

Submission to the Thematic Report on the Right to Freedom of Opinion and Expression and Gender Justice for the 76th Session of the General Assembly

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Overview

Certain categories of vilification or ‘hate speech’, including, in particular, vilification on the basis of race, are expressly recognised as legal wrongs under domestic and international laws. Notwithstanding its prevalence, vilifying speech directed at and about women on the basis of their actual or perceived female sex (‘sex-based vilification’) remains unregulated in most jurisdictions. Nor has the issue of sex-based vilification received much scholarly or policy attention.

This submission seeks to highlight the need for international and domestic anti-vilification laws to address sex-based vilification. Sex-based vilification represents a significant barrier, challenge, and threat to women in the public sphere in exercising their freedom of opinion and expression online and offline. In systemically subordinating and silencing women, communicative conduct constituting sex-based vilification also represents the most significant way in which freedom of expression has been and continues to be appropriated to undermine women’s human rights. Accordingly, a gendered or feminist perspective on the human right to freedom of expression would accept, acknowledge, and appropriately and adequately account for sex-based vilification’s harms. That is, in order to uphold women’s freedom of expression, protect women from violence, harassment, and intimidation online and offline, as well as to promote women’s public participation, states must enact and enforce sex-based vilification laws in their jurisdictions that appropriately and adequately address the systemic subordination and silencing harms to women of such speech. International law must in turn require and ensure that such domestic laws are enacted and enforced.

Responses to particular questions from the call for submissions are extrapolated in detail below. By way of warning, in order to speak meaningfully to those questions, I reproduce and describe examples of sex-based vilification in some detail in this submission. Those reproductions and descriptions necessarily include explicit and violent language, including descriptions of sexual violence.

As an additional note, though I have previously referred to ‘gender’ and ‘gender(ed) vilification’,¹ I use ‘sex’ and ‘sex-based vilification’ in favour of those terms throughout this submission. It is unclear that gender, as distinct from actual *or perceived* female sex,² is an axis of women’s systemic oppression in patriarchal societies in ways that are relevant to my analysis. For example, the vilification of women on the basis of their gender expression, including gender non-conformity, is an aspect of their vilification in patriarchal societies on the basis of their female sex. Sex-based vilification is also distinct from vilification on the basis of gender identity, as is prohibited in some jurisdictions.³ Gender identity as a category of vilification is typically addressed to vilifying speech directed at and about transgender and intersex persons⁴ and excludes vilification directed at and about women on the basis of their female sex.⁵ In contrast to women, to the extent that men are vilified in patriarchal societies otherwise than on the basis of their sexuality or gender identity, they tend to be vilified on the basis of their gender non-conformity, as opposed to their actual or perceived male sex. Often in that regard, they tend to be vilified on the basis of their relative ‘likeness’ to women.⁶ Accordingly, as mentioned below, some sex-based vilification is speech directed about women, even when it is directed at men and boys. Moreover, contemptuous speech directed at and about men and boys on the basis of their male sex does not, and cannot, systemically harm them in the ways that sex-based vilification harms women in patriarchal societies.

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¹ Anjalee de Silva, ‘Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law’ (2020) 43(3) *Melbourne University Law Review* 987.

² Going forward, I use ‘female sex’ to mean actual or perceived female sex.

³ In the Australian context, see, eg, *Discrimination Act 1991* (ACT) s 67A (*‘ACT Act’*); *Anti-Discrimination Act 1991* (Qld) ss 124A (*‘Queensland Act’*).

⁴ See, eg, *Anti-Discrimination Act 1977* (NSW) ss 38S (*‘NSW Act’*).

⁵ See, eg, *ACT Act* (n 3) (definition of ‘gender identity’); *Queensland Act* (n 370) sch (definition of ‘gender identity’); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘gender identity’) (*‘Tasmanian Act’*).

⁶ Jessica Megarry, ‘Online incivility or sexual harassment? Conceptualising women’s experiences in the digital age’ (2014) 47 *Women’s Studies International Forum* 46, 50 (citations omitted).

Question 1(a)

What barriers, challenges and threats do women in the public sphere face in exercising their freedom of opinion and expression online and offline?

Social and news media, as well as an emerging body of scholarly work, contain numerous accounts of speech directed at and about women and girls that prima facie expresses contempt for women and girls. In particular, the discussion in many jurisdictions has tended to focus on invective experienced by women in the public sphere via online and digital technologies. That surge in interest has occurred, it seems, not because the communication of contempt for women is anything new, but because the proliferation of online and other digital media means that the prevalence and severity of such speech is increasing, and is more easily observable and documented than before.

