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Vilification Laws: Tools for Tyranny

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ABSTRACT

Vilification laws share strong ties with key foundational concepts of Critical Theory. The Frankfurt School's philosophical disillusionment with revolutionary Marxism during the interwar period produced a critique that distrusted objective truth claims and encouraged social change by applied philosophy. The philosophical heritage of Critical Theory contains core principles that are antithetical to a flourishing liberal democracy and the free exchange of ideas. The arguments in support of vilification laws and the laws themselves show a strong connection to these principles. Vilification laws do not respect truth claims and encourage people to fearfully censor their own speech. If these tools continue to be used to shut down public debate the health and effectiveness of Australia's democracy will only be eroded.

I INTRODUCTION

Australian vilification laws share a strong ideological and theoretical relationship with postmodern Critical Theory. In several key ways

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they are the codification of foundational aspects of this theory.

We explore the relationship between vilification laws and postmodern Critical theory in two ways.

The first is an analysis of the parliamentary debates and speeches concerning the introduction of vilification laws in New South Wales and in Victoria. The parliamentary debates concerning the introduction of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) and the debates concerning the passage of the *Racial and Religious Tolerance Amendment Bill 2019* (Vic) show that parliamentarians use categories and ideological positions that display a strong relationship with key aspects of postmodern Critical Theory.

The second way in which we explore the relationship between vilification laws and postmodern Critical Theory is by looking at the laws themselves. In particular by looking at section 38S of the *Anti-Discrimination Act 1977* (NSW) and how the elements of vilification laws like section 38S have been interpreted and applied by the courts. It will be shown that the irrelevance of intent and actual incitement to hatred, the absence of a defence of truth and the prohibition of speech to protect a minority group are the conceptual children of key theoretical aspects of postmodern Critical Theory.

Vilification laws place civil and criminal sanctions on individuals for public speech of a particular kind. They prohibit the public expression of beliefs and ideas about other people if those beliefs and ideas relate to a protected attribute such as race or sex, and have the capacity to incite hatred and severe ridicule of the protected group.

These laws place a heavy burden on free speech because they limit the open contest of ideas in liberal democracies, regardless of whether

someone is speaking truthfully or if any harm is actually caused. They are concerning because they display elements of postmodern Critical Theory that are antagonistic to a flourishing democracy. They are tools ready-made for tyranny.

This chapter does not claim that drafters of Australian vilification laws have purposively legislated in devotion to Critical Theory. As the Apostle Paul said, ‘who knows a person’s thoughts?’¹ Rather, this paper seeks to show that there is a strong correlation between core foundational elements of postmodern Critical Theory and vilification laws. This relationship is concerning because it demonstrates that Australian vilification laws are not built on a foundation of objective truth, but rather seek to emancipate ‘oppressed’ groups from the supposed tyranny of power exerted through speech.

II CRITICAL THEORY

‘Critical Theory’ has become a widely used term, so that just like other such cultural monikers ‘The Rule of Law’ and ‘Liberal Democracy’, it can mean a great deal and therefore very little at all.

Key principles exist at the root of different social and political theories like postmodernism, democracy and liberalism. It is also these principles that, at their core, contain powerful and compelling aspects of theories that exert influence over society and culture.

The relationship between Australian vilification laws and postmodern Critical Theory is found in the key pillars on which postmodern Critical Theory rests.

¹ 1 Corinthians 2:11.

Generally, when ‘critical theory’ is referred to in the modern media or in popular books such as Helen Pluckrose and James Lindsay’s *Cynical Theories* what is being referred to is what we might call small ‘c’ critical theory. It is an elastic term that refers to broadly homogenous ideologies that contain similar core ideas. This critical theory is heavily dependent on the French postmodernists and poststructuralists who were writing from the 1960s – men such as Michel Foucault, Jacques Derrida and Jean-Francois Lyotard.² We will treat the elements of the postmodern theory of these philosophers as the key pillars of modern ‘critical theory’.

