

GENDER AND THE PROHIBITION OF HATE SPEECH

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This article examines the current absence of legal regulation of gendered hate speech in Australia. Drawing on contemporary examples, the article compares hate speech directed towards women as women with other forms of hate speech, in particular racial hate speech, which is currently the subject of legal regulation in all Australian jurisdictions. The various laws regulating hate speech in Australia, civil and criminal, are discussed. Possible reasons for the failure to recognise gendered hate speech are canvassed and recommendations made for legislative change to recognise the harm it causes.

I INTRODUCTION

In recent times, media coverage has been given to incidents involving what might be called ‘hate speech’ directed at women. The most recent concerned a series of insults and threats directed at some French women on a bus in Melbourne, who had apparently offended other passengers simply by singing songs in their native language. Two men were filmed shouting at the women to ‘Speak English or die’, but also making references to one of the women as ‘cunt’, ‘fat fucking bitch’, and threatening to ‘cut the bitch’s tits off’.¹ An earlier incident involved a series of slogans chanted (or written on placards) by protesters during a public rally against the federal government’s proposed carbon tax in 2011. The slogans were directed towards Prime Minister Julia Gillard, and included the words, ‘Ditch the witch’.² The signs, and the fact that the Federal Opposition Leader stood beside them while speaking to the media, were referred to by the Prime Minister in her now famous ‘misogyny speech’ in October 2012.³

Remarkably, with the exception of the Prime Minister’s naming of the ‘Ditch the witch’ incident as an example of misogyny, and some of the support her speech garnered, the gendered aspect of these two attacks went largely unremarked in the

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¹ Adrian Lowe, ‘Racist rant mars suburban bus ride’, *The Age (Melbourne)* (12 November 2012).

² Jeremy Thompson, ‘Abbott won’t apologise for climate rally abuse’ *ABC News Online* (24 March 2011); Julian Drape, ‘Carbon tax debate fires up in Canberra’, *The Age (Melbourne)* (23 March 2011).

³ The text of the speech is available at ‘Transcript of Julia Gillard’s speech’, *Sydney Morning Herald* (10 October 2012), <<http://www.smh.com.au/opinion/political-news/transcript-of-julia-gillards-speech-20121010-27c36.html>>.

media.⁴ In relation to the bus ride incident, media coverage focused on the racist nature of the attack and the fact that the women were targeted because they were French and had been singing French songs. The use of derogatory terms associated only with women, such as ‘cunt’ and ‘bitch’, was overlooked.⁵ It seems that gendered epithets are dismissed as rowdy protests or robust criticism, or simply par for the course, rather than being recognised as sex discrimination or gender hatred.

This same ‘gender blindness’ is evident in the lack of legal recognition given to the harm caused by gendered hate speech. The ‘harm principle’, that is, the concept that only conduct that causes harm should be prohibited, underpins the common law.⁶ While seemingly straightforward, the elasticity of the harm principle results in uncertainty as to its practical application in any particular factual context. Questions such as whether conduct that causes non-physical harm (such as psychological or environmental harm) or conduct involving potential rather than actual harm should be prohibited are capable of different resolutions and therefore there are ‘grey areas’ for application of the principle.⁷

One of these grey areas is the regulation of ‘dangerous speech’, that is, speech that might be said to hurt a person or group on the basis of her, his or its characteristics. Although speech is ostensibly just a collection of words, it can cause psychological harm, and can also directly or indirectly cause physical harm through the incitement or encouragement of violent acts. In the United States, there has been active debate over whether speech constitutes ‘ideas’ or ‘acts’ and whether it should therefore be subject to protection under the First Amendment in the context of the regulation of pornography, a particular subset of dangerous speech that will be discussed further below.⁸

In the first section of this article, the Australian legislative schemes for prohibition of hate speech, and the provisions for taking account of hate motivation in relation to substantive crimes, are outlined. In the second section, the phenomenon of gendered hate speech, and why it constitutes harm to women, are considered. Finally, the virtual absence from the legislation of gender as a ground of vilification is considered, noting that this absence occurs within a context of

⁴ Exceptions in relation to the ‘Ditch the witch’ slogans include a letter from Professor Margaret Thornton to the *Canberra Times*: ‘The Good, bad and ugly sides of climate tax protest’, *Canberra Times* (25 March 2011); Greens Senator Christine Milne noted that the placards were ‘sexist’: Drape, above n 2, while Sophie Mirabella MP denied that there was a gendered aspect to them: ‘Sophie Mirabella Talks about the No Carbon Tax Rally’, *Radio National* (24 March 2011).

⁵ For coverage of the incident see Adrian Lowe, ‘Racist rant mars suburban bus ride’, *The Age (Melbourne)* (12 November 2012); Andy Burns, ‘Police probe mob’s racist tirade against bus passenger caught on camera’, *The Herald Sun* (22 November 2012); Alex Ward, ‘Bus passengers gang up and threaten to kill French tourists on Australian bus because they don’t speak English’, *Daily Mail (UK)* (21 November 2012). One commentator did make reference to the fact that it was an attack by men against women: John Silvester, ‘Idiots captured on Coward camera’, *The Age (Melbourne)* (21 November 2012).

⁶ Originally expressed in 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.

⁷ Bronitt and McSherry, above n 6, 57-9.

⁸ See for example Catharine MacKinnon and Ronald Dworkin, ‘Pornography: an Exchange’ in Drucilla Cornell (ed), *Feminism and Pornography* (Oxford University Press, 2000) 121.

historical failure to recognise harms to women. I conclude by recommending that legislation should be amended in each Australian jurisdiction to include sex or gender as a ground of prohibited hate speech.

II HATE SPEECH AND HATE CRIME LEGISLATION IN AUSTRALIA

Despite the absence of a Bill of Rights or a constitutionally-entrenched right to free speech in this country,⁹ the Australian government has traditionally taken a cautious approach to the regulation of speech.¹⁰ Legislation prohibiting public acts of vilification has been contentious because it is seen as interfering with free speech.¹¹ Notwithstanding this caution, both state and federal governments have enacted laws that in certain circumstances prohibit speech that has the effect or the intention of inciting others to violence, or of insulting or intimidating persons or groups with certain characteristics. Laws in a number of jurisdictions also provide that it is an aggravating factor in sentencing if a crime is motivated by hatred toward a particular group.¹²

In relation to both these types of laws, hate speech is only prohibited when it is directed at particular groups. A noteworthy aspect of laws across Australian jurisdictions is the almost total absence of reference to sex or gender. The harm principle, insofar as it is applied through laws regulating dangerous speech, does not recognise harm caused to women, directly or indirectly, through speech.