Importantly, in the Australian context, as in other jurisdictional contexts, speech directed at women that constitutes harassment, sexual harassment, breaches of privacy, or other harmful or unlawful conduct may often also be said to constitute the *vilification* of (or ‘hate speech’ against) women. That is, such speech may be said to be directed at women for being women, or on the basis of their actual or perceived female sex, in the sense that it is about all women, even as it is directed at particular women. I refer to such speech as ‘sex-based vilification’.

Of course, despite its recent media attention, the problem of sex-based vilification is not a new problem. Speech that may reasonably be characterised as sex-based vilification occurs, and always has occurred, across jurisdictions and in a multitude of contexts. It typically accompanies violence committed against women,⁷ is often directed at and about women in positions of political leadership,⁸ and occurs prolifically

⁷ See, eg, Llezlie L Green, ‘Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law’ (2002) 33(3) *Columbia Human Rights Law Review* 733.

⁸ Marian Sawer, for example, has written about the ‘sexual vilification’ that pervaded former Australian Prime Minister Julia Gillard’s time in office: Marian Sawer, ‘Misogyny and Misrepresentation: Women in Australian Parliaments’ (2013) 65(1) *Political Science* 105. See also Kate Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press, 2017) 249–78; Sue Joseph, ‘Australia’s First Female Prime Minister and Gender Politics: Long-Form Counterpoints’ (2015) 9(2) *Journalism Practice* 250. Mainstream media reporting in Australia, the United Kingdom, the United States, and other jurisdictions also contains numerous accounts of sex-based vilification directed at and about other women politicians: see, eg, Teri Finneman, *Press Portrayals of Women Politicians, 1870s–2000s: From ‘Lunatic’ Woodhull to ‘Polarizing’ Palin* (Lexington Books, 2015); Clare Walsh, ‘Media Capital or Media Deficit? Representations of Women in Leadership Roles in Old and New Media’ (2015) 15(6) *Feminist Media Studies* 1025.

in pornography,⁹ advertising,¹⁰ popular culture (including film, music, literature, and other visual and performance arts)¹¹ and mainstream news and tabloid media reporting.¹² Despite the recent focus on the impacts of such speech on women in the public sphere, it is in fact directed at and about powerful women, ‘ordinary’ women, and women generally.¹³ It occurs in person, online, including characteristically as part of the cyber harassment of women, in physical spaces such as workplaces and educational institutions, and via speakers who may themselves colloquially be described as powerful or ‘ordinary’.¹⁴

Critical scholarship on discriminatory speech is crucial to understanding the harms of vilifying speech, as well as broader sociolegal considerations relating to the regulation of vilification. The work of critical theorists who take speech harms seriously reflects what many women and minority individuals experience when targeted by vilification. Importantly, it also articulates how vilification impacts on women’s and minorities’ political and material realities in societies imbued with patriarchal, racial, and other systemic oppression.

In accordance with the applicable critical scholarship, sex-based vilification is properly conceived of as ‘discriminatory treatment of women that constitutes and causes the systemic subordination and silencing

⁹ See, eg, Catharine A MacKinnon and Andrea Dworkin (eds), *In Harm’s Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997); Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993); Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) (*Feminism Unmodified*); Andrea Dworkin, *Pornography: Men Possessing Women* (Women’s Press, 1981). See also Amanda Wong, ‘Broken, Brutal, Bloody: The Harms of Violent Racial Pornography and the Need for Legal Accountability’ (2016) 8(1) *Georgetown Journal of Law and Modern Critical Race Perspectives* 225 for an intersectional perspective.

¹⁰ See, eg, Nancy Artz, Jeanne Munger, and Warren Purdy, ‘Gender Issues in Advertising Language’ (1999) 22(2) *Women and Language* 20; Mandy McKenzie et al, ‘Advertising (In)Equality: The Impact of Sexist Advertising on Women’s Health and Wellbeing’ (Issues Paper No 14, Women’s Health Victoria, December 2018) 10–19.

¹¹ See, eg, Annika Rudman, “‘Whores, Sluts, Bitches and Retards’”: What Do We Tolerate in the Name of Freedom of Expression?’ (2012) 26(3) *Agenda* 72; Edward G Armstrong, ‘Gangsta Misogyny: A Content Analysis of the Portrayals of Violence Against Women in Rap Music, 1987–1993’ (2001) 8(2) *Journal of Criminal Justice and Popular Culture* 96.

¹² See, eg, Martha C Nussbaum, ‘Objectification and Internet Misogyny’ in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press, 2010) 68 in relation to gossip websites. One might even make an argument, as Jocelyne Scutt does, that sex-based vilification is ‘so generalised’ that it encompasses ‘the vast majority of advertisements, reel after reel of film and video, rack upon rack of newspapers and magazines’: Jocelyne Scutt, ‘Group Defamation and the Vilification of Women’ (1992) 12(2) *Communications Law Bulletin* 9, 9.