Critical Theory, with a capital ‘C’, is also the proper name for a school of thought developed in Weimar Germany in the interwar period by members of the ‘Frankfurt School’.³ Antecedent to the development of postmodern critical theory, the Critical Theory thinkers of the early twentieth century laid the foundation for what is now small ‘c’ critical theory applied today through different paradigms, such as ‘critical race theory’ or ‘critical gender theory’.⁴ It is Critical Theory applied postmodernism that has theoretical similarities with vilification laws in Australia.

Critical Theory was born out of the Frankfurt School through the philosophical efforts of theorists such as Theodor W Adorno, Max Horkheimer and Herbert Marcuse.⁵ These theorists were of the Western European Marxist tradition. They were disillusioned with revolutionary Marxism and their theoretical approach was distinctive

² Helen Pluckrose and James Lindsay, *Cynical Theories* (Pitchstone, 2020) 21.

³ Steve Buckler, ‘Normative Theory’ in David Marsh and Gerry Stoker (ed), *Theory and Methods in Political Science* (Palgrave Macmillan, 3rd ed, 2010) 164.

⁴ Pluckrose and Lindsay (n 2) 46-51, James Bohman, ‘Critical Theory’, *Stanford Encyclopedia of Philosophy* (Web Page, 8 March 2005).

⁵ Ben Aggar, ‘Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance’ (1991) 17 *Annual Review of Sociology* 105, 107.

because it was developed in an attempt to answer what was seen as the failure of political Marxism to mobilise and change society.⁶

Though these men were dissatisfied with the efficacy of Marxism to mobilise the working classes in opposition to capital owners, they were still interested in philosophy and political theory as a normative social tool. Unlike a stereotypical ivory-tower philosopher, these thinkers were not satisfied to merely explore philosophical ideas. Their approach to knowledge and theoretical politics was purposive. It was, firstly, aimed at criticising liberal capitalism and philosophical liberalism in general. Secondly, it was normative. The paradigm that they applied to critique liberalism was also meant to supplant and ‘emancipate’ the ‘enslaved’ classes of society.⁷

The theoretical bedrock of Critical Theory is the presupposition of an ideological framework that is applied to society in order to create *change*. In a revealing early essay, Horkheimer, who is seen as foundational to the Frankfurt School’s body of thought, said,

If, however, theoretician and his specific object are seen as forming a dynamic unity with the oppressed class, so that his presentation of social contradictions is not merely an expression of the concrete historical situation but also a force within it to stimulate change, then his real function emerges.⁸

And,

Even the classificatory judgments of specialised science have a fundamentally hypothetical character, and existential judgments are allowed, if at all, only in certain areas, namely the descriptive

⁶ Buckler (n 3) 164; Aggar (n 5) 107.

⁷ Bohman (n 4).

⁸ Max Horkheimer, *Critical Theory: Selected Essays Max Horkheimer*, tr Matthew J O’Connell et al (The Continuum Publishing Company, 1975) 215.

and practical parts of the discipline. But the critical theory of society is, in its totality, the unfolding of a single existential judgment...⁹

Finally,

However many valid analogies there may be between these different intellectual endeavors, there is nonetheless a decisive difference when it comes to the relation of subject and object and therefore to the necessity of the event being judged. The object with which the scientific specialist deals is not affected at all by his own theory ... A consciously critical attitude, however, is part of the development of society: the construing of the course of history as the necessary product of an economic mechanism simultaneously contains both a protest against this order of things, a protest generated by the order itself, and the idea of self-determination for the human race ... Every part of the theory pre-supposes the critique of the existing order and the struggle against it along lines determined by the theory itself.¹⁰

Critical Theory is not merely descriptive; its purpose is to change society. A particular branch of Critical Theory that has born the fruit now shaping our laws and institutions is postmodern philosophy.

III THE POSTMODERN TURN

The philosophical products of postmodernism have been given force through the application of Critical Theory as a normative framework and bear a strong relationship to the theoretical foundations of vilifications laws.

⁹ Ibid 227.

¹⁰ Ibid 229.