Although there is no criminal prohibition of hate speech at the federal level, the offences of urging violence against groups, and urging violence against members of groups, found in sections 80.2A and 80.2B of the Commonwealth Criminal Code,¹³ serve as a prohibition of hate speech. 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.

⁹ However, the High Court has implied a freedom of communication in relation to political matters, subject to such restrictions as are reasonably appropriate and adapted to achieving a legitimate government end: *Lange Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁰ Simon Bronitt, 'Hate Speech, Seditious and the War on Terror' in Katherine Gelber and Adrienne Stone (eds), *Hate Speech and freedom of speech in Australia* (Federation Press, 2007) 129, 136.

¹¹ Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 70, 84. The authors note that Australia, upon ratification, entered a reservation to article 4(a) of the *Convention on the Elimination of All Forms of Racial Discrimination*, relating to racial vilification.

¹² These provisions are referred to below.

¹³ *Commonwealth Criminal Code Act 1995* (Cth). These provisions came into force in late 2010. The amendments were made in response to the ALRC Report, *Fighting Words: A Review of Seditious Laws in Australia*, Report no. 104 (Commonwealth of Australia, 2006), which recommended replacing the word 'seditious' with 'urging violence', and modernising and clarifying elements of the offences: Explanatory Memorandum to the *National Security Legislation Amendment Act 2010* (Cth), p 5.

These sections, together with an amended section 80.2, supersede the previous section 80.2, which was introduced by the *Anti-Terrorism Act (No. 2)* of 2005¹⁴ to replace sections 24A to 24E of the *Crimes Act 1914* (Cth) (“the Crimes Act”). The *Anti-Terrorism Act (No. 2)* simultaneously amended the definition of ‘seditious intention’ in the Crimes Act 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.¹⁵ The laws as reframed serve mixed objectives of protecting security and human rights; however the purpose of the 2005 amendments was not to strengthen the protection of racial minorities, but to expand the scope of prohibition of the incitement of terrorism.¹⁶

Notably, the offences in sections 80.2A and 80.2B do not prohibit urging a group to use force against another group or individual distinguished by sex or gender.¹⁷ It is unclear what the reason for this omission was. It may be that the incitement of violence between gendered groups was not envisaged as a possibility, an oversight that would be consistent with the historical oversight of crimes against women, considered below. It might be that sex/gender is not included in Article 20 of the *International Covenant on Civil and Political Rights*, suggested by the Gibbs Committee to be the basis for the amended sedition provision, although then section 80.2(5) as amended in 2005 included political opinion despite its not being mentioned in Article 20.¹⁸ It could also be because gendered violence was not conceptualised as having the capacity to threaten the peace, order and good government of Australia, which is a requirement of the offences in sections in 80.2A(1) and 80.2B(1).¹⁹ Given the absence of reference to sex or gender in the reports and debates leading to the amendment,²⁰ it would appear that little consideration was given to the issue at all.

Based on the wording of the offence provisions in sections 80.2A and 80.2B, it seems that conduct that violates these provisions will commonly constitute hate

¹⁴ *Anti-Terrorism Act (No. 2) 2005* (Cth).

¹⁵ Former s 30A(3)(d) of the *Crimes Act 1914* (Cth), repealed by the *National Security Legislation Amendment Act 2010*. The elaboration of the different ‘types’ of groups is not contained in the legislation but found in the Explanatory Memorandum to the *Anti-Terrorism Act No. 2 (2005)* at p. 89.

¹⁶ Simon Bronitt and James Stellios, ‘Sedition, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror” (2006) 30 *Melbourne University Law Review* 923.

¹⁷ The Explanatory Memorandum to the *Anti-Terrorism Act (No. 2) 2005* (Cth) notes that the new s 80.2(5) replacing ss 24A to 24E of the Crimes Act modernises the language in relation to groups or classes as recommended by the Gibbs report (p. 50).

¹⁸ See for example Sir Harry Gibbs, *Review of Commonwealth Criminal Law*, Fifth Interim Report, (Australian Government Publishing Service, June 1991), Chapter 32. The report refers only to the fact that s 24A was considered to require narrowing to particular groups in the community, whether distinguished by nationality, race, religion or other such groups and to the fact that the prohibition on grounds of race, religion or nationality was supported by the external affairs power and Article 20 of the *International Covenant on Civil and Political Rights*. However, sedition also includes a reference to groups defined by ‘political interest’, which is not referred to in Article 20. Political opinion is included in Article 26, which guarantees equal and effective protection against discrimination on any ground, including also sex.

¹⁹ Bronitt and Stellios argue that it is doubtful whether hate crimes outside of racial and religious violence would be likely to prejudice the security of the Commonwealth: above n 16, 947.

²⁰ Sex and gender are also not addressed in the ALRC Report, *Fighting Words: A Review of Sedition Laws in Australia*, Report no. 104 (Commonwealth of Australia, 2006).

speech (and may therefore also constitute a crime under state or territory legislation), which are considered further below.

In terms of civil provisions at the federal level, racial vilification is prohibited under the *Racial Discrimination Act 1975*.²¹ The *Sex Discrimination Act 1984* (Cth) contains no comparable provisions. The federal government's Exposure Draft Human Rights and Anti-Discrimination Bill, released for discussion in late 2012, aims to consolidate existing federal anti-discrimination schemes (sex, race, disability, age and the Australian Human Rights Commission Act) into a single scheme, ensuring that highest standards are applied across all types of discrimination in public life. Accordingly, in relation to 'discrimination', draft section 19 provides that a person 'discriminates' against another person if the first person treats, or proposes to treat, the other person unfavourably, including harassing the other person and other conduct that offends, insults or intimidates the other person, because the other person has a particular protected attribute, or a combination of protected attributes. 'Protected attributes' include, *inter alia*, sex and race, although sex is notably the subject of a number of exemptions contained in other provisions of the Act.²²

Discrimination is unlawful if it is connected with any area of 'public life', defined non-exhaustively as including (*inter alia*) work and work-related areas, education or training, provision of goods and services, access to public places, and membership and activities of clubs.²³ This includes conduct that 'offends, insults or intimidates' another person on the basis of either race or gender, if it occurs in the context of 'access to a public place' for example on the street or on public transport.²⁴ However, the Bill goes on to include a special prohibition on racial vilification, in similar terms to the current prohibition on 'offensive behaviour because of race, colour or national or ethnic origin' in section 18C of the *Racial Discrimination Act 1975*.²⁵ While there is some overlap between the definition of 'discrimination' and the definition of 'racial vilification', the latter is more specific in prohibiting conduct that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' and the perpetrator engages in the conduct either because the target/s is or are of a particular race or are assumed to be, or because the target or members of the target group have an associate of a particular race or assumed to be, and the conduct is

²¹ *Racial Discrimination Act 1975* (Cth) ss 18B-18F. Australia entered a reservation to article 4(a) of the *Convention on the Elimination of All Forms of Racial Discrimination*, relating to racial vilification, which means that it is not bound by treaty to enact criminal prohibitions on racial vilification and like offences, although it undertakes to legislate to that effect as soon as practicable.

²² Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) Part 2-2, Div 4. While these exceptions are themselves problematic from a feminist perspective, they are not the focus of discussion here.

²³ Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) s 22. Conduct that is unlawful under the Bill may be the subject of a complaint to the Human Rights Commission: s 88. The Bill extends the scope of sex-based discrimination to all areas of public life, broader than the more limited protection offered under the *Sex Discrimination Act 1984*.

²⁴ In *Rankilor v Jerome Pty Ltd t/as Barkers Discount Furniture Store* (2006) EOC 93-440, references to the complainant as a 'stupid woman' and a 'useless woman' were held to constitute sex discrimination in the manner of providing services contrary to the *Sex Discrimination Act 1984* (Cth).

²⁵ Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) s 51.

engaged in ‘otherwise than in private’. The 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 sight or hearing of people who are in a public place.

While the Bill, like the *Sex Discrimination Act 1984*, prohibits ‘sexual harassment’, there is no provision for sex or gender comparable to the racial vilification provision. Sexual harassment is defined as a situation where the first person makes an unwelcome sexual advance or request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to the target, and a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the other person would be offended, insulted, humiliated or intimidated by the first person’s conduct.²⁶ Unlike the racial vilification provision, the sexual harassment prohibition is clearly aimed at unwelcome sexual conduct rather than speech that is reasonably likely to offend, insult, humiliate or intimidate and is engaged in because the target is of a particular gender.²⁷ Although the prohibition of sexual harassment is obviously important and necessary, the lack of a gender vilification provision at the federal level is strong evidence of the invisibility of gendered vilification in Australian society.

At the state and territory level, all jurisdictions have enacted hate speech legislation, although the form varies. Tasmania provides for civil remedies only, not criminal penalties.²⁸ The Northern Territory only has general anti-discrimination laws, not specific hate speech provisions.²⁹ Western Australia has criminal provisions only, and all other jurisdictions provide for both criminal and civil remedies.³⁰ Jurisdictions vary in terms of the group characteristics that are covered by law. Legislation in all jurisdictions covers hate speech based on race. Religious hate speech is prohibited in Queensland, Tasmania and Victoria, while hate speech on the basis of sexuality and gender identity is prohibited in the ACT, NSW, Queensland and Tasmania.³¹

With the exception of Western Australia, criminal hate speech legislation generally prohibits a public act inciting hatred, serious contempt or ridicule of a person based on a specific ground, generally by means which threaten physical

²⁶ Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) s 49.

²⁷ It should, however, be noted that in the Queensland decision of *Brosnahan v Ronoff* [2011] QCAT 439, derogatory references to a transgender person as being a ‘faggot’ and having her ‘dick in a jar’, in the context of an attack on her property, were found to fall within the definition of sexual harassment in the *Anti-Discrimination Act* (Qld) s 119. Significantly, the conduct was also found to constitute ‘vilification on the grounds of gender identity’, however there is no corresponding prohibition in the Queensland legislation on vilification on the grounds of gender *per se*. I am indebted to one of the anonymous reviewers for bringing this case to my attention.

²⁸ *Anti-Discrimination Act 1998* (Tas) ss 16-9.

²⁹ *Anti-Discrimination Act* (NT) s 19.

³⁰ *Discrimination Act 1991* (ACT) ss 66-67; *Anti-Discrimination Act 1977* (NSW) ss 20B-20D; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 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.

³¹ Other hate speech grounds include HIV/AIDS status (*Discrimination Act 1991* (ACT) s 66 and *Anti-Discrimination Act 1977* (NSW) s 49ZXA-49ZXC); disability (*Anti-Discrimination Act 1998* (Tas) s 19).

harm to person or property.³² Civil hate speech laws tend to have the first two requirements, without the need to identify a threat to person or property.³³ Western Australia has enacted a broader set of provisions, including offences such as conduct likely to incite racial animosity or racist harassment, and conduct likely to racially harass.³⁴ There is also a contrast between the federal racial vilification provisions, discussed above, which focus on public acts that might offend the target group, and state and territory provisions, which generally focus on the response the hate speech generates in the general public, namely the incitement of hatred, serious contempt or severe ridicule.³⁵

The only jurisdiction in which hate speech is prohibited on the basis of gender is Tasmania, and these are civil and not criminal provisions.³⁶ Section 17 of the *Anti-Discrimination Act* (Tas) 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.³⁷

In addition to hate speech legislation, some jurisdictions also provide for situations where substantive crimes are accompanied by motivation of hatred based on a particular ground. There are three major models for so-called 'hate crimes'. The first is the 'penalty enhancement model', which provides for a higher maximum penalty where a crime is motivated by hatred, adopted in Western Australia (and the US) for hate-based crime.³⁸ The second, the sentence aggravation model, which provides that motivation by hatred is an aggravating factor on sentence, exists in New South Wales, Victoria, the Northern Territory and the United Kingdom.³⁹ The latter model, rather than stipulating an increase in penalty, simply provides for hate motivation to be taken into account as

³² Discrimination Act 1991 (ACT) s 67; Anti-Discrimination Act 1977 (NSW) ss 20D, 38T, 49ZTA, 49ZXC; Anti-Discrimination Act 1991 (Qld) s 131A; Racial Vilification Act 1996 (SA) ss 4-6; Racial and Religious Tolerance Act 2001 (Vic) ss 24-25 (Victoria does not require a 'public act').

³³ Discrimination Act 1991 (ACT) s 66; Anti-Discrimination Act 1977 (NSW) ss 20C, 38R, 49ZT, 49ZXB; Anti-Discrimination Act 1991 (Qld) s 124A; Civil Liability Act 1936 (SA) s 73; Anti-Discrimination Act 1998 (Tas) s 19 (s 17 also creates a broader prohibition against conduct which offends, humiliates, intimidates, insults or ridicules where a reasonable person would anticipate the conduct would have that effect); Racial and Religious Tolerance Act 2001 (Vic) ss 7-8.

³⁴ Criminal Code Act (WA) ss 78, 80B.

³⁵ However, the Tasmanian Anti-Discrimination Act s 17 is similarly worded to the federal provision. The difference in the wording of the provisions may be significant in terms of the scope of the vilification that is covered, however that is beyond the scope of this article.