¹³ In the online context, see, eg, Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014).

¹⁴ *Ibid.*

of women on the basis of their sex.¹⁵ For example, some sex-based vilification treats women as inferior on the basis of their sex. In so treating women, and because its speakers have authority in patriarchal societies, sex-based vilification ranks women as inferior on the basis of their sex.¹⁶ It also enacts permissibility facts that legitimate the treatment of women accordingly.¹⁷ In ranking and legitimating the treatment of women as inferior on the basis of their sex, sex-based vilification constitutes women as subordinate.¹⁸ It also constitutes women as having no business speaking or having nothing of consequence to say, therein constituting women as silenced.¹⁹

Causal harms of subordination and silencing may follow sex-based vilification's constitutive harms of subordination and silencing.²⁰ Hearers' beliefs, desires, and other emotions tend to accommodate to vilifying speech.²¹ Hearers may consciously change their attitudes to accord with sex-based vilification, or hearers' attitudes may be triggered or conditioned by such speech.²² For example, 'rape myth propositions such as "when women say 'no', they mean 'yes'" might become ... part of the "common ground" ... shared between speaker and hearer.²³ Shifts in hearers' attitudes to accommodate sex-based vilification in turn render it more likely that hearers will act in ways that harm women. Women may also internalise sex-based vilification such that their attitudes and actions with respect to themselves and other women manifest in sexist or misogynistic ways.

The extent to which sex-based vilification subordinates and silences women, or will do so over time, in fact, causally speaking, is an empirical question that cannot be precisely assessed.²⁴ However, what is important to understand is this: women are, in fact, systemically subordinated and silenced in patriarchal societies; those harms flow from the systemic constitution and reconstitution of women as subordinate and silenced in those societies; and speech acts of sex-based vilification contribute to—in that they are speech acts of—

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Anjalee de Silva, 'Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law' (PhD Thesis, The University of Melbourne, 2021) 116, citing Rae Langton, 'Beyond Belief: Pragmatics in Hate Speech and Pornography' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 84 (emphasis added).

²¹ Ibid.

²² Langton (n 20) 72.

²³ Langton (n 20) 83 (citation omitted).

²⁴ de Silva (n 1) 1022.

that constitution.²⁵ That is, sex-based vilification contributes to causing both discrimination and violence against women in patriarchal societies. Moreover, women typically feel threatened and humiliated by occurrences of sex-based vilification and they adapt their own behaviours accordingly, by policing their identities, speech, and movements or by leaving online and offline spaces and disengaging from public life.²⁶ **Sex-based vilification thus represents a significant barrier, challenge, and threat to women in the public sphere in exercising their freedom of opinion and expression online and offline.**

Question 1(b)

What are the distinct challenges faced by those who experience multiple and intersecting forms of discrimination?

It is important to acknowledge that sex-based vilification, being discriminatory conduct, is often experienced by women intersectionally, along the lines of race, religion, sexuality, gender identity, class, disability, and so on. For example, women of colour are regularly subjected to speech that constitutes both sex-based and racial vilification.²⁷ There is also evidence to suggest that women of colour, lesbians, and gender non-conforming women, for instance, are targeted with particular virulence, both in terms of the prevalence and nature of sex-based vilification to which they are subjected.²⁸

²⁵ Ibid.

²⁶ Sometimes, women suffer far worse as a result of such speech: see, eg, Danielle Keats Citron and Mary Anne Franks, 'Criminalizing revenge porn' (2014) 49 *Wake Forest Law Review* 345, 345 in the online context.

²⁷ Intersectionality is a theoretical framework pioneered by Kimberlé Crenshaw. For an account of harmful speech at the intersections of sex and race, see, eg, Kimberlé Williams Crenshaw, 'Beyond Racism and Misogyny: Black Feminism and 2 Live Crew' in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 111 ('Beyond Racism and Misogyny').

²⁸ See eg, Citron, *Hate Crimes in Cyberspace* (n 13) 13–16. See also Danielle Keats Citron, 'Law's Expressive Value in Combating Cyber Gender Harassment' (2009) 108 *Michigan Law Review* 380 ('Law's Expressive Value') in relation to cyber harassment, some of which constitutes sex-based vilification.

Question 2

Can you provide examples or information on ways in which freedom of opinion and expression has been abused or appropriated to undermine women's human rights?

In systemically subordinating and silencing women, communicative conduct constituting sex-based vilification represents the most significant way in which freedom of expression has been and continues to be appropriated to undermine women's human rights. The persistent occurrence of sex-based vilification as part of the cyber harassment of women is a particularly clear example of where this occurs.

