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STANDING COMMITTEE ON EDUCATION AND COMMUNITY INCLUSION
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Submission Cover Sheet

Inquiry into Racial Vilification

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The Committee Secretary
Standing Committee on Health, Ageing and Community Services
ACT Legislative Assembly
By email: LCommitteeECI@parliament.act.gov.au

Submission - ACT Discrimination Commissioner

Thank you for the opportunity to provide a submission to the Committee's inquiry into Racial Vilification in the ACT. I have endeavoured to address a number of the terms of reference in the context of the information and feedback I receive through the complaint handling process I administer under the ACT *Human Rights Commission Act 2005* ('HRC Act') and my role as Discrimination Commissioner in the ACT.

Background information

The ACT Human Rights Commission (HRC) is an independent agency established by the HRC Act. The HRC includes the President and Human Rights Commissioner, the Public Advocate and Children and Young People Commissioner, the Disability and Community Services Commissioner, the Discrimination Commissioner, the Health Services Commissioner, and the Victims of Crime Commissioner.

Under the HRC Act I can accept complaints across a range of complaint jurisdictions including

- discrimination, vilification & sexual harassment,
- health services & health records
- services for people with a disability and their carers
- services for children and young people
- services for older people and their carers
- vulnerable people complaints (i.e. complaints about abuse, neglect or exploitation of people with a disability or people over 60)
- veterinary services
- occupancy disputes
- Victims of Crime Charter of Rights
- Sexuality & gender identity conversion practices.

The breadth of matters we deal with gives us a broad insight into where and how people interacting in the ACT community may experience issues of racism and racial vilification. The consolidated complaint handling functions of the HRC means matters that might be brought to the HRC as a health service complaint or occupancy dispute, that raise issues of race or vilification, can also be dealt with under the Discrimination jurisdiction providing us with the opportunity to reframe those issues for the parties to the complaint.

The ACT Government has taken steps since the enactment of the ACT *Discrimination Act 1991* ('ACT DA') to ensure that people in the Canberra community have protections and rights if they experience discrimination or vilification. The ACT DA is an element within a framework of civil and criminal protections outlined briefly below. This framework is consistent with the obligations Australia entered into in ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

With respect to racial vilification matters, these are generally made as complaints under the ACT DA as race discrimination or racial vilification claims. 'Race' for the purposes of the ACT DA includes colour, descent, ethnic and national origin and nationality and any two or more distinct races that are collectively referred to or known as a race. The ACT DA also protects people from discrimination on the grounds of religion and immigration status.

Unlawful racial or religious vilification occurs where a person incites hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people, other than in private. The scope of 'other than in private' is to ensure an appropriate balance between private freedom of expression and privacy rights, and the right to equality and to be free from serious vilification in accessing areas of public life.

The scope of these provisions was considered by ACAT in *Bottrill v Sunol* [2018] ACAT 21. In *Clinch v Rep (No. 2)* (2020) ACAT 68 the ACAT considered the application of the ACT DA to alleged vilification on Facebook and the responsibility of the Facebook page author to moderate comments made by others which were considered to be victimisation.

The ACT DA protects people from discrimination in areas of public life including a range of work relationships such as employment, contract workers, partnerships, employment agencies and qualifying bodies; education; accommodation; the provision of goods, services and facilities; access to premises; clubs; and requests for information.

The ACT DA also protects people from being victimised by being subjected to any detriment if they make a complaint or provide information to the HRC as part of the complaint process, ensuring that people can bring a complaint to the HRC knowing they are protected from retribution or exercising their right to provide information or make a complaint to the HRC. This is particularly important in a complaint process utilised by many people who may experience disadvantage because of their protected attribute who should be able to raise their concerns and have them considered by the HRC without fear of being victimised.

ACT community members are also covered by the Commonwealth *Racial Discrimination Act 1975* (RDA) which covers a broader range of areas of public life and also makes unlawful vilification on the grounds of race, colour or national or ethnic origin. S.18C of the RDA defines offensive behaviour as an act otherwise than in private that is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people and is done because of race, colour or national or ethnic origin of a person or some or all of the people in the group.

The ACT *Criminal Code 2002* makes serious vilification a criminal offence in the ACT. S.750 states a person commits an offence if a person intentionally carries out an act, and the act is a threatening act, and the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on a number of grounds including race and religious conviction and the act is done otherwise than in private.