³⁶ Anti-Discrimination Act 1998 (Tas) s 17.

³⁷ Anti-Discrimination Act 1998 (Tas) ss 16, 17, 19. Section 17, on the other hand, refers only to gender, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.

³⁸ Criminal Code (WA) ss 80I, 313, 317, 317A, 338B, 444; *Hate Crimes Sentencing Enhancement Act* 28 USC § 994 (1994); *Federal Sentencing Guidelines US* (2011) § 3A1.1.

³⁹ *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); *Criminal Justice Act* 2003 (UK) ss 145 (racial and religious aggravation) and 146 (sexual orientation and disability); *Crime and Disorder Act* 1998 (UK) ss 28 and 96.

potentially one of a number of aggravating factors, and is therefore more flexible in terms of the impact it has on sentence.

The third model is the substantive offence model, creating specific crimes that apply where the perpetrator is motivated by prejudice. Although there are no substantive 'hate crime' laws in Australia (as opposed to hate speech laws), in some overseas jurisdictions there is provision for substantive crimes motivated by hatred or prejudice. For example, California, Massachusetts and Canada all criminalise certain types of conduct motivated by prejudice.⁴⁰

Notably, in relation to Australian hate crime provisions, gender is not expressly included as a relevant factor. Of the sentence aggravation models, the Northern Territory and Victoria refer to group identity without specifying what kind of groups, while Western Australia refers only to race and New South Wales to a range of categories but gender is not specifically mentioned.⁴¹ Therefore, there is the capacity for gender hatred to operate as an aggravating factor on sentence in the Northern Territory, Victoria and New South Wales, but to date there have been no reported cases in which this has occurred.⁴²

The utilisation of hate speech laws in Australia has been limited,⁴³ and does not inspire confidence in their availability as an effective remedy against vilification. Only Western Australia has successfully prosecuted someone under the vilification laws, most recently in *O'Connell v State of Western Australia*.⁴⁴ However, in relation to racial hate speech and, in some cases, vilification on the basis of religion and sexuality, statutory prohibitions at least exist as a potential tool in tackling discrimination. That is not the case in relation to gender-based hate speech. In the next section, I argue that this is not because gendered hate speech does not exist; rather for reasons that will be explored in the third section, the harm caused by gendered hate speech is not recognised under Australian law.

III THE PHENOMENON OF GENDERED HATE SPEECH

The first challenge that arises in addressing the problem of gendered hate speech is to identify it. The definition of civil hate speech that applies in most jurisdictions is a public act inciting hatred, serious contempt or ridicule of a

⁴⁰ California Penal Code, §§ 422.6, 190.03 (2011); Mass Gen Laws, §§ 37, 39 (2011); Criminal Code RSC 1985 C-46 ss 318-320, cited in Gail Mason, 'Hate crime laws in Australia: Are they achieving their goals?' (2009) 33(6) *Criminal Law Journal* 326.

⁴¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2); *Criminal Code Compilation Act 1913* (WA) s 80I.

⁴² Mason does not refer to any gender-based hatred sentences in her analysis of Australian legislation: Gail Mason, above n 40. I did not locate any cases in which gender hatred was treated as an aggravating factor in a search of LexisNexis (Casebase) database.

⁴³ Mason, above n 40. One of the limitations that has been identified is the difficulty in proving the motive of the offender: Tasmanian Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Issues Paper No. 16, June 2010), <<http://www.law.utas.edu.au/reform/documents/RVFinalA4.pdf>>.

⁴⁴ [2012] WASCA 96 (dismissing the appellant's appeal against conviction for one offence of engaging in conduct likely to harass a racial group, and seven offences of engaging in conduct intended to create, promote or increase animosity towards, or harassment of, a racial group). Also see the case of Damian Blaxall, cited in Katherine Gelber and Adrienne Stone (eds), *Hate Speech and freedom of speech in Australia*, Federation Press, Sydney, 2007, 8-9 (involving a graffiti attack in which swastikas and racists slogans were posted).

person based on a specific ground. Although the application of hate speech definitions is always capable of different interpretations (the ‘public’ aspect is discussed in more detail below), it seems that this definition would encompass 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. It is not necessary to look far in order to find examples of such conduct. On the street, in film and on television, in public and in private, words associated with female hatred such as ‘bitch’, ‘slut’, ‘tramp’, ‘slurry’, ‘skank’ and ‘cunt’ and other words that associate women with animals or body parts, are used with such regularity that they are rarely the subject of comment.⁴⁵

Unlike words such as ‘nigger’ or ‘Paki’ which automatically trigger an adverse response in the public domain and are commonly recognised as racial slurs, words used to and about women are not recognised as gendered epithets.⁴⁶ Yet, as Gelber notes, both types of hate speech have the effect of making a ‘truth claim’ about the inferiority of the recipient, which reinforces and recreates the victim’s position of inequality.⁴⁷

It is true that a substantial proportion of derogatory language based on a woman’s gender would satisfy the criteria of inciting hatred, serious contempt or ridicule, but not the additional criteria for most criminal provisions of incorporating means that threaten harm to person or property. This latter requirement is an important qualifier on all criminal hate speech, and one that limits criminal conduct to words that pose a real threat of physical harm. However, gender-based denigration or harassment does occur in the context of other words and actions that threaten or in fact constitute physical harm. For example, domestic and sexual assaults are frequently accompanied by the use of words that denigrate a woman on the basis of her gender.⁴⁸ The use of terms such as ‘bitch’ and ‘cunt’, accompanied by a threat to ‘cut the bitch’s tits off’, described above in relation to the Melbourne bus incident, would clearly fall within such a definition of criminal hate speech.

Another relatively recent example of conduct that might be said to involve vilification on the basis of gender was a Facebook page set up by some University of Sydney students entitled ‘Define Statutory’ and defined as ‘pro-rape’. The page, subsequently removed from Facebook, was variously described as ‘inciting people to sexual violence’ and ‘grooming perpetrators of sexual violence’.⁴⁹ This

⁴⁵ See Pamela Romito, *A Deafening Silence: Hidden violence against women and children* (The Policy Press, 2008) (transl Eastwood, J), 48; Deb Waterhouse-Watson, ‘All Women are Sluts: Australian Rules Football and Representations of the Feminine’ (2007) 27 *Australian Feminist Law Journal* 155. For gendered epithets in the political context see Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (Routledge, 1996), Chapter 2, and in the military context see Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force: Phase 2 report* (Australian Human Rights Commission, August 2012) 78.

⁴⁶ Cf Katherine Gelber, *Speaking Back: The free speech versus hate speech debate* (John Benjamins, 2002) 71 (who does give recognition to gendered epithets).