Danielle Citron defines cyber harassment as 'involv[ing] the intentional infliction of substantial emotional distress accomplished by online speech that is persistent enough to amount to a "course of conduct" rather than an isolated incident.'²⁹ Cyberstalking is cyber harassment that 'causes a person to fear for his or her own safety or would cause a reasonable person to fear for his or her safety'.³⁰ The 'cyber' label in relation to both practices captures the ways in which the Internet facilitates harassment and stalking, as well as the ways in which it 'exacerbates the injuries suffered'.³¹ For ease of reference, I use 'cyber harassment' going forward to refer to both cyber harassment and cyberstalking.

Cyber harassment is often, though not exclusively, directed at women with public profiles,³² particularly when they speak openly about issues affecting women.³³ Importantly, the cyber harassment of women typically involves sustained and tactical campaigns involving a variety of expressive or communicative conduct.³⁴ Campaigns of cyber harassment are often also engaged in by 'cyber mobs' of more than one assailant.³⁵ Anonymity and invisibility of assailants online make it difficult to measure the extent of any given mob.³⁶ Relevantly, if individuals take part in mob-based campaigns, but do not themselves engage in

²⁹ Citron, *Hate Crimes in Cyberspace* (n 13) 3.

³⁰ Ibid (citation omitted).

³¹ Ibid 4. See generally at 4–12.

³² Citron, 'Law's Expressive Value' (n 28) 380 (citation omitted).

³³ Emma A Jane, "'Back to the Kitchen, Cunt": Speaking the Unspeakable About Online Misogyny' (2014) 28(4) *Continuum* 558, 562 (citations omitted).

³⁴ Citron, *Hate Crimes in Cyberspace* (n 13) 3–4. It may also involve conduct that is not properly described as 'speech-based' and that, therefore, is not discussed below (for example, distributed-denial-of-service-attacks).

³⁵ Ibid 24.

³⁶ Ibid.

a requisite *course* of conduct, it is unclear whether their behaviour would constitute offences under existing criminal laws.³⁷ Though ‘the totality of their actions inflicts devastating harms ... the abuse cannot be pinned on a particular person.’³⁸ That is particularly the case given that the networking capabilities of online technologies allow for cyber mobs to form and work together in ways that may fall short of thresholds for joint criminal liability or accessory liability under existing domestic criminal laws.³⁹

My work identifies five categories of sex-based vilification that commonly occur as part of the cyber harassment of women, namely: ‘threats and violent invective’; ‘sexualised invective’; ‘non-consensual pornography’; ‘other objectifying speech’; and ‘other contemptuous speech’.⁴⁰ Manifestations of the cyber harassment of women corresponding to those categories of sex-based vilification are sex-based in at least three ways. First, they are sex-based in that they are speech acts that are directed predominantly at and about women as compared to at and about men.⁴¹

Second, they are sex-based linguistically. That may manifest explicitly; for example, one woman ‘explained that of the nearly 200 comments [constituting cyber harassment that she had received], only [three] failed to mention her gender in a disparaging or threatening manner.’⁴² It may also manifest implicitly, in systemic ways. Harassers often rely on *ad hominem* invective and in particular ‘hyperbolic imagery of graphic — often sexualized — violence’.⁴³ Citron argues that ‘examples of cyber gender harassment show that it routinely involves threats of rape and other forms of sexual violence.’⁴⁴ Jane argues that online speech directed at and about women in those terms ‘has become normalized to the extent that threatening rape has become the *modus operandi* for those wishing to critique female commentators.’⁴⁵ As sexual violence is a constitutive aspect of women’s oppression to men in patriarchal societies, threats of sexual violence directed at and

³⁷ Ibid. In the Australian context, for example, state and territory laws criminalise stalking. Those offences often target behaviour amounting to harassment, which typically requires that perpetrators have engaged in a course of relevant conduct: see, eg, *Crimes Act 1958* (Vic), s 21A (*Victorian Crimes Act*).

³⁸ Ibid. See also Manne (n 8) 62.

³⁹ In the Australian context, see, eg, *Victorian Crimes Act* (n 37) s 323(1).

⁴⁰ de Silva (n 20) 65–119.

⁴¹ Citron, ‘Law’s Expressive Value’ (n 28) 378–9; Emma A Jane, “‘Your a Ugly, Whorish, Slut’”: Understanding E-Bile’ (2014) 14(4) *Feminist Media Studies* 531, 536; Megarry (n 6) 51 (citations omitted).

⁴² Citron, ‘Law’s Expressive Value’ (n 28) 383.

⁴³ Jane (n 41) 533. Jane notes that ‘such aggression sometimes manifests as a direct threat, but most commonly appears in the form of hostile wishful thinking, such as “I hope you get raped with a chainsaw”’: at 533 (citation omitted).

