https://www.vox.com/world/2018/4/25/17277496/incel-toronto-attack-alek-minassian>>.
- ⁶⁷ Zoe Williams, “‘Raw hatred’: why the ‘incel’ movement targets and terrorises women”, *The Guardian*, 26 April 2018.

I have argued elsewhere that perpetrators of domestic violence are often motivated by masculinist ideology, and on that basis that domestic violence that occurs in these circumstances may be reconceived as terrorism.⁶⁸

In the context of this discussion, I suggest that gendered hate speech that meets the criteria for an act of terrorism, namely an act of violence, or incitement of violence, combined with ideological motivation, should be treated as an act of terrorism. This would include the offence of advocating terrorism, contained in s 80.2C of the Commonwealth Criminal Code.

A person commits the offence of advocating terrorism if s/he advocates the doing of a terrorist act or the commission of a terrorism offence and is reckless as to whether another person will engage in a terrorist act or commit a terrorism offence. This offence carries a maximum penalty of five years' imprisonment. The offence applies even if the offence advocated does not occur, and also applies if more than one terrorism offence is advocated.

The offence of advocating terrorism would appear to be directly applicable to some of the cases referred to by Emma Jane in her book, for example online postings that identify the address of a female target and encourage or incite others to visit the address and attack the target (the attack incited often being of a sexual nature). This would constitute advocating an act of violence accompanied by an ideological motivation (namely, a desire to punish or control women generally for violating social or conventional norms) and therefore the offence of advocating a terrorist act.

Attempts to reconceptualise violence against women as terrorist violence have been the subject of denigration in the media,⁶⁹ however if such violence fits squarely within the legal definition of terrorism, one must rhetorically ask why terrorism offences are not being used to prosecute this insidious form of harm against women.

VII. Why Gendered Hate Speech Should Be Regulated

While the invisibility of gendered hate speech in Australia may be seen as one of the reasons why governments have not seen fit to legislate against it, the absence of regulation also contributes to its invisibility. This creates a vicious cycle whereby the harm of gendered hate speech goes unnoticed and unregulated.

Feminist sociologist Dorothy Smith, drawing on Marx, argues that people learn about social phenomena not through their own experiences but through the media and other social reports.⁷⁰ Concepts or assumptions are applied in abstraction from

⁶⁸ This was the topic of my PhD thesis entitled "Reconstructing Domestic Violence as Terrorism against Women" (2012), Australian National University.

⁶⁹ Corinne Barraclough, "Incel and the perilous politics of terrorism", *The Spectator*, 26 April 2018, <<https://www.spectator.com.au/2018/04/incel-and-the-perilous-politics-of-terrorism/>>.

⁷⁰ Dorothy Smith (1990) *The Conceptual Practices of Power*, Northeastern University Press.

their factual context; particular “facts” are then chosen from an example to illustrate or support the concept or assumption. Similarly, courts work within the context of legislation, which sets out the parameters of abstract concepts within which they operate. Within a particular factual scenario, aspects of conduct are chosen from the available evidence to support the existence of whatever legal concepts are at play.⁷¹

The case of *Casey v Blume*⁷² provides an illustration. Gladys Casey brought a complaint against Christopher Blume in relation to a range of racist, sexist and sexualised comments about her that he made over a public radio channel. The comments included racist references (e.g. “wog”, “dago”), sexist comments (referring to Ms Casey as “slut”, a “barking dog” and a “prostitute”) and sexualised comments (giving her address and inviting others to contact her for sex). The comments were found to constitute sexual harassment and vilification on the grounds of race, both of which are prohibited by Queensland legislation. However, no consideration was given to whether they also constituted vilification on the grounds of sex – because there is no such provision in the Queensland legislation.

The absence of legal regulation therefore not only excludes a legal mechanism for addressing gendered hate speech, but also provides the framework in which hate speech is discussed and, in the absence of a concept or assumption for addressing gendered hate speech, it is then ignored or overlooked.

If governments were to recognise gendered hate speech in the same way that they do racist hate speech, this would afford recognition to the harm caused by gendered hate speech and assist in achieving public recognition of what gendered hate speech does and is capable of doing. Although it is unlikely that this would result in a mass of civil litigation or prosecutions for gendered hate speech, it would provide a mechanism for action against gendered hate speech in appropriate cases.

As with racist hate speech, the enactment of legislation is not a panacea for all evils. Legislation must be used in combination with programs for awareness and prevention. There also remains an important role for social regulation of hate speech to play, as demonstrated in the *Chris Hall/Paloma Newton/Zane Allchin* case referred to above.

Friends of Newton, the initial target of the derogatory post by Chris Hall, subsequently formed a group called “Sexual Violence Won’t be Silenced”. Together with others such as Australian Alanah Pearce and Canadian Steph Guthrie, they constitute a group of what Jane refers to as “feminist digilantes” who engage in social retribution against online abusers by publishing the details of the offenders online, and passing them onto the media, and the offenders’ employers and social networks.⁷³ Emma Jane gives the example of Michael Brutsch, a 49-year-old military father and financial services company programmer who was exposed by Adrian Chen as the real-life iden-

⁷¹ I have previously written about this in my PhD thesis in Chapter 2.2.

⁷² [2012] QCAT 627.

⁷³ Emma Jane: “Feminist Digilante Responses to a Slut-Shaming on Facebook”, *Social Media and Society*, April-June 2017, 1-10.

tity of online presence “Violentacrez” who was responsible for creating, amongst other things, the site “Creepshots”, featuring covertly taken pictures of women’s breasts and buttocks.⁷⁴ Brutsch was fired within a day of Chen’s exposé being published.

Conclusion

Despite the harm caused to women by gendered hate speech, its harm is largely unrecognised in the Australian legal system.

Unfortunately, it is only in the context of high profile acts of violence like the attacks carried out by Rodger Elliott and Alek Minassian that attacks directed against women as women become visible and the subject of discussion. Yet these attacks represent only the most extreme examples of an ongoing tirade of misogynist abuse directed against women. The rise of social media and other technological communication forums has increased the opportunities for such abuse to proliferate with little risk of repercussion for offenders.

The enactment of legislative provisions prohibiting gendered hate speech would act as a state imprimatur against this kind of conduct and recognition at government level of the harm that it causes. What is required in the immediate context is more awareness of gendered hate speech, what it is, who perpetrates it, and how it plays a role in the promotion of masculinist ideology.

⁷⁴ Emma Jane (2017) 49.