Postmodernism is deeply sceptical of the epistemological claims of scientific liberalism. Like the Frankfurt School it questions the theorist's ability to step outside of their own linguistic, cultural and sociological context in order to make any kind of objective assessment from the 'outside'.¹¹ In other words, the autonomous, free-thinking subject who shapes their own identity through free and independent rational choices is a myth.¹² What matters in a postmodern interpretation of the world is the 'discourse' driven narrative from which the world is being observed. Every person is just another storyteller.¹³

According to postmodern theorists like Foucault, the chosen and dominant discourse that is used to interpret the world is an expression of power.¹⁴ The dominant discourse cannot be verified according to an outstanding standard of objective reality. Therefore, all interpretations of the world and society are competing narratives with their own value propositions. These narratives compete for dominance in order to exert power over others. The modern and ascendant 'discourse' of scientific liberalism and capitalism is therefore an expression of wilful power over others to the detriment of some groups and to the benefit of others.¹⁵

This theory of society elevates the importance of language to an extreme position. This is because not only are the communicated perspectives and interpretation of the world through language are important and a will to exert powerful dominance, but the words, phrases, idioms and semantic meaning of these are also an expression of power. Under this paradigm, language is no longer a vehicle for persuasion and praise,

¹¹ Aggar (n 5) 116-117.

¹² Buckler (n 3) 170.

¹³ Bruce Haddock, *A History of Political Thought* (Polity Press, 2008) 255-256.

¹⁴ Buckler (n 3) 171.

¹⁵ Buckler (n 3) 164-165.

but the medium itself can be a tool of coercive power, depending on your socio-political outlook.

What one person may see as a normal expression of reality, another might see as a will to powerful dominance over a suppressed class of people. This understanding of language and power applied from discourse is crucial to understanding the influence of postmodern Critical Theory on vilification laws in Australia.

It is not that this postmodern Critical Theory has been specifically applied to the development of vilification legislation. Rather, its traces can be seen in the way that legislators perceive the importance of language and speech and the way that these affect discrete groups of people.

Postmodern interpretations of language and power have been operationalised through normative Critical Theory approaches to society through three main ‘pillars’ of understanding:

1. Knowledge and truth are not objective – it is impossible to step outside of your own linguistic and cultural context to make objective moral truth claims, especially about social issues;
2. Language is powerful and dangerous – language is not only a means to convey meaning and argument, to persuade others to act, but is in and of itself capable of causing harm to a person;
3. All narratives and observations are expressions of power – there is no factual observation that can be made independent of a discourse that promotes the power and dominance of a social group – society and politics is a contest of different groups for dominance.¹⁶

¹⁶ Pluckrose and Lindsay (n 2) 35-41.

IV AUSTRALIAN VILIFICATION LAW – EVIDENCE FOR THE INFLUENCE OF POSTMODERN CRITICAL THEORY

These postmodern elements are present in the parliamentary debates concerning vilification legislation in Australia. What is often argued is that certain forms of speech must be suppressed or controlled to achieve safety (both physical and emotional) for vulnerable groups. This argument has evolved from a position that suppressing vilifying speech will reduce speech-induced violence to one that also asserts harm from the language and speech itself. The harm is made real by receiving the words as a vulnerable class.

Vilification laws are also seen in these debates as a means of social control and improvement. The idea being that by controlling speech society can be behaviourally improved and minority groups emancipated from oppression.

A *The Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW)

The *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) was introduced to the NSW parliament on 4 May 1989 and assented to on 17 May 1989.¹⁷ The Act was championed by the Liberal Attorney General John Dowd and had bi-partisan support from Labor members such as Bob Carr and John Newman.¹⁸

In the second reading speech and following remarks made by members of the Legislative Assembly the focus of debate was on the fact that

¹⁷ *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 1989, 7488 (John Dowd, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 May 1989, 7919 (Bob Carr, Leader of the Opposition).

racist speech and speech that incited violence on racial grounds was behaviour unbefitting of the Australian public.¹⁹ Such a speech needed to be eradicated because it could potentially incite actual violence and mistreatment of individuals and it could also be offensive to those individuals, damaging their dignity.²⁰

Also present in the debate was the idea that by eradicating vilifying language and controlling language, society would be improved and moulded to be more cohesive.²¹ This idea was communicated in the Legislative Council.²² By changing the language, Australian society would be educated, and its behaviour would be changed.