⁴⁴ Citron, ‘Law’s Expressive Value’ (n 28) 380 (citations omitted).

⁴⁵ Jane (n 41) 535.

about women are sex-based. Manifestations of the cyber harassment of women are also rife with sex-based stereotypes; they encompass '(new) articulation[s] of (old) sexualising misogyny'.⁴⁶ Citron argues that

[e]xamples of cyber gender harassment show that it ... often reduces targeted women to sexual objects and includes humiliating comments that reinforce gender-constructed stereotypes, such as '[w]ho let this woman out of the kitchen?' and 'why don't you make yourself useful and go have a baby'.⁴⁷

Similarly, Jane's work demonstrates that

[e]-bile targeting women commonly includes charges of unintelligence, hysteria, and ugliness; these are then combined with threats and/or fantasies of violent sex acts which are often framed as 'correctives'.⁴⁸

Paradoxically, 'female targets are dismissed as both unacceptably unattractive man haters *and* hypersexual sluts who are inviting sexual attention or sexual attacks.'⁴⁹ Thus,

[t]he cyber medium is new but the e-bile message has roots in a much older discursive tradition: one which insists women are inferior and that their primary function is to provide sexual gratification for men—and then denigrates them for this self-same characterisation.⁵⁰

As part of her research on the #mencallmethings hashtag on Twitter, Jessica Megarry found that many comments captured by the hashtag 'displayed a preoccupation with physical appearance and suggested that a woman's worth and value lie in her sexual appeal to men.'⁵¹ Accordingly, 'in a paradigm where women are consistently valued by their attractiveness to men, unattractiveness is seen to be the highest form of insult.'⁵² Moreover, 'many comments shared in the hashtag such as "fuck that cunt, I would with my fist"

⁴⁶ Jane (n 33) 559.

⁴⁷ Citron, 'Law's Expressive Value' (n 28) (citations omitted).

⁴⁸ Jane (n 41) 533.

⁴⁹ Ibid.

⁵⁰ Jane (n 33) 566.

⁵¹ Megarry (n 6) 50.

⁵² Ibid.

... implicitly rely upon pornographic images and language in order to insult and degrade women'.⁵³ They highlight that 'women's bodies are uniquely sexed bodies in patriarchal society'.⁵⁴

When a particular woman's behaviour is perceived as deviant from the norm of submissive femininity, the #mencallmethings conversation suggests that the type of harassment she receives is particularly reliant on positioning women as sex objects. Alongside remarks reposted in the hashtag which were concerned with 'weight, breast size, hotness, lack of hotness' ... were insinuations that no man 'would want to date an egotistical, finger-wagging bitch ... other than to fuck [her]'.⁵⁵

So, 'whether attackers reduce women to their sexual body parts, threaten rape, or invoke demeaning, gendered stereotypes', it is clear from the sex-based language permeating the cyber harassment of women that targeted women are harassed on the basis of their sex.⁵⁶ Further, as Jane notes, although online invective has been in circulation for many years, 'its rhetorical construct has remained remarkably stable over time'.⁵⁷ Megarry argues similarly that while

aggressive harassment women receive online is more frequently directed at women who contribute to public debates, harassers relied on the *same material* regardless of whether the women (sic) they were attacking was a feminist, simply working in the public eye, or an unknown social media user.⁵⁸

Noting the 'overwhelmingly impersonal, repetitive, stereotyped quality' of abuse, Sady Doyle argues that 'all of us are being called the same things, in the same tone'.⁵⁹

⁵³ Ibid (citations omitted).

⁵⁴ Ibid, citing Jan Jindy Pettman, *Worlding Women: A Feminist International Politics* (Allen and Unwin, 1996) 8.

⁵⁵ Megarry (n 6) 50 (citations omitted).

⁵⁶ Citron, 'Law's Expressive Value' (n 28) 384.

⁵⁷ Jane (n 33) 560. Jane notes, for example, that 'a prescription of coerced sex as an all-purpose corrective emailed to an Australian newspaper columnist more than a decade ago, reads almost identically to tweets being sent to female politicians in the UK in 2013': at 565.

⁵⁸ Megarry (n 6) 50 (emphasis in original) (citations omitted).

⁵⁹ Sady Doyle, 'But How Do You Know It's Sexist: The #MenCallMeThings Round-Up' *Tiger Beatdown* (Web Page, 10 November 2011) <<http://www.tigerbeatdown.com/2011/11/10/but-how-do-you-know-its-sexist-the-mencallmethings-round-up/>>.