We note also that the Victorian Parliament undertook an Inquiry into *Anti-Vilification Protections* which reported in March 2021 and the Victorian Government's response was tabled in September 2021. Information about the inquiry and its recommendations is available at <https://www.vic.gov.au/inquiry-into-anti-vilification-protections>. On 31 January 2022 a report was tabled in the Queensland Parliament on its *Inquiry into serious vilification and hate crimes* <https://documents.parliament.qld.gov.au/tp/2022/5722T26.pdf> which may assist the Committee in considering these matters.

ACT Human Rights Commission statistics

Complaints received	2017/18	2018/19	2019/20	2020/21	1/7/- 31/12/2021
Race disc	34	36	48	38	34
Racial vil	5	3	9	9	6
Total R/RV*	39	39	57	47	40
Religion disc	2	8	11	5	3
Religion vil	4	1	2	2	0
Total disc**	166	166	208	218	158
% R/RV	23%	23%	27%	21%	25%
% Race & Rel ***	26%	29%	34%	25%	27%

* Race discrimination and racial vilification complaints combined

** Total discrimination complaints received in period

*** Total % of complaints where race & religious discrimination and vilification identified in complaint.

A. Social and legal context in which vilification based on race, linguistic diversity, ethnic origin, religion or status as Aboriginal or Torres Strait Islander people occur

There is extensive research that has been conducted in Australia about experiences of racial hatred, racial vilification and race discrimination. The 1991 Report of the National Inquiry into Racist Violence in Australia identified the prevalence of race-based micro aggressions that were enablers or authorising behaviours for escalating levels of vilification and violence. The report also comprehensively described the harm caused to a group of people when vilification, harassment or violence is experienced by one member of the group because of their race, national or ethnic origin, cultural background or colour. The importance of legislative responses to realise community opposition to racist behaviours and racial vilification was key to establishing what were unacceptable behaviours and providing a remedy for people who experienced racial vilification as a step to reducing and addressing incidences of racial violence in Australia.

The recent New Zealand Royal Commission of Inquiry into the terrorist attack on Christchurch mosques on 15 March 2019 confirmed the findings of the 1991 inquiry but particularly considered the evolving online environment and relevance to hate speech and hate crime. The report notes that ‘while hate crime and hate speech are, at least for legal purposes, different concepts they are linked by underlying commonalities and, in terms of their consequences, sit on the same spectrum of behaviours’¹. Recent research continues to show the link between hate speech and hate crime, focusing now on the links between online hate speech and offline hate crime². The study notes the need to consider hate crime as a process not a discrete act, with victimisation ranging from hate speech through to violence, noting that social media must form part of that understanding. The Royal Commission report noted the value, therefore, in seeking to reduce hate speech online and offline, not only to prevent the direct harm it causes but also limit the escalation of hate speech to hate crime.

While sometimes controversial, the offensive behaviour provisions which were developed following the 1991 report and gave effect to Article 4 of CERD, came into effect in the RDA in 1995 and established a new threshold for unlawful racist speech in Australia.

In 2011/12 the Federal Race Discrimination Commissioner conducted a national listening tour to develop the first National Anti-Racism Strategy which was launched in 2012 covering a three-year period. The Strategy was renewed in 2015 for a further three years. In 2018 The AHRC released a report on activities under the national anti-racism strategy, *Anti-Racism in 2018 and beyond*. The campaign noted a high level of support for its activities, but noted persistent experiences of racism being reported by multicultural and Aboriginal and Torres Strait Islander communities.

The Challenging Racism project auspiced by the University of Western Sydney undertakes regular national surveys of people’s attitudes to and experiences of racism in Australia. The Scanlon Foundation’s Mapping Social Cohesion survey is an annual survey of a range of factors affecting social inclusion and cohesion but also specifically examines some issues relevant to racism including attitudes towards migration and experiences of discrimination. The 2020 report endeavoured to track changes in experiences of discrimination arising from the pandemic.

While national surveys and research give a broader picture of the experiences of racial discrimination in Australia, we appreciate that individual experiences of ACT community members will provide valuable input to the Committee’s understanding of the nature and experiences of racial vilification in the ACT, and expectations with respect to remedies.

B. Effectiveness of existing reporting mechanisms, both for the purpose of redress in relation to individual incidents and for statistical monitoring of the prevalence of

¹ Part 9, Social cohesion and embracing diversity, Chapter 4, para 12.