Members of Parliament highlighted real violence and racist behaviour during these debates. The kinds of activities mentioned included physical attacks, racist graffiti and hateful pamphlets being distributed to the community.²³

In these early debates concerning some of the first vilification laws introduced in Australia, there was a clear understanding that the laws were being introduced to combat public speech which offends and of which it is alleged contributes to the perpetration of violent acts in the community. The idea that language is harmful was certainly present in these debates, though it is represented as being harmful because it actually *causes* harmful events. It is also represented as being harmful because of its psychological effect on a community.

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 1989, 7490-7491 (John Dowd, Attorney General).

²⁰ Ibid.

²¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 May 1989, 7931 (John Dowd, Attorney General).

²² New South Wales, *Parliamentary Debates*, Legislative Council, 10 May 1989, 7817 (Helen Sham-Ho).

²³ Ibid 7818.

The key pillars of postmodern Critical Theory are present in these parliamentary debates, particularly the power of language and discourse control. This does not mean that the proponents of the bill were motivated by Critical Theorists. However, there is a correlation between the early arguments for these laws and concepts contained within postmodern Critical Theory.

B The Racial and Religious Tolerance Amendment Bill 2019 (Vic)

These postmodern Critical Theory ideas are also visible in more recent debates concerning the Victorian *Racial and Religious Tolerance Amendment Bill* seeking to amend the *Racial and Religious Tolerance Act 2001*.²⁴

The second reading speech on the bill was delivered on 28 August 2019. The Bill sought to rename the existing Act as the *Elimination of Vilification Act*, and extend the protected attributes under it to include gender, disability, sexual orientation and sex characteristics.²⁵

The second reading speech cites examples of vulgar and inappropriate speech directed towards a handful of prominent female public figures, one of whom:

[H]as for years received daily online abuse, including rape and death threats, as well as being the target of several huge mob attacks. During the first of these ‘pile-ons’ she received over 2000 messages over a two-day period involving ‘every kind of abuse possible’.²⁶

²⁴ Racial and Religious Tolerance Amendment Bill 2019 (Vic); *Racial and Religious Tolerance Act 2001* (Vic) (*Victorian Act*).

²⁵ Victoria, *Parliamentary Debates*, Legislative Council, 28 August 2019, 2726 (Fiona Patten).

²⁶ *Ibid.*

Just as in the debates concerning the NSW laws discussed above, the sponsor linked public speech to the perpetration of violent acts against a group, arguing that addressing public speech must be included in the fight to reduce cases of domestic violence against women.²⁷

The sponsor developed this connection between speech and violence, going beyond the relationship described in the NSW debates as being connected to hurt feelings. She identified the speech itself as a form of violence (emphasis added),

Victoria understands family violence. We instituted a royal commission and we are implementing all of its 227 recommendations. We accept that ‘we must change community attitudes towards women if we are to prevent violence from happening in the first place’, to quote the Premier of Victoria. **Yet we have done little to address this type of violence against women where it is most pervasive.** Hate speech lives and breeds in social media feeds and the comments sections of news articles; it is shaming, bullying and **brutalising** via the everyday mediums that we use to communicate and consume media.

Bullying in this form has led to suicide. **It causes physical, psychological and emotional harm.** It affects people’s sense of self-worth and feelings of safety and belonging in the community.²⁸

The sponsor further developed this point by talking of the effects of this kind of speech as inciting and itself being violence interchangeably,

[H]ate speech that if left unchecked can embed discrimination

²⁷ Ibid.