What matters is not which guys said it: What matters is that, when you put their statements side-by-side, they all sound like *the exact same guy*. And when you look at what they're saying, how similar these slurs and insults and threats we get actually are, they always sound like they're speaking to *the exact same woman*. When men are using the same insults and sentiments to shut down women ... we know that it's not about us; it's about gender.⁶⁰

Likewise, Megarry's work on the #mencallmethings hashtag

conveys that all the women involved were subjected to a particular kind of online abuse which can *only* be used against the female sex in patriarchal society. When a woman hears that she is 'Evil/Hysteric/Easily Offended ...' it is understood to be insulting in a context where masculinity is defined by such qualities as goodness, rationality and level headedness ... Within our linguistic and metaphorical schema it is not intuitive to refer to a man as a 'bitter hag' ... or a 'spiteful unrapeable fuckpig' ... as such images pertain specifically to the female condition and suggest that inequality has been inscribed in the language itself.⁶¹

Notably, *prima facie* harmful online speech is often characteristically anti-female or anti-feminine and may constitute sex-based vilification of women even when it is directed *at men*.

[E]-bile aimed at men ... commonly impugns their masculinity via derogatory homophobia or the suggestion that they suffer some kind of micropenile disorder; they have, in other words, vanishingly small penises. If aesthetic criticisms are involved, they usually take the form of attacks on the physical appearance of male targets' female partners or family members.⁶²

There is a third, important way in which manifestations of the cyber harassment of women corresponding to the categories of sex-based vilification that I identify in my work are sex-based. Such utterances 'convey the message that the internet is a male space to which women have limited access, and communicate to women that their presence online is tolerated only on the basis of their ... value and appeal to men.'⁶³ That is, cyber harassment of women constituting threats and violent invective, sexualised invective, non-consensual pornography, other objectifying speech, and other contemptuous speech are sex-based

⁶⁰ Ibid.

⁶¹ Megarry (n 6) 50 (citations omitted).

⁶² Jane (n 33) 533. See also Citron, *Hate Crimes in Cyberspace* (n 13) 15.

⁶³ Megarry (n 6) 50.

functionally. They do things in the world, and those things are sex-based. They are speech acts that constitutively and causally reflect and reinforce patriarchal oppression in patriarchal societies.⁶⁴

Specifically, the categories of sex-based vilification of threats and violent invective, sexualised invective, non-consensual pornography, other objectifying speech, and other contemptuous speech that commonly occur as part of the cyber harassment of women may be conceived of as punitive, corrective acts in response to perceived sex-based norm violations by the women at whom they are directed or, more accurately, by ‘classes’⁶⁵ of women whom the targeted women are perceived to represent. They function to punish and correct women merely for existing visibly in public life, which has traditionally been a male domain, and for abdicating their ‘womanly’ moral support roles⁶⁶ in order to so exist. They therein constitute discriminatory treatment of women, not just ways of talking about them, and are about (classes of) women generally, on the basis of their sex, even as they are directed at particular women. In so treating women, they systemically subordinate and silence women both constitutively and causally. The relevant causal harms are varied and are likely very many. Significantly for the purposes of the Special Rapporteur’s report, and as flagged above, women typically feel threatened and humiliated by such speech. They also adapt their own behaviours accordingly, by policing their identities, speech, and movements or by leaving online and offline spaces and disengaging from public life.

Question 3

What in your view are the key elements of a gendered perspective on the human right to freedom of opinion and expression? What would a feminist perspective add to the understanding of this right?

A gendered or feminist perspective on the human right to freedom of expression would accept, acknowledge, and appropriately and adequately account for the systemic subordination and silencing harms to women of communicative conduct constituting sex-based vilification. That is, a gendered or feminist interpretation and application of the freedom would ensure that communicative conduct constituting sex-based vilification is either uncovered nor unprotected by the freedom, subject to

⁶⁴ The examples discussed in this chapter have an American, Australian, and British focus, which reflects the literature from which they are drawn. However, similar speech acts are also directed at and about women located in other jurisdictions: see, eg, Citron, *Hate Crimes in Cyberspace* (n 13) 21.

⁶⁵ Manne (n 8) viii.

⁶⁶ *Ibid.*

appropriate exceptions for a narrow range of expression; for example, exceptions for proportionate expression for the purposes of political communication or scholarly or artistic works.

More specifically, rights to free expression with respect to sex-based vilification remain effectively unrestrained under international law and in many domestic jurisdictions, as discussed below, and this is unacceptable. It is particularly unacceptable in the context of existing international and domestic anti-vilification laws with respect to racial, religious, and other categories of vilification that are less pervasive and no more harmful than vilifying speech directed at women, who make up more than half the world's population. The role of states in undoing or addressing the harms to women of sex-based vilification, including through law, is necessary, significant, and not one that may properly be outsourced to non-state actors. Accordingly, it is a role that must also be required and enforced under international law.

