May 2014

DISCUSSION PAPER: TACKLING RACIAL VILIFICATION IN THE NORTHERN TERRITORY

An overview of current issues in anti-vilification law, explaining why these issues are important to Territorians and suggesting what amendments are proposed for the *Anti-Discrimination Act* of the Northern Territory.
1. Executive summary

Territory Labor presents this discussion paper for consideration and discussion across the Territory on how we can work together to send a clear signal that racial vilification is not acceptable in the Territory. In this paper we call for public comment from Territorians on a proposal for a Private Members Bill to include racial vilification protection in the Anti-Discrimination Act of the Northern Territory.

This paper presents an overview of current anti-discrimination legislation in the Territory and other Australian jurisdictions. The Territory is the only jurisdiction which does not have anti-vilification provisions in legislation.

Racial vilification is a real issue on our streets, in our schools and on the internet and it needs to be tackled across the Territory. The federal government has flagged an intention to wind back federal laws against racial vilification which would leave a significant gap in the necessary legal protections from discrimination and would leave Territorians unprotected from racial hatred.

All laws, but particularly those dealing with discrimination are not only prescriptive but also have educational and symbolic functions.

Territory Labor has a proud track record in government and this discussion paper seeks comment from Territorians on ways to build upon that legacy. For more than a century, the Australian Labor Party has been a strong advocate of equality, fairness, growth and reform in Australia.

The Leader of the Opposition, Delia Lawrie MLA, will consult with the community and stakeholders to develop a Private Members Bill to be introduced into the Legislative Assembly of the Northern Territory to implement protections against racial vilification.

Territory Labor wants to hear from you on our proposal for an amendment to the Anti-Discrimination Act to make it unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person or groups on the grounds of race.
2. Background

Discrimination

The Australian Human Rights Commission describes racial discrimination as when a person is treated less favourably than another person in a similar situation because of their race, colour, descent, national or ethnic origin or immigrant status.

Vilification

The Australian Human Rights Commission describes racial vilification (sometimes referred to as racial hatred) as doing something in public – based on the race, colour, national or ethnic origin of a person or group of people – which is likely to offend, insult, humiliate or intimidate.

Examples of racial hatred may include:

- racially offensive material on the internet, including e-forums, blogs, social networking sites and video sharing sites
- racially offensive comments or images in a newspaper, magazine or other publication, such as a leaflet or flyer
- racially offensive speeches at a public rally
- racially abusive comments in a public place, such as a shop, workplace, park, on public transport or at school
- racially abusive comments at sporting events by players, spectators, coaches or officials.

The Australian Human Rights Commission also describes some things that are not against the law, provided they are “done reasonably and in good faith” – even if they are done in public. Under federal law, the things that are not against the law if they are “done reasonably and in good faith” are:

- an artistic work or performance – for example, a play in which racially offensive attitudes are expressed by a character
- a statement, publication, discussion or debate made for genuine academic or scientific purposes – for example, discussing and debating public policy such as immigration, multiculturalism or special measures for particular groups
- making a fair and accurate report on a matter of public interest – for example, a fair report in a newspaper about racially offensive conduct
- making a fair comment, if the comment is an expression of a person’s genuine belief.


There are very few statistics on vilification. The NSW Anti-Discrimination Board received more than 1,100 complaints under the Anti-Discrimination Act 1977 (NSW)
in 2006/07, 2007/08 and 2008/09 including around 2% or 3% in each year which were complaints of vilification.

<table>
<thead>
<tr>
<th>Vilification complaints received by ADB</th>
<th>2006/07</th>
<th>2007/08</th>
<th>2008/09</th>
</tr>
</thead>
<tbody>
<tr>
<td>Racial</td>
<td>24</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>11</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>35</td>
<td>27</td>
<td>23</td>
</tr>
</tbody>
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In 2012/13 the Australian Human Rights Commission received 2,177 complaints and 23% of complaints were lodged under the Racial Discrimination Act 1975. In comparison with the previous year, there was an increase in complaints received under the Racial Discrimination Act which reflected an increase in the number of complaints received regarding material on the internet.


It is understood that 6 cases of racial vilification under the Racial Discrimination Act 1975 (Commonwealth) were considered by the Australian Human Rights Commission in 2012/13. If the Commonwealth provisions were repealed, these Territory complainants would have no avenue for their cases to be considered.

**Racial Discrimination Act 1975 (Commonwealth)**

The Racial Discrimination Act 1975 aims to ensure that people of all backgrounds are treated equally and have the same opportunities. The Act also makes discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.

**Section 18C of the Racial Discrimination Act 1975**

Section 18C of the Racial Discrimination Act makes it unlawful for someone to do an act that is reasonably likely to “offend, insult, humiliate or intimidate” someone because of their race or ethnicity.

Section 18D of the Racial Discrimination Act contains exemptions which protect freedom of speech. These ensure that artistic works, scientific debate and fair comment on matters of public interest are exempt from section 18C, providing they are said or done reasonably and in good faith.

The Australian Human Rights Commission has noted that sections 18C and 18D were introduced in response to recommendations of major inquiries including the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can
soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts. Australia also has obligations to implement protections against racial hatred under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Sections 18C and 18D, Racial Discrimination Act 1975

Section 18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

   (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

   (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

   (a) causes words, sounds, images or writing to be communicated to the public; or

   (b) is done in a public place; or

   (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

"public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Section 18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

   (i) a fair and accurate report of any event or matter of public interest; or

   (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.
Courts’ interpretation of Section 18C

The Australian Human Rights Commission has noted that courts have consistently interpreted sections 18C and 18D as maintaining a balance between freedom of speech and freedom from racial vilification. The courts have held that for conduct to be covered by section 18C, the conduct must involve “profound and serious” effects, not “mere slights”. The courts have also found that section 18C is an appropriate measure to implement Australia’s obligations to prohibit racial hatred under the ICCPR and ICERD. While many laws restrict freedom of speech, such as laws applying to defamation, advertising and national security, section 18C fills an important gap in legal protections for those affected by racial hatred and vilification.


