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Director, Legal Policy

Department of the Attorney-General and Justice

GPO Box 1722

DARWIN NT 0801 1 December 2017

ATTN: Ms. Sarah Witham

Dear Ms. Witham:

I am writing to provide feedback on the proposed changes to the *Anti-Discrimination Act ('NT ADA')*of the Northern Territory. As the Discussion Paper on Modernisation of the *NTADA* points out, the Northern Territory is the only jurisdiction in Australia that has neither civil nor criminal racial vilification laws. As the Discussion Paper implies, access to Commonwealth remedies for racial vilification entails a lengthy procedure that must be followed by the victim as a pre-condition to commencing civil proceedings.[i] Most complainants lack the resources and inclination to pursue civil remedies if the matter is not resolved. Being able to access remedies in the NT through local laws will provide another avenue of redress for victims of vilification.

It appears as if the changes proposed to the *NTADA* will be modelled on the civil provisions of Section 18 and 18 D of the *Racial Discrimination Act 1975 (Cth)('RDA')* with protections extended to include acts done because of a characteristic of that person on the basis of race, disability, sexual orientation, religious belief, gender identity or intersex status.

The move by the NT to provide civil remedies for vilification should be applauded. Laws prohibiting unlawful vilification serve manifold functions. Such laws promote the values of representative democracy by seeking to ensure minorities participate meaningfully in public and political discourse; redress historical marginalization and discrimination of minorities; encourage civil dialogue and respect between all groups in society; foster fundamental principles of human rights, such as the right to dignity and equality, which allow minorities to live in the community free from fear of hostility and violence; serve an educative and symbolic function in highlighting societal abhorrence of vilification; and advance social cohesion by endorsing tolerance of diversity in a multicultural society.

The recent debate on marriage equality demonstrates the urgent need for vilification laws in the NT. During the recent debate on the marriage equality survey, there was graffiti vilifying gay people displayed in places around Darwin. Because there was no territory legislation prohibiting such vilification, no action could be taken under local laws to address this problem. Such vilification makes minorities have their sense of security eroded because they feel susceptible to future physical and emotional injury. The targets of such vilification suffer greater injury than victims of other types of unlawful conduct. These injuries may include a variety of negative feelings, such as loss of dignity, depression, and other physical maladies induced by the vilification. There is a growing body of national and international literature documenting the links between personal experiences of racism and poor health. [ii] There was a reported surge in requests for mental health services as a result of some of the negative debate surrounding the same-sex marriage postal survey, including instances of vilification. [iii]

As with the *RDA,* the key element in establishing civil liability under the proposed changes to the legislation is the emotional impact of the speech on the victim of the offensive or insulting speech. As with its federal counterpart, such a provision will protect individuals against prejudice and

intolerance on the basis of protected characteristics. In addition, there is a wealth of Commonwealth case law that can be relied upon in interpreting the parallel language in the proposed provisions of the *NTADA*.

The Discussion Paper also suggests including exemptions (or defences) to liability under the *NTADA* that are analogous to such exemptions under the *RDA*. Again, including such exemptions reflect an appropriate balance with considerations of free and fair speech.

The Discussion Paper makes no mention about potential criminal provisions in the proposed changes. I recently wrote an extensive law review article on Human Rights Law and Racial Hate Speech Regulation in Australia which advocates the adoption of Commonwealth criminal penalties for the most egregious forms of racist hate speech to implement Australia's obligations under the *International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.* I have attached a copy of this article for your information.[iv]

Given the Commonwealth government is unlikely to pass such criminal laws prohibiting severe racial vilification, I would suggest the NT consider implementing criminal provisions for instances of severe forms of vilification involving incitement to hatred and overt violence and physical threats to persons and property. Incidents of severe vilification undermine societal attempts to promote social justice and the human rights principles of dignity, equality and tolerance. Such incidents also increase the moral blameworthiness of the offender and should justify greater punishment. Expressly labelling and penalizing such conduct reinforces the law's symbolic and educational message about society's unwillingness to countenance the commission of such acts. The underlying norms of equality and entitlement to be treated as full members of society provide the reason for regulating this specific kind of offense. The creation of a specific severe vilification offenses would serve the goals of retribution, community protection, denunciation, and deterrence by punishing such conduct, denouncing the perpetrators of such conduct, and discouraging others from committing such offenses in the future.

It should be acknowledged that laws proscribing serious vilification have almost never been enforced at the state and territory level because of complicated procedural hurdles in the relevant legislation, a lack of knowledge on the part of law enforcement about the existence of such offenses, and resistance by prosecutors to bring claims under offenses which impose much higher evidentiary burdens and lighter sentences than exist for parallel common crimes, such as assault, affray and intimidation. New South Wales, along with Queensland, South Australia, Victoria and the Australian Capital Territory have made serious vilification a criminal offense within current anti-discrimination legislation, however, the laws do not form part of the consolidated criminal law legislation or the criminal codes of those jurisdictions. The only jurisdiction in which there has been a successful prosecution under state or territory legislation is Western Australia which has incorporated the offense of racial vilification into its Criminal Code. Western Australia has also imposed greater penalties for certain criminal offenses when committed in circumstances of racial aggravation. I would suggest the NT make the offenses of severe vilification part of the NT's criminal code and provide greater penalties than exist for parallel common crimes, such as assault, affray and intimidation. I would also suggest that law enforcement officers be educated about the existence of such offenses.

If you have any questions regarding the substance of this submission, please do not hesitate to contact me.

Kind regards,

Dr. Alan Berman

Associate Professor of Law

Charles Darwin University School of Law

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[i] For example, the victim must initially file a complaint with the Australian Human Rights Commission ('AHRC'). After the complaint is lodged, the matters may be dismissed if the substance of the complaint is not covered by the *RDA* . The matter may also be dismissed after an investigation is conducted if it is determined the matter is one over which the AHRC has no jurisdiction under the legislation. If appropriate, an attempt will be made to conciliate or resolve the matter through a face-to-face meeting for telephone conference. The AHRC is not empowered to determine if unlawful discrimination as defined in the relevant legislation has occurred. If the matter is not resolved by the Commission, the complaint is terminated and the complainant has only sixty days to commence civil proceedings in the Federal Magistrates Court or the Federal Court of Australia for breaches of Section 18C of the *RDA.* This process depends solely on complaints instigated by individuals or groups affected by the challenged breach. The AHRC has neither the resources nor the mandate to initiate investigations of breaches of the legislation in the absence of a complaint.

[ii] *See generally* Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health,* 35 INT'L J. EPIDEMIOLOGY 888 (2006); YIN PARADIES, RICCI HARRIS & IAN ANDERSON, THE IMPACT OF RACISM ON INDIEGNOUS HEALTH IN AUSTRALIA AND AOTEAROA; TOWARDS A RESEARCH AGENDA (2008).

[iii] *See, for example, Painful experience: Mental health toll of same-sex marriage postal survey* SBS News *available at* https://www.sbs.com.au/news/article/2017/11/13/painful-experience-mental-health-toll-same-sex-marriage-postal-survey; *Same-sex marriage survey sparks spike in access of LGBTI mental health support* ABC News *available* at http://www.abc.net.au/news/2017-09-18/same-sex-marriage-survey-lgbtqi-mental-health-support/8955956)

[iv] Alan Berman, *Human Rights and Racial Hate Speech Regulation in Australia: Reform and Replace?* Vol.44, No. 1 GA.J.INT'L&COMP.L (2015).