⁴⁷ *Ibid*, 71-2.

⁴⁸ James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses*, Northeastern University Press, Boston, 1999, 82. I have also observed this phenomenon personally through my previous work as a criminal prosecutor.

⁴⁹ Ruth Pollard, ‘Elite College Students proud of ‘pro-rape’ Facebook page’, *Sydney Morning Herald*, 9 Nov 2009; ‘Pro-rape Facebook Page Condemned’ *ABC News Online* (9 Nov 2009),

would appear to satisfy all the requirements of hate speech, yet because of the absence of gender as a specified ground in the vilification provisions, could not, as the law currently stands, be prosecuted in any Australian jurisdiction.

The main focus of this article is verbal speech acts, however it is worth noting that pornography is a widespread and pervasive form of public speech that may well, in certain circumstances, constitute gendered hate speech. Material that depicts sexual violence in a way that would offend the standards of ordinary people is refused classification under federal government legislation,⁵⁰ however violent pornography and material that depicts women in ways that are humiliating or degrading are readily available, particularly via the internet.⁵¹ Derogatory language used to describe women and the acts being done to them are a common feature of pornographic materials.⁵² Since pornography produced for public consumption is undeniably a 'public act', it would constitute hate speech where it incites hatred, contempt or humiliation of women.

The recognition of certain types of pornography as dangerous speech is consistent with the identification of pornographic material as harmful to women by feminists such as Andrea Dworkin and Catharine MacKinnon.⁵³ In the United States, MacKinnon and Dworkin drafted a well-known Anti-Pornography Ordinance that was passed into law in Indianapolis and Minneapolis,⁵⁴ but was subsequently struck down for violating the First Amendment of the Constitution.⁵⁵ In Australia, the implied freedom of communication extends only to political matters, and since it is unlikely that pornography could be said to constitute political speech, there is no Constitutional barrier to the recognition of pornography as harm for the purposes of hate speech laws.⁵⁶

When one examines the harm that is said to be targeted by hate speech laws, the rationale applied in favour of prohibiting other forms of hate speech applies equally to gendered hate speech. Hate speech is a phenomenon that affects not

<<http://www.abc.net.au/news/stories/2009/11/09/2736793.htm>>. Another pro-rape Facebook page was reported in May 2010: Lanai Vasek, 'Facebook fury over pro-rape page', *The Australian* (25 May 2010).

⁵⁰ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and also the Guidelines for the Classification of Films and Computer Games.

⁵¹ Michael Flood and Clive Hamilton, *Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects* (The Australia Institute, February 2003), Chapter 3.

⁵² *Ibid.*, 32.

⁵³ The best-known example is the demonstration of harm caused through pornography outlined in Catharine MacKinnon and Andrea Dworkin (eds), *In Harm's Way: the Pornography Civil Rights Hearings* (Harvard University Press, 1998). See also Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography and Inequality' in Karen Maschke (ed), *Pornography, sex work, and hate speech* (Garland Publishing, New York, 1997) 69; Catharine MacKinnon, 'Not a Moral Issue' in Karen Maschke (ed), *Pornography, sex work, and hate speech* (Garland Publishing, New York, 1997) 2.

⁵⁴ Model Anti-Pornography Civil-Rights Ordinance, Andrea Dworkin and Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality*, Organizing Against Pornography (Minneapolis, 1988).

⁵⁵ *American Bookseller Association Inc v Hudnut, Mayor, City of Indianapolis* 771 F 2d 323 (7th Cir 1985). In Minneapolis it was disallowed by the Mayor.

⁵⁶ In any case, it is difficult to see how pornography or other forms of gendered hate speech could be said to violate the implied freedom of political communication if other forms of hate speech did not do so.

only the individuals targeted but all members of the group, through increasing the sense of vulnerability and victimisation of members.⁵⁷ Talking about hate crime generally, the New York State legislature has noted that:

Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.⁵⁸

This is true of gendered hate speech no less than for other forms of vilification.

A number of writers, through their recognition of the gendered nature of harms committed systematically by men against women, have laid the theoretical foundation for recognition of violence against women as hate crime.⁵⁹ Angelari notes that women are not considered by society to be ‘interchangeable’ in the same way as victims of racially or ethnically motivated crime, that is, harm committed against an individual woman is not considered to impact on other women in the same way that crime committed against a member of an ethnic group might be seen as a harm to all members of that group.⁶⁰

However, the view that women are not ‘interchangeable’ overlooks the impact that violence against individual women has upon all women, and the ways in which women moderate and alter their behaviour in response to violence and its perceived threat.⁶¹ Instances of sexual assault are an excellent example; reports of rape are often accompanied by media and police exhortations to women to alter their behaviour by not walking alone, avoiding certain areas at night, and locking their doors;⁶² women who read or hear these messages understand that they could be the ‘next victim’ and that the last victim was targeted *because she was a woman*.

Like substantive hate crime, gendered hate speech has a detrimental effect on women. The harm caused to women by hate speech may manifest itself in a variety of ways; the victim knows she is targeted because she is a woman, and other women present during the crime or who read or hear about it subsequently

⁵⁷ Gelber, above n 46, Chapter 4.

⁵⁸ NY [Penal] LAW (Consol) § 485.00.

⁵⁹ The best known being Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989); Kate Millett, *Sexual Politics* (Sphere Books, 1971); Susan Brownmiller, *Against our Will: Men, Women and Rape ... a conscious process of intimidation by which all men keep all women in a state of fear* (Penguin 1976) discussed in 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.

⁶⁰ Angelari, above n 59. In relation to this, see for example the recent discussions relating to a number of violent crimes in which Indian nationals were the victims, which were perceived by members of the Indian community in Australia as specifically targeting them as a racial group: for discussion see Peter Spolc and Dr Murray Lee, ‘Indian Students in Australia: Victims of Crime, Racism or the Media?’ published online at <http://proceedings.com.au/isana2009/PDF/paper_Spolc.pdf>.

⁶¹ Angelari, above n 59, 428-30.

⁶² Patricia Easteal, *Voices of the Survivors* (Spinifex Press, 1994) 1.

are aware of that and the potential for them to be victims also. Notwithstanding this, gender is largely absent from the target categories in hate speech offence provisions. In the following section, I consider this lacuna and examine possible explanations for it.