Question 4

Do you see any legal gaps, inconsistencies or controversies that should be clarified in this report, e.g. between protecting the right to freedom of expression and protecting women from ICT violence? Please indicate any specific issues in the international legal framework that in your view would benefit from further analysis in this report.

Notwithstanding the prevalence of sex-based vilification, there is a 'sex-based gap' in anti-vilification laws.⁶⁷ Apart from some notable exceptions at the domestic level in some jurisdictions,⁶⁸ anti-vilification laws on the basis of sex ('sex-based vilification laws') do not exist. Nor has the issue of sex-based vilification received much scholarly or policy attention.⁶⁹ In contrast, vilification on the basis of other ascriptive characteristics,

⁶⁷ By 'anti-vilification laws,' I mean legislation that self-consciously addresses an essentially legalistic understanding of vilification. Such laws tend to sanction speech expressing hatred towards, or seen to give rise to a risk of hatred, discrimination, or violence towards, individuals possessing particular ascriptive characteristics.

⁶⁸ See *Criminal Code*, RSC 1985, c C-46, ss 318(1), (4), 319(1)–(2), (7); *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 10.

⁶⁹ In the Australian context, the recently introduced Racial and Religious Tolerance Amendment Bill 2019 (Vic) and its second reading speech are notable exceptions: Victoria, Parliamentary Debates, Legislative Council, 28 August 2019, 2725–7 (Fiona Patten). See also Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Final Report, March 2021) 48–51, 56–8. Some further notable exceptions in the Australian context are Kylie Weston-Scheuber, 'Gender and the Prohibition of Hate Speech' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 132; Anjalee de Silva, "'Words Can Harm Us": The Need for Gender Vilification Provisions in Victorian Law' (2014) 88(8) *Law Institute Journal* 40; Tanya D'Souza et al, 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' (2018) 41(3) *University of New South Wales Law Journal*

including, for example, race, religion, sexuality, gender identity, intersex status, disability, and HIV/AIDS status, is unlawful under international law and in many domestic jurisdictions.⁷⁰ The socio-legal implications of the harms and regulation of those categories of vilifying speech, in particular, racial and religious vilification, have also been more extensively considered at the scholarly and policy levels in many jurisdictions.⁷¹

It is also clear that existing laws in many jurisdictions, for example, sexual harassment and ‘obscenity’ laws, are inappropriate and inadequate to regulate the harms to women of sex-based vilification.⁷² While such laws may incidentally capture some conduct that prima facie constitutes sex-based vilification, they are not directed at the systemic subordination and silencing harms of sex-based vilification and, accordingly, do not address those harms.⁷³ Significantly, regulation by law of harmful, sex-based speech is organised in many jurisdictions as giving rise to disparate, situational, and seemingly unrelated categories of harm.⁷⁴ Such regulation thus obfuscates the shared, cumulative, and reinforcing functions of such speech as sex-based

939; de Silva (n 1). See also New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [7.86]–[7.87]. Scholarship on discrete categories of harmful, sex-based speech, for example, sexual harassment and some pornography, is relatively well established. What the extant scholarship does not do is provide a functional account of the unifying ways in which those categories of speech harm women as sex-based *vilification*.

⁷⁰ For example, each of those categories of vilification is prohibited in varying forms in one or more Australian jurisdictions: *Racial Discrimination Act 1975* (Cth) s 18C; *Criminal Code Act 1995* (Cth) ss 80.2A–80.2B, 80.2D; *ACT Act* s 67A; *Criminal Code 2002* (ACT) s 750; *NSW Act* ss 20C, 38S, 49ZT, 49ZXB; *Crimes Act 1900* (NSW) s 93Z; *Queensland Act* ss 124A, 131A; *Civil Liability Act 1936* (SA) s 73; *Racial Vilification Act 1996* (SA) s 4; *Tasmanian Act* s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 7–8, 24–5; *Criminal Code Act Compilation Act 1913* (WA), ss 77–80. In September 2017, the Northern Territory Department of the Attorney-General and Justice published a discussion paper in relation to, among other things, amending the *Anti-Discrimination Act 1992* (NT) to include anti-vilification laws prohibiting offensive conduct on the basis of race, religion, disability, sexual orientation, gender identity, and intersex status: Department of the Attorney-General and Justice (NT), ‘Modernisation of the Anti-Discrimination Act’ (Discussion Paper, September 2017). For examples of categories of vilification prohibited in foreign domestic jurisdictions, see Alexander Brown, *Hate Speech Law: A Philosophical Examination* (Routledge, 2015) ch 2. Racial and religious vilification are also prohibited under international law: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), arts 1, 4; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 20.

⁷¹ See, eg, Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).

