



Comment on the ACT Human Rights Office Issues Paper: Racial and Religious Vilification in the ACT

**September
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INTRODUCTION

ACTCOSS acknowledges that Canberra is built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage they have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage, and low-income citizens of the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a dynamic, collaborative and sustainable community sector.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

Introduction

This paper is a short response to the *ACT Human Rights Office Issues Paper: Racial and Religious Vilification in the ACT* (the Issues Paper). ACTCOSS welcomes this review of the *Discrimination Act 1991* (the Act) and, in particular, 'Part 6, Racial, Sexuality and HIV/AIDS vilification'. In this submission, ACTCOSS employs the human rights framework used in the Issues Paper. Our submissions are organised around a number of the human rights identified as relevant to vilification legislation, namely:

- The right to equality and non-discrimination;
- The right to freedom of religious beliefs;
- The right of ethnic and religious minorities to use their language, practice their religion and enjoy their culture; and
- Freedom of expression.

ACTCOSS submits that existing vilification laws need to be amended in order to fulfil the ACT Government's obligations under the *Human Rights Act 2004* (HRA) and to render territory legislation consistent with international human rights standards. However, our position is that human rights standards can only be meaningful if widely understood and if remedies are accessible for disadvantaged victims of human rights breaches. The Issues Paper offers an opportunity to go some way towards achieving this, by broadening the scope of racial vilification provisions, adding religious and other vilification provisions and improving access to justice for vilification complainants.

ACTCOSS understands that the main focus of the Issues Paper is on racial and religious vilification. Nonetheless, ACTCOSS advocates the "alternative approach" outlined in the Issues Paper, which would "outlaw vilification linked to any of the attributes covered by the Discrimination Act". We would suggest that there is no justification for the privileging of some protected attributes over others and would like to see all protected attributes considered for inclusion in vilification legislation.¹ For this reason, some of our responses to the questions raised in the Issues Paper are framed by reference not only to racial vilification, but to vilification directed towards minority groups generally.

The right to equality and non-discrimination (Section 8, HRA)

The HRA and the International Covenant on Civil and Political Rights (ICCPR) enshrine recognition and equality before the law as a basic human right. Section 8 of the HRA provides that:

¹ ACTCOSS refers the Human Rights Office to our previous request to include socio-economic status as a protected attribute under the *Discrimination Act 1991*. See letter from ACTCOSS, ACT Shelter, Youth Coalition of the ACT and Australian Federation of Homelessness Organisations to Mr Jon Stanhope MLA, dated 4 November, 2005.

'Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.'

Equality before the law and 'equal and effective protection against discrimination' require equal access to justice. The first barrier to access to justice is lack of awareness and understanding of the law. ACTCOSS is concerned that there is a lack of public understanding, particularly among the disadvantaged, as to the meaning of vilification, as well as human rights provisions, processes and remedies more generally. A clear and effective public information campaign is required to raise public awareness and enhance access. ACTCOSS suggests that information might be most effectively distributed via community networks, Aboriginal and Torres Strait Islander and multicultural newspapers and radio programs as well as more general public campaigns. Further, to reach those most likely to be affected by racial or religious vilification, information needs to be printed in a variety of languages.² The information should outline the basis for a complaint, how complaints can be made, the role of community organisations, the nature of representative actions and the availability of translation services and other assistance.

Language and a lack of education comprise additional barriers to access. ACTCOSS shares the concerns raised in the Issues Paper as to the adequacy of the conciliation procedure. We suggest that this procedure may result in lesser access for those from Indigenous and culturally and linguistically diverse backgrounds where individuals are required to advocate largely unassisted on their own behalf. For this reason, ACTCOSS stresses the importance of the free interpreter and translation services provided by the Human Rights Office (HRO) to complainants in racial vilification cases.³ However, we suggest that these services may need to be supplemented by free legal advice in some cases.