A *The absence of gender as a category of hate speech*

1 *Possible explanations for the failure to recognise gendered hate speech*

It might be argued that gendered hate speech has not attracted the same legislative attention as other forms of hate speech because it is not as easily recognisable as hate speech, and legal prohibition would therefore be too difficult to enforce.⁶³ Gendered hate speech, like other forms of sex discrimination, is largely perceived in Australia to be a problem associated with other countries, and this impression is reinforced by the ad hoc nature of sex discrimination complaints that is necessitated by the system of individualised complaints that is enshrined in Australian legislation.⁶⁴

However, the same problem arises in relation to other forms of hate speech. Race-based hate speech is often not easily recognisable. Indeed, it is sometimes framed in 'positive' terms such as an affirmation of love for one's own culture/race or a 'discourse of care' overtly expressing concern for the maligned group.⁶⁵ Australian research suggests that 'everyday' forms of racism such as disrespectful treatment and name-calling are more common than institutional forms of racism.⁶⁶ Subtle forms of vilification may be even more harmful than overt forms because they are more likely to be accepted as legitimate forms of expression.⁶⁷

The subtle nature of much of the racism expressed in Australian society has not prevented the enactment of laws specifically prohibiting race-based hate speech. Perhaps, then, the absence of gender as a category of hate speech is due to the failure to recognise much of it as harmful speech at all, subtle or not.

It is perhaps the very pervasiveness of gendered hate speech that contributes to its invisibility and its insidiousness. The use of derogatory terms based on gender is widespread, and their identification as gendered terms is made more problematic by their diversified use, for example the word 'cunt' is commonly used as a generally derogatory term *by men about other men*.⁶⁸ The term only becomes the

⁶³ Thornton notes that sex discrimination is more 'conceptually elusive' than race discrimination: Margaret Thornton, *The Liberal Promise* (Oxford University Press, 1990), 62.

⁶⁴ Margaret Thornton, 'Can we Feminise Human Rights' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 319, 321-4.

⁶⁵ Gail Mason, 'The Reconstruction of Hate Language' in Katherine Gelber and Adrienne Stone (eds), *Hate Speech and freedom of speech in Australia* (Federation Press, 2007), 34. A recent example is to be found in *Eatock v Bolt* (2011) FCA 103, where in an action for racial vilification, one of the arguments raised by journalist Andrew Bolt was that he was concerned about injustice in the allocation of opportunities to Indigenous people: see [444].

⁶⁶ Kevin Dunn et al, 'Cities of race hatred? The spheres of racism and anti-racism in contemporary Australian cities (2009) 1(1) *Cosmopolitan Civil Societies Journal* 1.

⁶⁷ Gelber, above n 46, 79.

⁶⁸ Note that online dictionary tools almost without exception include 'female genitalia' and 'disparaging term for a woman' amongst the meanings of the term: see

subject of controversy when prefaced by a word that transforms it into a racial epithet, for example ‘black cunt’,⁶⁹ or in the Melbourne bus incident, where gendered epithets took place in the context of a racist attack. The liberal underpinnings of the law also direct focus onto the subjective intention of the speaker rather than the *effect* of the speech; as gendered language is routinely used in a flippant or throwaway fashion, it may be difficult to establish the requisite intention for a criminal prosecution.⁷⁰

Certainly, the legal system in Australia has an unenviable history of coming late to the recognition of forms of harm committed systematically against women. For example, it was not until the work of feminist activists and women’s groups in the 1970s that the problem of domestic violence was given a name and brought to public attention, after it had appeared and disappeared from public attention in the late 1800s.⁷¹ Proponents of the *Sex Discrimination Act*⁷² had to work hard to fight against perceptions that the legislation was both unnecessary and potentially harmful to the fabric of society.⁷³ Until the early 1990s, a man had a legal entitlement to access his wife’s body and could not be prosecuted for rape.⁷⁴ It is therefore not surprising that the law would be slow to recognise gendered hate speech as a form of harm committed primarily against women.

Possibly because women constitute such a significant proportion of the population, gender-based slurs may also be perceived as targeting only the individual women to whom they are directed rather than women *as a group* or *as*

<<http://www.thefreedictionary.com/cunt>>,

<<http://www.urbandictionary.com/define.php?term=cunt&page=2>>,

<<http://onlineslangdictionary.com/definition+of/cunt>>,

<<http://www.merriam-webster.com/dictionary/cunt>>, <<http://en.wikipedia.org/wiki/Cunt>>.

⁶⁹ Adrian Howe, ‘Every Time you said “Penis”’: (Men’s) Violence, Victim Advocacy and Impermissible Speech’ (2010) 25 *Australian Feminist Studies* 209-222, 216. See also Kylie Weston-Scheuber, ‘Why the Silence on Johns Dropping the C Bomb?’, *National Times*, 21 June 2010, <<http://www.theage.com.au/opinion/society-and-culture/why-the-silence-on-johns-dropping-the-cbomb-20100621-yrwb.html>>.

⁷⁰ This applies in relation to offensive behaviour laws: see Bronitt and McSherry, above n 6, 843-5. In the civil context, it has been noted that the motivation or intention of the alleged discriminator is a relevant, though not necessary, consideration: *Human Rights & Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 321-2. In a recent decision, the NSW Court of Appeal held that it is not necessary to establish an intention on the part of the perpetrator to incite hatred in order to make out the incitement of hatred on the ground of homosexuality: *Senol v Collier & Anor (No 2)* (2012) 260 FLR 414.

⁷¹ For an in-depth discussion of the history of the recognition of domestic violence in Australia see Ann Genovese, *The Battered Body: a Feminist History*, Doctoral Thesis (University of Technology, Sydney, February 1998).

⁷² Sex Discrimination Act 1984 (Cth).

⁷³ Margaret Thornton and Trish Luker, ‘The Sex Discrimination Act and its Rocky Rite of Passage’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 24.

⁷⁴ The marital rape exemption was formally abolished in Australia by the High Court in *R v L* (1991) 174 CLR 379, following the House of Lords decision in *R v R* [1992] 1 AC 599. For statutory abolition see Crimes Act 1900 (NSW) s 61T; Crimes Act 1958 (Vic) s 62(2); Criminal Law Consolidation Act 1935 (SA) s 73(3); Crimes Act 1900 (ACT) s 69.

a class. For example, although racial and gender vilification are sometimes combined, the former aspect is more likely to be recognised than the latter.⁷⁵

Thus, when a racial epithet is used, that is associated directly and exclusively with race. Many gender-based epithets, however, on the surface relate to a *particular aspect* of gender, usually sexuality. Many derogatory terms used to and about women, ‘slut’, ‘whore’, ‘ho’, ‘tart’, ‘skank’ and ‘slurry’ to name a few, appear to label the recipient not simply as a woman, but as a *sexually promiscuous* woman. It is therefore possible to characterise them not as forms of gender-based discrimination but as insults based on perceived characteristics or traits of the particular women to whom they are targeted.