²⁸ Ibid.

and prejudice; hate speech that can lead to hate crime, which does not occur in a vacuum. It is the **violent manifestation** of prejudice in the wider community.²⁹

It is significant that the legal prohibition that vilification laws impose is directed towards incitement of hatred, serious contempt, ridicule and violence against another person.³⁰

The sponsor has collapsed the cause and effect of the law into one. She is arguing that the speech itself, apart from a demonstrable negative effect, is violence and should be prohibited. The Victorian vilification law, like all laws with legal sanctions, must be directed toward specific behaviour. It cannot be directed only against the effect of the behaviour or behaviour that has no causal connection to a harm. However, vilification legislation actually comes as close as possible to this by sanctioning speech that has the theoretical capacity to incite an effect, without requiring evidence of actual incitement.³¹ The Bill specifically inserted the words ‘likely to incite’ into the Act.³²

The debates about the Bill not only display elements of critical theory in the way that they describe the importance and power of language, but also in the way that the debate was framed about protecting and emancipating a protected class of people from another class or group. A council member supported the Bill out of concern for ‘vulnerable and marginalised people (who) are unable to escape hatred and intolerance

²⁹ Ibid.

³⁰ Victoria, *Parliamentary Debates*, Legislative Council, 28 August 2019, 2726 (Fiona Patten); ‘*Victorian Act*’ ss 7(1), 8(1).

³¹ *Victorian Act* s 7-8; Racial and Religious Tolerance Amendment Bill 2019 (Vic) cl 10(2)(b); Victoria, *Parliamentary Debates*, Legislative Council, 11 September 2019, 3035 (David Davis, Leader of the Opposition); *Sunol v Collier (No 2)* [2012] NSWCA 44, [41].

³² Racial and Religious Tolerance Amendment Bill 2019 (Vic) cl 10(2)(b).

cast towards them'.³³ Another council member also couched his support of the Bill in a discussion of marginalised groups defined by their protected attribute being verbally assaulted by another group.³⁴ The council member viewed the proposed laws as socially influential and educative, able to modify society's behaviour, as did supporters of the NSW vilification laws.³⁵ This historical support for vilification legislation reflects key elements of postmodernism. Language is powerful, language can harm, language is the assertion of power over of another class.

There exist in these debates key assumptions about harm, moral culpability for harm and how harm is caused by language that provides an effective framework for the postmodern elements discussed above to be used to push for legislative reform.

V LOOKING AT THE LAWS THEMSELVES

Vilification laws structurally display the key elements of postmodern Critical Theory.

Almost all vilification legislation in Australia uses what is known as the 'incitement' model for its legislative framework.³⁶ This incitement model was adopted in the first piece of Australian vilification legislation in New South Wales in 1989.³⁷ The wording between different State and Territory legislation is very similar, with the exception of Victoria,

³³ Victoria, *Parliamentary Debates*, Legislative Council, 11 September 2019, 3037 (Andy Meddick).

³⁴ Victoria, *Parliamentary Debates*, Legislative Council, 11 September 2019, 3038 (Samantha Ratnam).

³⁵ *Ibid* 3040.

³⁶ Neil Rees, Simon Rice & Dominique Allen, *Australian Anti-Discrimination & Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 682-683.

³⁷ *Ibid* 682.

though the Victorian provision has been interpreted in line with the NSW legislation.³⁸

The development of modern vilification and ‘hate-speech’ laws that prohibit incitement can be found in international agreements on human rights such as the *Universal Declaration of Human Rights* (‘UDHR’) and the *International Covenant on Civil and Political Rights* (‘ICCPR’).

During the drafting of the UDHR, Articles 19 and 7 posed particular problems for the drafters as to how restricted free and open expression should be.³⁹ The final Article 19 reads as follows:

Everyone has the rights to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴⁰

During the drafting phase the Soviet and Czechoslovakian delegates suggested restrictive limitations that would have confined the breadth of this freedoms.⁴¹ The suggestions were rejected by the non-communist nations.