² *Online Hate and Offline Harm* (8 May 2019); Matthew L Williams and others “Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime” (2020) 60(1) *British Journal of Criminology*

vilification based on race, linguistic diversity, ethnic origin, religion or status as Aboriginal or Torres Strait Islander people in the ACT community generally.

ACT community members have a number of ways of reporting incidents of race discrimination or racial vilification in the ACT. People can call or email the HRC to report incidents of racial vilification. The HRC also has an online reporting form ([Tell us about it – Canberra Community reporting tool - ACT Human Rights Commission](#)) which allows people to anonymously report discrimination or vilification in the ACT which enables us to monitor any trends or events that may occur where the person doesn't wish to make a complaint or is a bystander or witness rather than an aggrieved person.

If a person makes a complaint to the HRC about racial vilification, the process provides for us to make contact with the respondent and generally try to resolve the complaint on terms the complainant has outlined to us. The outcome of the conciliation process depends on the parties' participation. Where we are unable to resolve a matter, we can finalise it and the complainant can ask the HRC to refer their complaint to the ACAT to have the matter heard and determined.

The process is consistent with that provided by other equal opportunity commissions around Australia and with the racial hatred provisions under the Cth RDA. The process provides for an enforceable remedy where matters are not able to be resolved by the commissions.

Concerns about racial vilification can also be raised with the Australian Human Rights Commission (AHRC), the Australian Federal Police (AFP) who provide the police services in the ACT (ACT Police), or the eSafety Commissioner. There is no single point of contact regarding these types of matters, but the AHRC and the ACT HRC publish annual reports detailing the matters we receive including enquiries (which are contacts from the public seeking information about our jurisdiction, how to make a complaint etc) and complaints that raise issues of racial vilification.

Where a matter is raised with the HRC that may not be raised by the aggrieved person themselves, but by a bystander or witness, we may take action where we are able to identify a respondent to a matter or where alternative action is appropriate. For example in a matter where concerns are raised about alleged vilification through statements and posters in an apartment complex, we have worked with the strata managers to remove the material and place signs in the public areas noting the need for safe and inclusive community in the complex.

Where racial vilification is reported online or on social media in some cases, we are able to work with the provider to have material removed or the account suspended pending investigation. This can be difficult to implement where material is authored anonymously or is moved about the web or online environment to avoid the service provider successfully taking action to remove or block the material.

Given the diversity of settings in which racial vilification occurs, a single point of reporting or oversight can be difficult to achieve and given different legal thresholds may apply

depending on where the material is authored or accessed, this can lead to frustration for people seeking to report their experiences.

C. Adequacy of the existing legal frameworks applying to vilification based on race, linguistic diversity, ethnic origin, religion or status as Aboriginal or Torres Strait Islander people in the ACT, including any gaps in their coverage, and evidence-based ways to reduce the incidence of racially based vilification.

As previously outlined a number of frameworks apply to racial vilification that occurs in the ACT. This includes the ACT Discrimination Act, the Cth Racial Discrimination Act, criminal offences contained in the ACT Criminal Code and other specific protections for workplaces such as the *Fair Work Act 2009* and workplace health and safety laws.

Discrimination and vilification laws cover discrimination in specific areas of public life such as employment, education, the provision of goods, services & facilities, accommodation. Vilification provisions cover behaviour that occurs otherwise than in private, that is, vilification in public spaces such as workplaces, transport, shopping centres and online environments.

We note that the Queensland report considered issues raised with the definition of ‘public act’ and whether clarification of the definition would assist in both community understanding of the scope of the vilification provisions and to assist in consistency of decision making by courts and tribunals. The ACT DA definition refers to acts done ‘otherwise than in private’ and may benefit from similar consideration to specifically reference social media and online environments or as suggested in the report.

D. Adequacy and accessibility of existing processes and practices of relevant organisations to address vilification based on race, linguistic diversity, ethnic origin, religion or status as Aboriginal or Torres Strait Islander people.

The HRC provides information through a range of mechanisms about the complaint handling service provided by the HRC and particularly about options for reporting or making a complaint about experiences of race and religious discrimination or vilification. The HRC encourages people to call to obtain information about the scope of the laws and the process and remedies available for people who experience racism or racial vilification. People can also email or visit the HRC in person or contact us through our website.

The HRC has had regular ads running in local ACT print publications and has placed public service announcements about the process for raising complaints about race discrimination or racial vilification on community radio over the last 12 months. We will evaluate the effectiveness of the ads with the radio service at the end of the financial year 2021/22.