However, to understand gendered vilification as a personal attack is to misunderstand the gendered basis for, and consequences of, such terms. To begin with, terms such as those described above are not used only in situations where the speaker actually has a perception that the recipient is sexually promiscuous. Terms such as ‘slut’ and ‘ho’ are commonly used against women in all sorts of settings, including where there can be no possible perception of sexual promiscuity, and sexual history or experience bears no relevance in the context (for example the Melbourne bus ride incident). Secondly, if these terms denoted simply sexual promiscuity, they would be used also in relation to men, but they are not.

Thirdly, to pretend that the kinds of words used regularly to and against women are about sex (the act) and not gender, is to ignore the relationship between the two that has been described by, in particular, Catharine MacKinnon.⁷⁶ On MacKinnon’s view, sex can be used to oppress women,⁷⁷ and that goes for sex speech as it does for sex act. Sex is written on women’s bodies, and that has nothing to do with what they wear or how they present themselves. For some men, women *are* sex, and that is why they are called the names they are.

The de-gendering of gender-laden terms is also facilitated and obscured by their regular use by women.⁷⁸ For example, the overlooking of gendered hate speech was manifest in the prosecution of a girl in Western Australia for calling another girl a ‘white slut’ during the course of an assault. The girl pleaded guilty to assault and was sentenced for that, however the magistrate dismissed the charge of racial harassment, finding that this was a case of ‘petty name-calling’ rather than severe

⁷⁵ The 2008 Hate Crimes Survey recognised the need for states to provide enhanced penalties for offences committed because of, inter alia, the victim’s gender, however gender vilification is only discussed in combination with racial vilification: Human Rights First, 2008 Hate Crimes Survey (Human Rights First, 2008), 7, 21.

⁷⁶ Catharine MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987), especially Chapter 3.

⁷⁷ *Ibid.*, 86-7.

⁷⁸ Berns notes that de-gendering of domestic violence is achieved by using women writers for stories that question the prevalence of domestic violence or its gendered nature: Nancy Berns, ‘Degendering the Problem and Gendering the Blame: Political Discourse on Women and Violence’ (2001) 15 *Gender and Society* 262.

abuse.⁷⁹ Although the insult had dual aspects, one relating to race and one to gender, the case was treated as one of racial rather than gender vilification.⁸⁰

Another explanation for the legal non-recognition of gendered hate speech may be that it often occurs in the private domain (for example, the domestic context) while the legal definition of hate speech generally requires a ‘public act’, which might be justified on the basis that hate speech must generate some harm above and beyond that created by an interaction between two individuals. While limiting gendered hate speech to speech occurring in the public realm would exclude some hate speech from the scope of prohibition, a significant amount of gendered vilification occurs within the public domain already; the private nature of some gendered vilification therefore does not explain its absence from existing prohibitions. In any case, as discussed in the next section, concepts of ‘public’ and ‘private’ are malleable and open to different interpretations.

B Relevant tests for ‘hate speech’ – the public/private distinction and the motivation tests

The state has historically drawn a distinction between conduct in the ‘public’ and ‘private’ realms, a distinction which has often worked to the detriment of women,⁸¹ for example the state’s historical refusal to intervene in affairs between husband and wife even where the wife was suffering physical and other forms of abuse. However, the concepts of private and public are malleable and subject to different meanings in different contexts.⁸² What is a ‘public act inciting hatred, serious contempt or ridicule’?⁸³ Does the speech said to have that effect need to be published in a public place? Is it the intention of the perpetrator to incite, or the fact that someone is incited that is relevant? Is it necessary for a third party to hear or see the incitement before it can be said to meet the legal criteria? In the age of modern technology, what if the act is performed where the perpetrator believes nobody else is present, but somebody records it and broadcasts it via the internet? What if the offending material is removed immediately, but its content is reported in the newspaper the next day? What if the conduct takes place in a private residence, but is overheard by neighbours and passersby? In each of these scenarios, ‘public’ and ‘private’ are capable of different interpretations and it is therefore not possible to state as a general proposition that most hate speech against women would not constitute a ‘public act’.

⁷⁹ *Police v A Child* (Magistrate Auty, unreported, 14 Sept 2006) discussed in D Weber, ‘WA Court Dismisses Charges over Racial Insult’, Transcript for ABC Local Radio program AM (15 Sept 2006), <<http://www.abc.net.au/am/content/2006/s1741596.htm>>.

⁸⁰ The fact that the perpetrator was the same gender as the victim may have contributed to this aspect being overlooked, however the argument that I make here is that gendered hate speech is not recognised regardless of the perpetrator’s gender.

⁸¹ Margaret Thornton, ‘The Cartography of Public and Private’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 1.

⁸² For example, Ben and Gaus discuss how publicness and privateness can each be understood in three-dimensional contexts of access, agency and interest and a particular object may exhibit aspects of both: SI Benn and GF Gaus, ‘The Liberal Conception of the Public and the Private’ in SI Benn and GF Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983) 31.

⁸³ For example, the definition of ‘public act’ in the ACT includes any act observable by the public, and the distribution/dissemination of any material to the public, both of which would incorporate some of the scenarios set out below: *Discrimination Act 1991* (ACT) s 65.

In relation to hate motivation as a relevant factor in sentencing, the test used to identify an act as a hate crime may determine whether or not gender-based hatred is recognised. Gail Mason identifies three different tests used both in Australia and internationally to identify hate crimes.⁸⁴ The first, the ‘motivation’ test, makes it a requirement of hate speech that the defendant be motivated by group hatred, prejudice or hostility. Prosecution on the basis of this test requires evidence not only that the offender *possessed* a particular prejudice, but also that her or his actions were *motivated* by that prejudice.

The second is the ‘group selection’ test, whereby a victim is chosen due to their membership of a particular group, notwithstanding that the offender may not be motivated by hatred or prejudice against that group. The third test is the ‘demonstration of hostility’ test, whereby an act will qualify as a hate crime if accompanied by words that demonstrate hostility for a particular group. While Victoria and Western Australia incorporate a combination of tests, the New South Wales and Northern Territory provisions adopt only the motivation test.⁸⁵

The difference between the tests will have consequences for what actions are and are not identified as hate crimes. For example in *Aslett v The Queen*,⁸⁶ a robbery targeting victims of Asian background was found not to constitute a hate crime on the basis that the victims were targeted because the offenders believed Asian people to be more wealthy, not because they were motivated by racial hatred or prejudice. By contrast, in *R v Gouros*, the Victorian County Court appears to have adopted the group selection test, which is likely to increase the scope of offences that will be considered motivated by prejudice.⁸⁷

If one takes the same approach to gendered hate crime, it seems likely that either of the ‘group selection’ or ‘demonstration of hostility’ tests will encompass more gendered hate crime than the ‘motivation test’. For example, in the English case of *R v Londesbrough*,⁸⁸ use of the words ‘fucking Paki ... fuck off out of our country’ made by the accused during an assault were found to satisfy the demonstration of hostility test. A sexual offender or domestic violence perpetrator may well be considered to have chosen his victim on the basis of her gender (or at least as one of the factors for that choice) or to have demonstrated hostility towards women through his choice of language, even though it may be difficult to prove he was ‘motivated’ by a hatred of, or prejudice against, women.