The Soviets were not satisfied with the concept of fighting ideas with ideas and wanted to prohibit the expression of particular ideas, in this case fascism, because they thought the mere opposition of robust debate would be ineffective to prevent the rise of future destructive

³⁸ Rees, Rice and Allen (n 36) 682; *Catch the Fire Ministries Inc v Council of Victoria Inc* (2006) VSCA 284, [160].

³⁹ Paul Coleman, *Censored: How European “Hate Speech” Laws are Threatening Freedom of Speech* (Kairos Publications, 2nd ed, 2012) ch 1.

⁴⁰ *Universal Declaration of Human Rights*, GA Res 217A, art 19.

⁴¹ Coleman (n 39) ch 1.

ideologies.⁴² Western liberal democracies were concerned about entrenching restrictions on speech in international law where the final word on what was permissible belonged to the State.

The debate on ‘hate-speech’ laws continued with the ICCPR. The Soviet and communist states were successful in rejecting prohibitions on speech that only incited violence and were able to include prohibitions on the incitement of hatred in Article 20(2):

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.⁴³

The voting record on this adoption reveals that the ‘internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited.’⁴⁴

The language of incitement to hatred adopted in vilification statutes was implemented by totalitarian states that sought to eradicate any domestic opposition to communist rule.

The Australian vilification incitement model that borrows from this legal pedigree is named as such in juxtaposition to the ‘causing offence’ model, which is used by the federal *Racial Discrimination Act* and because the law looks to whether there is a potential for animus to be incited in persons, rather than for offence to be caused.⁴⁵

⁴² Ibid ch 1.

⁴³ Coleman (n 39) ch 2; *International Covenant on Civil and Political Rights*, GA Res 2200A, art 20(2).

⁴⁴ Jacob Mchangama, ‘The Sordid Origin of Hate-Speech Laws’, *Hoover Institution Policy Review* (Web Page, 1 December 2011).

⁴⁵ *Racial Discrimination Act 1975* (Cth) s 18C.

There are three differences between these models. The first concerns the effect of the conduct in question. The second concerns the perspective from which the conduct is viewed and its effect assessed. The third concern is the causal link between the conduct in question and the protected attribute of the target person.⁴⁶ The two models both have in common that they do not require evidence of actual offence or incitement, but rather an objective test is used to ascertain whether the offence is reasonably likely to occur or is capable of inciting hatred in the group receiving the public conduct.⁴⁷

We will focus on the ‘incitement’ model because it is the one predominantly used in all States and Territories. The NSW Act provides a good example:⁴⁸

38 S Transgender vilification unlawful

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of –

- (a) a person on the ground that the person is a transgender person, or
- (b) a group of persons on the ground that the members of the group are transgender persons.

(2) Nothing in this section renders unlawful –

- (a) a fair report of a public act referred to in subsection (1), or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege

⁴⁶ Rees, Rice and Allen (n 36) 683.

⁴⁷ Rees, Rice and Allen (n 36) 697, 734.

⁴⁸ *Anti-Discrimination Act 1977* (NSW) s 38S; *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW).

(whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or

- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Vilification legislation in this form has several significant features that have been drawn out by case law:

1. It is unnecessary to prove that the respondent intended to incite hatred or serious contempt;
2. It is unnecessary to prove that anyone was actually incited to hatred or serious contempt;
3. The law is a prohibition on behaviour towards a particular group or kind of person;
4. The alleged vilifying act must have capacity to incite the impugned response in group to which the public act is directed.⁴⁹

It is also significant that the exceptions provided in subsection 2 of the above section, which are indicative of other exceptions provided in incitement model legislation, provide no exception for statements that are truthful. The 'fair report' exception in subsection 2(a) protects public communication about events that could be vilification, like an article that reports on a public speech that contained vilifying remarks.⁵⁰ This protects a journalist, but not the public speaker. even if what they are saying is in fact true. Truth is no defence, in contrast to defamation law.⁵¹

⁴⁹ *Sunol v Collier (No 2)* [2012] NSWCA 44, [41]; *DLH v Nationwide News Pty Ltd (No 2)* [2018] NSWCATAD 217, [10]-[11].