The HRC participates in public events to promote the complaint handling processes available to the ACT community through the HRC and meets on a regular basis with community

members, legal centres, advocacy groups and other stakeholders to promote the coverage of the ACT DA, availability of the complaint handling process in the ACT, and discuss other options for resolving or addressing racial or religious vilification in the ACT.

The Victims of Crime Commissioner (VOCC) Multicultural Liaison Officer (MLO) works primarily on the VOCC community engagement but is active in the ACT community and promotes and provides information about the information and complaint handling service available from the HRC.

If people seek information or bring a complaint to the HRC, they can be supported by a support person or advocate and interpreters are provided where needed to ensure the process is accessible to everyone.

E. Value of establishing, and possible content of, an anti-racism strategy for the ACT.

The HRC would support any anti-racism initiatives developed by the ACT Government. We note that the Australian Human Rights Commission is currently consulting on a National Anti-Racism Framework and the HRC has been involved in discussions with the AHRC on that strategy. The HRC suggests that any anti-racism strategy that is developed in the ACT must be developed in consultation with community members, relevant stakeholders and be informed by individuals or organisations with recognised anti-racism expertise.

F. any other matter the committee considers relevant.

ACT Police

The HRC has advocated for coverage of ACT Policing by the ACT Discrimination to provide a mechanism for ACT community members to have a local resolution-focused complaint mechanism to deal with complaints of alleged discrimination by ACT Policing. All of state and territory police services have local coverage by state and territory legislation. The ACT is unique in having a police service that is not covered by local discrimination law. ACT community members can make a complaint of alleged discrimination to the AHRC under Commonwealth discrimination laws, but consistent community feedback is a preference for a local remedy through the HRC, consistent with the complaint mechanisms and remedies provided for complaints about other ACT agencies.

ACT Policing is covered by the Victims of Crime Charter of Rights complaints jurisdiction administered by the HRC and is a public authority for the purposes of the ACT *Human Rights Act 2004*. The HRC considers mechanisms are available that would enable ACT Policing to be covered by the ACT DA and so provide a consistent remedy for ACT community members.

Discrimination Act reform

The HRC notes that the ACT government is currently consulting on potential reforms to the ACT Discrimination Act including the potential inclusion of a positive duty. This would require organisations to take steps to eliminate discrimination, harassment and vilification in their workplaces, service delivery and engagement with the public. If the positive duty were implemented it may provide another tool by which to encourage organisations to take steps to eliminate experiences of racial and religious vilification by people accessing their services, in their workplaces, or in public spaces they are responsible for such as public transport or online environments.

Racial vilification in education settings

The HRC receives complaints about incidents of alleged racial vilification between students across the different schools settings in the ACT i.e. public, private, preschool, primary and secondary levels of schooling. While some settings and schools have taken steps to address bullying in schools and there is a focus on ensuring schools are safe and inclusive, our observation from the complaints we receive is that education settings are not always equipped to identify or respond to claims of racism between students, which often takes the form of comments, social media posts etc and so could constitute racial vilification for the purposes of the ACT DA or the Cth RDA.

While utilising complaint mechanisms through the HRC or the AHRC may not be considered the best mechanism to resolve these types of matters, parents and students will access our process where they believe the matter has not been appropriately dealt with in the school setting. This may be because the exchanges have not been considered to be race based, there is inexperience in how to respond to the claims, there is no clear protocol regarding the involvement of parents or guardians in resolving those matters, or privacy is identified as a barrier to the student and/or parents of the target of alleged racism or racial vilification being provided with information about the outcome to any inquiries made by the education provider.

While racial vilification and racism unfortunately occur in many settings in the ACT community the difficulties arising in these experiences in an education or school setting can have a significant impact on a child's willingness to attend school, their learning outcomes, and their sense of safety, inclusion and identity. I draw this to the Committee's attention noting that any recommendation made by the Committee regarding an anti-racism strategy for the ACT, or the implementation of the National Anti-Racism framework in the ACT, could consider whether a specific communications strategy for children and young people would be a component of such a strategy.

I appreciate the opportunity to provide this short submission. I would be pleased to discuss this submission and the issues raised in the inquiry with the Committee at a convenient opportunity.

Regards



Karen Toohey
Discrimination Commissioner
ACT Human Rights Commission