The ‘group selection’ and ‘demonstration of hostility’ tests have the advantage of focusing on the harm caused to the victim as a result of the offence, rather than simply the motivation of the perpetrator. It is unlikely to make much difference to the victim whether the offender was especially motivated by prejudice or hatred

⁸⁴ Mason, above n 40.

⁸⁵ *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); *Criminal Code Act 1913* (WA) s 80I. For interpretation of the Victorian provision see *R v Gouros* (unreported, Victorian County Court, 14 December 2009), discussed in Gail Mason, ‘*R v Gouros*: Interpreting Motivation under Victoria’s New Hate Crime Laws’ (2010) 34 *Criminal Law Journal* 323.

⁸⁶ [2006] NSWCCA 49.

⁸⁷ *R v Gouros* (unreported, Victorian County Court, 14 December 2009), discussed in Mason, above n 85.

⁸⁸ *R v Londesbrough* [2005] EWCA Crim 151, discussed in Mason, above n 40, 333.

for them, or whether the perpetrator selected them because of a particular characteristic, or chose to denigrate them based on that characteristic and in doing so demonstrated hostility towards them. Each is likely to cause the same harm as the others.

A combination of all three tests is therefore likely to encompass the harm caused to victims rather than simply the cases where there is available evidence of the perpetrator's particular motive. This would include more of the harm caused by hate speech and hate crime of all kinds, including crimes of gender-based hatred, were those to be legislated into effect.

As explored in this section, there are a variety of possible explanations for the current absence of gender as a ground of prohibition in hate speech and hate crime laws. However, none of these explanations supports the omission of gender. If hate speech laws are designed to target the harm caused by hate speech, in particular its effect on members of groups from which victims are selected, then gendered hate speech should be prohibited in the same way as other forms of hate speech.

IV THE NEED FOR GENDERED HATE SPEECH TO BE RECOGNISED IN LEGISLATION

The obvious remedy for this oversight is to amend legislation to expressly include gender as a prohibited hate crime category. Gendered vilification should be recognised both as a civil prohibition and as a criminal offence, as other types of vilification are in some jurisdictions, and gendered hatred as a motivating factor for violent and property crimes should be expressly recognised as an aggravating matter for sentencing purposes.

Some feminists are, understandably, pessimistic about the potential for effecting change through law reform.⁸⁹ However, this is one area in which law reform has the potential to generate changes in practice. Mason suggests that racial vilification laws may have caused some racist groups to alter their propaganda so as to avoid prosecution.⁹⁰ There is the risk, as she points out, of criminalisation making hate speech more subtle and covert rather than eliminating it altogether. However, the problem of offenders altering their behaviour to circumvent criminal laws is not new, nor is that a reason for conduct not to be criminalised if it fits within the conception of a 'harm' that should be the subject of a criminal offence.

The invisibility of gendered vilification, as evidenced by the Melbourne bus incident and the carbon tax protest, are troubling. Including gender vilification expressly within civil and criminal hate speech provisions would give legal recognition to the problem, which may in turn generate public discussion about, and awareness of, the problem. When racial epithets are hurled, racial vilification laws stand as at least some recognition that a wrong has occurred that should be addressed. Gender vilification should be accorded the same recognition.

⁸⁹ This is at the forefront of the difference between liberal feminists, who believe in equality through legal and social reform, and radical and socialist feminists, who believe that a transformation of power structures is required.

⁹⁰ Mason, above n 65.

The suggestion that gendered hate speech should be criminalised is likely to provoke the argument that such laws would be unworkable due to the sheer volume of hate speech that could be prosecuted, if the types of speech referred to in the second section above were defined as hate speech. However, the floodgates have certainly not opened in relation to the prosecution of racially-based hate speech. This is not due to the lack of racial vilification to prosecute.⁹¹ Rather, it is likely that hate speech laws relating to gender would be applied in the way other hate speech laws have been to date – sparingly.

In any case, it is hardly a valid argument that something that should otherwise be considered criminal activity should not be prohibited because it is so common. If that argument were accepted, it is almost inevitable that common criminal activities such as speeding and illicit drug use would have been decriminalised long ago. Rather, if one accepts that gendered hate speech constitutes a form of harm to individual women and women as a group, just as other forms of hate speech constitute harm, there must be some justification for omitting gender from the categories of hate speech recognised by law.

V CONCLUSION

Hate speech laws have not been applied frequently in Australia, but they do exist. The very act of prohibition by law acts as a symbolic statement that certain conduct is harmful and not to be tolerated. Although the infrequent enforcement of laws raises questions about their efficacy, the fact the prohibitions exist creates the potential for legal action, in addition to making this symbolic statement.

To date, Australian jurisdictions (with the partial exception of Tasmania) have not provided the same protection against gendered hate speech as they have against other forms of vilification. This constitutes a failure to recognise the harm caused to women by gendered hate speech, and to provide a means of legal redress when it occurs. That gendered hate speech should remain legal while other forms are prohibited is anomalous and should be rectified.

I do not suggest that the legal prohibition of gendered hate speech would result in its elimination, any more than the prohibition of racial hate speech has brought an end to that form of vilification. However, legal action to address the anomaly would at least constitute recognition that there is presently a gap in the law, a gap that represents a continuation of the state's historical reluctance to effectively address harm to women. Legal prohibition also provides an avenue for public recognition and discussion of harm. Women are commonly the targets of abuse on the street in similar situations as the women targeted in the Melbourne bus incident, whether accompanied by a racial aspect or not. Criminalisation of gender vilification would provide a mechanism whereby others may be motivated to report such conduct to the police, clear in the knowledge that it constitutes a criminal offence, rather than placing the onus on individual victims to take expensive and time-consuming legal action. However, civil provisions remain important in providing the same protection to individuals targeted for vilification on the basis of gender as victims targeted on the basis of other characteristics.

⁹¹ Dunn et al, above n 66.

Hate speech does hurt, and the law recognises this through the civil and criminal prohibition of hate speech. That it fails to recognise that this is also the case for hate speech based on gender is an anomaly within the law, and one that should be rectified as soon as possible.