⁵⁰ *Rees, Rice and Allen* (n 36) 740; *Hussein v Nationwide News Pty Ltd* [2016] NSWCATAD 139, [35]-[36].

⁵¹ For example – see the *Defamation Act 2005* (NSW) s 26.

These features display a strong relationship to the essential elements of postmodern critical theory.

A Knowledge and Truth are Subjective

The first and most significant relationship is that what is objectively true is irrelevant to a test of whether vilification has taken place.

As outlined above, Critical Theory as a discipline is highly sceptical of a theorist being able to step outside of their own situation to be able to objectively assess any kind of social phenomenon by an external, objective standard.⁵² What matters to the Critical Theorist is the application of the presupposed framework for analysis, with an understanding that the theorist is intellectually constrained by their own position in relation to what they are analysing.

Incitement model vilification laws display similarities to this aspect of Critical Theory in that whether what the respondent said is actually true or not, is not valued, nor relevant to ascertaining whether vilification has taken place. What matters is whether the public statement or act is likely to incite hatred for the protected person or group.

The likelihood of incitement is also dependant on the nature of the group receiving the speech.

This group could be particularly offended by certain acts or have heightened sensibilities when it comes to certain topics such that it could be provoked to hatred where another group would not.

The laws themselves are directed towards speech that has the capacity

⁵² Aggar (n 5) 116-117.

to incite an emotion of hatred or a change in attitude towards the protected group. More than this, it is not even necessary that this incitement occurs; the speech merely must be likely to incite.⁵³

Like postmodern Critical Theory, objective truth is irrelevant to vilification law. What matters is the subjective experience of a group of people and their attitude to another group of people.

B Language is Powerful and Dangerous

Another way in which the incitement model vilification laws are connected to postmodern Critical Theory is the way in which speech and language are treated as harmful and something to be controlled in order to effect changes in social power.

The laws seek to eradicate emotions, thoughts and actions that are deemed to be socially immoral and abhorrent because they are directed towards a group that possesses an attribute that is deemed to be privileged. Furthermore, because the speech does not need to actually produce the undesirable effects, the laws are treating the speech itself as especially dangerous and problematic – the laws are not directed towards ameliorating undesirable harms by sanctioning harm caused, but are rather directed at eradicating language and speech that challenges the social status of privileged groups.

This demonstrates a strong connection between postmodern Critical Theory in its treatment of language and speech as powerful and intimately connected to power.

⁵³ *Sunol v Collier (No 2)* [2012] NSWCA 44, [41].

C The Purpose of Theory is to Assert Power Over Others

Vilification laws value whether a minority group is being (theoretically) harmed by another person or group regardless of whether the dislike or contempt invoked is an objectively apposite moral response.

The fact that these laws operate in this way links them strongly to one of the key elements of critical theory, not just theoretically, but purposefully. Critical Theory's purpose is to change society by using a theoretical framework to change power relationships between groups/ classes of people.

Vilification laws are purpose focused. These laws prohibit speech that is said to have a directly harmful effect on the minority group and that is thought to encourage unsociable behaviour towards that group. The laws are directed towards a social outcome which is to protect and emancipate minority groups from oppressor groups – which is *the* key purpose of Critical Theory.

VI CURRENT EFFECTS OF VILIFICATION LAWS IN
AUSTRALIA

These facets of vilification laws which are related to postmodern Critical Theory are having a negative effect on the health of free speech in Australian society.

A recent case that demonstrates the suppressive effect of Australian vilification laws is that of *Clinch v Rep*.⁵⁴ Rep is a feminist and public commentator who has been vocal in her concern about the

⁵⁴ *Clinch v Rep (No2)* [2020] ACAT 68.

effect that trans-activism is having on the interests and safety of biological women.⁵⁵ Clinch is a biological man who identifies as a woman, who was previously a member of the Australian armed forces and then became politically active. This case concerned a previous history of proceedings between the parties where the respondent had made a public apology to the applicant on Facebook after a mediated settlement was reached.