Indeed, the complexity of the law and limited access to free legal advice comprises a final barrier to access. At present, complainants have limited access to free legal services for discrimination and vilification cases. ACTCOSS notes and supports the community view expressed in the ACT Government's *Facing up to Racism* report that 'advice about the complaint process should be made available at various community locations, libraries, medical centres and shopfronts'.⁴ For those unable to obtain assistance, the conciliation process can seem complex and intimidating. ACTCOSS fears that this may be itself a disincentive against making a vilification complaint. The Issues Paper notes that community sector organisations can act as an advocate for a complainant. For this reason, distribution of the ACT 'Harmony Card' needs to continue, providing the contact details of agencies able to assist and advocate on behalf of victims of vilification. However, informing victims of this option may not be

² ACTCOSS notes that the ACT Government undertakes to 'Where possible provide information on services in a variety of languages' in ACT Government, *Facing up to Racism: A Strategic Plan Addressing Racism and Unfair Discrimination 2004-2008* at p. 6. (*Facing up to Racism*)

³ *Facing up to Racism* at p.6

⁴ At p. 16.

enough to ensure broader access to justice due to pressure on an already under-resourced community sector. Access to justice must be improved through increased investment in free legal services for discrimination cases and increased investment in community legal education.

Further, ACTCOSS suggests that to promote access to justice and affirm human rights as a community issue, the standing provisions of the Act should be broadened. Currently, only an aggrieved person or their agent can lodge a complaint of racial vilification under the Act. The preamble to the HRA states that 'respecting, protecting and promoting the rights of individuals improves the welfare of the whole community' and encourages the view that each individual shares a mutual responsibility in relation to others to uphold human rights. We note that during the ACT's 'Facing up to Racism' consultations, it was proposed that individuals should be able to make complaints on behalf of others or as representatives of communities and groups.⁵ We support such a proposal, provided that it ensures the participation of a victim in the process. If implemented, this would lead to greater recognition of vilification as a social problem in need of a social and community solution. The current narrow standing provisions have an individualising effect, promoting individual solutions to the problem of the vilification of minority groups. This encourages an understanding of abuse as directed towards an individual, rather than an ethnic, religious or other minority group, and committed by an individual respondent, whose conduct is thus seen as socially deviant and anomalous rather than, at least partly, the product of systemic factors. Broader standing rules would recognise the systemic and group nature of vilification.

Like the HRO, ACTCOSS is concerned by the disparity between the social 'reality of everyday racist abuse', and the very small number of racial vilification cases found to meet the threshold test. We argue that these statistics suggest that the threshold needs to be lowered to achieve the purpose of anti-discrimination laws. We agree with the HRO that the ACT legislation would be improved by being brought in line with the Commonwealth *Racial Hatred Act 1996*, such as to make racially offensive behaviour unlawful without a requirement to incite. We further agree with the suggestion in the Issues Paper that this would 'remove a barrier to the resolution of racial vilification complaints', 'be more consistent with community expectations of the role of anti-discrimination laws' and 'provide greater clarity by enabling more reliance on case law'. However, although greater clarity might be achieved by amendments in line with Commonwealth legislation, due to increased reliance on federal case law, this would not automatically increase access to justice. In order to do so, complainants would need to be able to access information about Federal case law in a summary, plain English form or receive free legal advice as to the meaning and significance of recent cases. The provision of information sheets which distil key principles from Federal case law could play an important function in improving access.

⁵ Issues Paper at 9.

Further, the New Zealand provisions, summarised at the end of the Issues Paper, appear to provide a better alternative than the Commonwealth legislation. Those provisions deal separately with racial harassment and the creation, or incitement, of racial disharmony. Significantly, the New Zealand law does not contain a public act requirement for cases of 'racial harassment'. It therefore provides a remedy against both the individual and social harms caused by expressions of racial hostility.

The right to freedom of religious beliefs (Section 14, HRA)

Section 14 of the HRA recognises freedom of thought, conscience, religion and belief. Currently the Act does not recognise religious vilification. Religious vilification laws must be introduced into the Act if the ACT Government is to fulfil its obligations in relation to this human right. ACTCOSS agrees with the suggestion in the Issues Paper that any religious vilification provision should include protection of those who hold non-religious beliefs, as is consistent with the Victorian *Racial and Religious Tolerance Act 2001* and the NSW *Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*.