⁷² de Silva (n 20) 139–43.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

vilification that constitutes and causes the overall systemic subordination and silencing of women in patriarchal societies.⁷⁵

The following issues in the international legal framework would thus benefit from analysis in the Special Rapporteur's report:

1. Has the introduction of 'sex' or 'gender' as a category of prohibited vilification under international law been considered to date by the relevant international legislative bodies?
2. Is there a coherent explanation for the absence of sex-based vilification laws at the international level, especially in the context of existing international law prohibitions against racial and religious vilification?
3. What does it mean for women that racial and religious vilification, which are less pervasive and no more harmful than sex-based vilification, are prohibited under international law whereas sex-based vilification remains permitted under international law?
4. How should the international legal framework address the problem of sex-based vilification?

Question 7

What do you believe States should do to a) uphold women's human right to freedom of opinion and expression b) protect women from violence, harassment, and intimidation online and offline and c) promote women's public participation?

In order to uphold women's freedom of expression, protect women from violence, harassment, and intimidation online and offline, and promote women's public participation, states must enact and enforce sex-based vilification laws in their jurisdictions that appropriately and adequately address the systemic subordination and silencing harms to women of such speech. International law must in turn require and ensure that such domestic laws are enacted and enforced. Any such law would of course need to render the complexities of how speech constituting sex-based vilification manifests and functions into legal language capable of interpretation and application by lawyers, judges, other administrators, and other actors, including, importantly, women themselves. Accordingly, such a law would need to be accompanied by a holistic and effective enculturation process directed at its proper interpretation and application. It would also need to encompass appropriate exemptions for categories of expression particularly worthy of protection; for example, exemptions for proportionate expression for the purposes of political communication or scholarly or artistic works.

⁷⁵ Ibid.

Some sex-based vilification may also be appropriately regulated through a combination of legal and non-legal content moderation laws, regulations, and guidelines (as opposed to anti-vilification laws). Content moderation laws and regulations may be administered by state bodies through content classification schemes, advertising standards schemes, broadcasting standards schemes, codes of conduct for social media firms and other platform hosts, or otherwise.⁷⁶ Corporations and organisations (for example, media and technology firms, including social media firms, internet service providers, and other platform hosts) may also be encouraged by states and other actors to commit to voluntary codes of conduct⁷⁷ or put in place internal guidelines pertaining to the classification, identification, and removal of content constituting sex-based vilification.⁷⁸ Academics, lawyers, policy makers, and others may also work with states, institutions, corporations, organisations, and communities in various capacities on ‘constitution-making’ or other projects directed at bettering the design of policies, procedures, and governance infrastructures pertaining to the moderation of speech constituting sex-based vilification.⁷⁹

Additionally, counter-speech is an important aspect of holistic responses to vilifying speech, including sex-based vilification. Institutions’, corporations’, organisations’, communities’, and, in particular, states’ non-regulatory contributions to educational and capabilities building resources enabling women to themselves speak back against sex-based vilification, as well those actors’ non-regulatory counter-speech on women’s behalf, constitute crucial components of any tiered and multifaceted approach to addressing sex-based vilification. For example, capabilities building resources in the form of instructional materials may be employed to encourage women and other actors to counter-speak against sex-based vilification when it does occur, as well as to empower them to actually and effectively do so.

⁷⁶ Australia’s eSafety Commissioner, for example, is legislatively empowered to negotiate directly with platform hosts for the removal of some material, including some material constituting sex-based vilification pursuant to my functional theory of harm, in particular, non-consensual pornography: ‘Our Legislative Functions’, *eSafety Commissioner* (Web Page) < <https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions>>.

⁷⁷ See, eg, European Commission, ‘Code of Conduct on Countering Illegal Hate Speech Online’ (30 May 2016).

⁷⁸ See, eg, the Facebook Oversight Board: Nick Clegg, ‘Welcoming the Oversight Board’, *Facebook* (Web Page, 6 May 2020) < <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/>>.

⁷⁹ See, eg, Evelyn Douek, ‘Facebook’s “Oversight Board”: Move Fast with Stable Infrastructure and Humility’ (2019) 21(1) *North Carolina Journal of Law and Technology* 1; Kate Klonick, ‘The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression’ (2020) 129 *Yale Law Journal* 2418.

Question 9

What do you think internet intermediaries should do to protect women's right to freedom of opinion and expression and make the online space safe for women?

In order to protect women's freedom of expression and make online spaces safe for women, intermediaries can and should implement content moderation and counter-speech policies and practices that appropriately and adequately address the systemic subordination and silencing harms to women of online sex-based vilification. The role of intermediaries in these respects is discussed above as part of my response to Question 7.

Appendices

Appendix 1

de Silva, Anjalee, 'Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law' (2020) 43(3) *Melbourne University Law Review* 987