After Rep had posted her apology on Facebook there were a large number of comments made, some of which were critical and pejorative of the applicant and the transgender community. Clinch alleged that these comments constituted unlawful vilification by Rep.

The ACT Civil and Administrative Tribunal found that once Rep became aware of the third-party comments on her Facebook and did not remove them that she was then responsible for the comments.⁵⁶ Due to the nature of the dispute, much of the feminist content in support of Rep and which were the subject of the complaint were treating Clinch as a man who was bullying women.⁵⁷

Underneath the arguments and the discussion of the legal issues was a fundamental disagreement between the parties about what it means to be male and female. This is irrelevant to the reasoning the eventual decision in favour of Clinch because vilification laws do not seek truth, they are only concerned with whether animus against the protected class could be incited.

This case is particularly chilling to public debate about contentious issues of significant public interest because, despite the fact that the

⁵⁵ Ibid [18].

⁵⁶ Ibid [41].

⁵⁷ Ibid [45].

individuals involved were going about that debate in an unsavoury manner, Rep, an individual, was held accountable for the speech of others.

This ACT Tribunal decision placed a responsibility on every person who uses social media to police public speech on their own accounts for fear of retribution by the State. This creates a strong chilling effect for free and open expression in public forums where social media is one of the key forums in which people engage in political and religious debate today.

The Human Rights Law Alliance has had experience of the weaponisation of vilification laws through assisting Queensland mother Katrina Tait.

Katrina is a professional photographer and devout Catholic who opposed 'Drag Queen Story Time' taking place in Brisbane public libraries.⁵⁸ She posted on social media the following view:

I can't believe I have just had to sign a petition to try stop drag queen story time happening at libraries in our country. I can't believe this actually happened in Brisbane last weekend. What happened to protecting children's innocence and letting them just be kids? Why the need to have adult entertainers reading them stories? Hardly good role models with many involved in drugs and prostitution etc. Feeling scared for our children's future. Please sign and help save their innocence.⁵⁹

A NSW LGBTQ activist saw this post and personally contacted Katrina, threatening to sue her under NSW anti-vilification law.

⁵⁸ Human Rights Law Alliance, 'Katrina Tait – Threatened by Activists', *Our Cases* (Web Page, 10 February 2021)..

⁵⁹ Ibid.

The activist also sent her a purported media release that would have revealed her name, her business, her previous address and her mobile phone number.

Katrina was later notified by the NSW Anti-Discrimination Board that the activist had filed a complaint. With the assistance of the Human Rights Law Alliance, Katrina was able to effectively answer the notice and the activist dropped the complaint.

Katrina's post was a benign comment that was motivated by genuine motherly concern for her children and other people's children. Vilification laws do not respect this, nor do they respect whether any of Katrina's assertions are true or not. These are questions that should be discussed in a public forum and should be determined by assessing the facts.

The use of vilification laws by activists like the one in this case creates a chilling effect and prosecutes the key purpose of postmodern Critical Theory.

The laws attack groups and views that are set up in opposition to the chosen "oppressed" class in order to re-shape society to "emancipate" the group that is set up as marginalised. In reality the laws are being used to marginalise and silence people like Katrina and Rep because they do not share socially popular views.

VII CONCLUSION

Australian vilification laws share a strong ideological and theoretical relationship with postmodern Critical Theory.

Core elements of postmodern Critical Theory, such as the subjectivity of knowledge, the influence and power of language and the controlling use of language as an expression of power all find correlating characteristics in the debates that supported the legislation of vilification laws and in the way in which the laws operate.

These laws have proven themselves to be tyrannical tools that pay no heed to truth and the importance of open public debate for a healthy and flourishing democratic society. In practice vilification laws are not addressing actual harms. They are directed towards the suppression of speech that could be subjectively interpreted as having the capacity to incite hatred towards a protected class.

These are laws that are not designed to impose sanctions for a demonstrable wrong, as is the case with the majority of punitive laws. Vilification laws are designed to suppress speech. The increased use and expansion of vilification laws will only further erode free and open debate in Australia.