Exposure draft Freedom of Speech (repeal of s18C) Bill 2014 (Commonwealth)

On 25 March 2014, the Attorney-General, Senator the Hon George Brandis, released an exposure draft Bill on proposed amendments to Racial Discrimination Act. The draft amendments include inserting a new section into the Racial Discrimination Act which would remove the first three terms and narrow the definition of “intimidate” to fear of physical harm. It would also add the word "vilify" but define it to mean the incitement of third parties to hatred.

Views about repeal of Section 18C

The Australian Human Rights Commission’s submission to the Attorney-General's Department about the proposed recommends that the exposure Bill as drafted should not proceed. The Commission has identified key areas of concern with the proposed exposure draft, including:

- A narrow definition of vilification, which excludes conduct that is degrading; and limited definition of intimidation, which excludes conduct causing emotional or psychological harm;
- The Commission is concerned by the breadth of the exemption in subsection (4) of the Draft Bill. This provision is so broad it is difficult to see any circumstances in public to which the protections would apply. Of particular significance is the removal of the requirement that acts be done reasonably and in good faith. The Commission considers that, at the very least, a requirement of good faith should be included. This would prevent racist abuse offered up in the course of public discussion being permitted.

The Close the Gap Campaign Steering Committee has recommended the Federal Government not proceed with proposed changes because it would adversely affect the health of racial minorities including indigenous Australians. The Campaign has said “If we are to close the unacceptable health and life expectancy gap between Aboriginal and Torres Strait Islander people and other Australians, racism must be addressed. The RDA in its current form has a critical role to play.”

Other organisations, including the Australian Hellenic Council NSW are gravely concerned about the federal government’s proposed watering down of the racial vilification provisions in the Racial Discrimination Act. The Federation of Ethnic Communities’ Councils of Australia (FECCA) has warned the Government that the change would leave Australians with no protection against racial vilification and the Chinese Australian Forum says it is an "immoral" move that will encourage racism.

**Other States and Territories**

All Australian States and the ACT have racial discrimination legislation in many ways similar to the federal Racial Discrimination Act. Their approaches to racial vilification vary jurisdiction to jurisdiction. Only the Northern Territory has no racial vilification provisions at all.


**Anti-Discrimination Act 1998 (Tasmania)**

It is unlawful under the Tasmanian Act to engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of race or a number of other categories.

ANTI-DISCRIMINATION ACT 1998

S19. Inciting hatred

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –
(a) the race of the person or any member of the group; or

(b) any disability of the person or any member of the group; or

(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or

(d) the religious belief or affiliation or religious activity of the person or any member of the group.

**Anti Discrimination Act (NT)**

The Northern Territory Anti-Discrimination Commission was established in 1993 to administer the *Anti-Discrimination Act*. The Anti-Discrimination Commissioner is an independent statutory officer who has various functions under the Act including the promotion of equality of opportunity in the Territory; complaint handling and conduct of hearings; and provision of advice to the community and the government about the operation of the Act. The Commission fulfils the Commissioner's functions in two main ways, by handling complaints made under the Act and through the provision of public education and training.

Territory legislation covers race and religion-based discrimination but needs a connection to public spheres such as work, education or goods and services.

Racial "harassment" is prohibited by the civil law provisions of section 20(1)(b) of the *Anti-Discrimination Act* and section 200 of the *Criminal Code* creates offences such as making threats. These provisions may be applicable in certain circumstances but there is no Territory law that deals with racial vilification specifically.

Territorians have less protection from racist speech and behaviour than Australians in other jurisdictions so Territory Labor believes it is time to update Territory legislation.

**3. Territory Labor's proposal**

Territory Labor is proposing to introduce an amendment to the *Anti-Discrimination Act* to make racial vilification unlawful in the Territory if it is:

- a racist act,
- committed in public,
- which could incite serious contempt or severe ridicule of an individual or group because of race, colour, nationality, ethnic, ethno-religious or national background

We propose to model our amendments on Tasmania’s strong anti-discrimination provisions.
4. Consultation on our proposal

Territory Labor is seeking the views and feedback of Territorians on the following matters:

1. Do you support a proposal for an amendment to the Northern Territory’s Anti-Discrimination Act to make it unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person or groups on the grounds of race?
2. How should racial vilification be defined?
3. Are fair comments, said or done reasonably and in good faith appropriate exemptions to racial vilification?
4. Should religious vilification be specifically banned or should a definition be included as “ethno-religious”?
5. Should sanctions be civil, criminal or both?
6. How should a complaint be dealt with?

Comments are sought from Territorians on or before Monday 23 May 2014 on the issues set out in this discussion paper. We apologise for the short consultation timeframe but believe it is important to ensure a Bill can be introduced into the Legislative Assembly of the Northern Territory in a timely fashion to ensure Territorians are not left unprotected should the federal government repeal the section 18C provisions.

Any submission, feedback or comment received by the Northern Territory Leader of the Opposition will be treated as a public document unless clearly marked as "confidential".

Comments should be sent to:

Northern Territory Leader of the Opposition, Parliament House, Mitchell St,
Darwin NT 0800

Comments can also be sent to the following email address:

Opposition.Leader@nt.gov.au

An electronic copy of this paper can be found at: www.territorylabor.com.au

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