As the Issues Paper notes, harassment, abuse and vilification of Australia's Muslim community has increased in the aftermath of September 11 and the so-called 'War on Terrorism'. Given this climate of abuse and fear, ACTCOSS submits that it is particularly important the ACT government makes a strong statement against both racial and religious vilification. ACTCOSS suggests that such a statement would have an important symbolic and educative effect. Indeed, we are of the opinion that this general symbolic effect may be the most significant of the amendments, given that the most important potential outcome of the legislation is attitudinal change. However, due to the existing material, psychological and practical obstacles to making a complaint, this educative effect may not necessarily translate into an increased number of vilification cases brought.

The right of ethnic and religious minorities to use their language, practice their religion and enjoy their culture (Section 27, HRA)

It is important to recognise that it is principally members of minority groups who are the victims of vilification. Protection from vilification and abuse is therefore a fundamental aspect of the territory's obligation to protect the rights of ethnic, religious or linguistic minorities to use their language, practice their religion and enjoy their culture. This right is undermined if members of minority groups fear abuse and are therefore reluctant to enter public spaces or publicly display aspects of their racial, cultural or religious identity, for example, by using their language or wearing particular clothing.

Freedom of expression (Section 16, HRA)

As acknowledged in the Issues Paper, in practice, freedom of expression is limited by the extent to which it can interfere with other basic human rights. Section 28 of the HRA provides that human rights may be 'subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.' Article 29 of the Universal Declaration of Human Rights qualifies freedom of expression by recognising that laws can set limits on one person's freedom in order to secure respect for the rights and freedoms of others. Indeed, the obligation to protect one human right, for example freedom of religion, may *require* limitations to be imposed on another, for example, freedom of expression.

It is important to acknowledge the extent to which vilification can limit its victim's freedom of expression. It is for this reason that the International Convention on the Elimination of All Forms of Racial Discrimination and the ICCPR require signatories to implement legislation regulating acts of racial hatred and discrimination. The ICCPR also includes incitement to religious hatred, obliging all state parties to prohibit racial and religious hatred and to limit other rights accordingly. Although the Australian Government included a reservation in its signing of the ICCPR, ACTCOSS argues that the ACT Government should act as an exemplar of human rights protection, exceeding the minimum commitments made by the Federal Government. Further, as argued above, this is necessary to make meaningful the ACT Government's stated purpose in enacting the HRA.

Although it is important that the discussion of legitimate public issues is not stifled, the abuse and vilification of minority groups leads not only to individual distress but to community harm. A climate of fear may silence minority groups and cause them to withdraw from participation in public life. Further, it has been suggested that vilification creates a climate in which more serious racist violence is likely to be carried out.⁶

In debates about religious vilification in other states and territories, some church groups have expressed concern about vilification provisions, fearing that they will stifle free speech and religious debate. Given that there appear to be high levels of misunderstanding about the meaning and content of vilification legislation, ACTCOSS submits that any public information campaign needs to explain the threshold required for a complaint to succeed and to emphasise that religious debate and criticism is not threatened by the legislation. ACTCOSS does not want to see an increase in religious conflict and disharmony, as has been claimed to be a consequence of religious vilification legislation in other states and territories. However, we suggest that such inter-religious conflict might be minimised by public understanding of the requirements of the legislation, and the distinction between legitimate religious debate and vilification.

⁶ Sally Frances Reid and Russell G. Smith, 'Regulating Racial Hatred', *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, February 1998.

Conclusion

ACTCOSS welcomes this review of the *Discrimination Act, 1991*. In our view, the disparity between the small number of racial vilification cases brought under the Act and the real incidence of racial abuse mandates legislative reform.

Equality and access to justice demand that the vilification provisions of the legislation be amended to:

- lower the threshold from 'incitement to hatred' and remove the public act requirement for cases of individual racial harassment in line with the New Zealand legislation;
- broaden the standing provisions to allow representative actions;
- add religious vilification; and
- consider the appropriateness of adding vilification on the grounds of any of the protected attributes in the Act.

Further, ACTCOSS submits that legislative reforms need to be accompanied by a clear and effective information campaign, both to improve access to justice by raising awareness and to avoid the potential disharmony that misunderstanding may generate. In addition, funding needs to be directed towards improving access to free legal and non-legal advice, such as to facilitate complaint-making for the disadvantaged.