1. Civil Liberties Australia (CLA) would like to thank the ACT Human Rights Office for the opportunity to comment on the *Discrimination Act 1991* (ACT).

2. CLA unreservedly condemns all forms of racial and religious vilification. CLA holds the view that such conduct is born of ignorance and intolerance, is entirely counterproductive, and has no place in a civilised and progressive society. However, it is one thing for us to hold a view – it is another thing entirely to prevent, by force of law, others having a competing view from expressing it.

3. The mere fact that we disagree with a view or sentiment is not a sufficient reason to ban it. Ultimately it has to be asked why vilification along religious and racial reasons is prohibited by law. CLA notes that the ACT Human Rights Office Discussion Paper does not deal with this fundamental question; it proceeds on the assumption that such vilification should be prohibited.

4. There may be debate about the precise nature and purposes of such provisions, but generally such provisions are designed to protect minorities from abuse and to promote tolerance and acceptance within the community. When we prohibit conduct in the furtherance of these objectives it exposes an obvious paradox: in the furtherance and promotion of tolerance of one view, we will not tolerate another, i.e. to promote tolerance we must be intolerant.

5. CLA submits that such logic is dangerous, and extreme caution must be exercised when deciding which opinions, views, and comments may be expressed, and which ones cannot.

6. Notwithstanding what many might consider the desirability of banning racial or religious 'hate speech', there are also compelling arguments for not banning such speech. The American Civil Liberties Union (ACLU) notes that

> The ACLU has often been at the center of controversy for defending the free speech rights of groups that spew hate, such as the Ku Klux Klan and the Nazis. But if only popular ideas were protected, we wouldn't need a First Amendment. History teaches that the first target of government repression is never the last. If we do not come to the defense of the free

> speech rights of the most unpopular among us, even if their views are antithetical to the very freedom the First Amendment stands for, then no one's liberty will be secure. In that sense, all First Amendment rights are "indivisible."
>
> Censoring so-called hate speech also runs counter to the long-term interests of the most frequent victims of hate: racial, ethnic, religious and sexual minorities. We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them. As one federal judge has put it, tolerating hateful speech is "the best protection we have against any Nazi-type regime in this country."
>
> At the same time, freedom of speech does not prevent punishing conduct that intimidates, harasses, or threatens another person, even if words are used. Threatening phone calls, for example, are not constitutionally protected.[1]

7. That is not to suggest that no limits may be placed upon free speech, but such limits must be carefully thought out. CLA points to the old adage that "the road to hell is paved with good intentions." History is littered with laws motivated by the most altruistic of intentions, but which have been misused and abused and had a detrimental effect. In *Australian Capital Television v Commonwealth,* Chief Justice Mason of the High Court noted that:

> Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments.[2]

8. The American Civil Liberties Union notes that such laws have a history of abuse:

> In Great Britain, for example, a Racial Relations Act was adopted in 1965 to outlaw racist defamation. But throughout its existence, the Act has largely been used to persecute activists of colour, trade unionists and anti-nuclear protesters, while the racists -- often white members of Parliament -- have gone unpunished.[3]

INTERSECTION BETWEEN VILIFICATION LAWS AND FREE SPEECH

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[1] American Civil Liberties Union – "Freedom of Expression, ACLU Discussion Paper", http://www.aclu.org/freespeech/gen/11178pub19970102.html, Date accessed: 20 September 2006.
[2] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 145.
[3] American Civil Liberties Union, "Hate Speech on Campus", http://www.aclu.org/studentsrights/expression/12808pub19941231.html, Date accessed: 20 September 2006.

The Implied Right to Political Communication

9. Any Australian law must be consistent with the implied right to political communication within the Australian Constitution. The 'test' as to whether a law is consistent was reduced to the following formulation in *Lange v Australian Broadcasting Corporation* which effectively poses the following two questions*:*

1. Does the impugned law "effectively burden freedom of communication about government or political matters?"
2. If there is an effective burden, the question is whether the law – or perhaps the burden – is directed to a "legitimate end", and is "reasonably appropriate and adapted to serve that end?"[4]

10. In *Levy v Victoria,* McHugh J as part of the majority, argued that the right to political communication implied in the Australian Constitution:

> also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been do widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.[5]

11. CLA is of the view that existing provisions of section 66 of the *Discrimination Act,* let alone any amendments to include religious vilification, fall afoul of this test.

12. For example, consider the following hypothetical. A politician launches a scathing public attack at homosexual people who support the adoption of children by homosexual couples. This is an inherently political subject. In so doing, the politician's comments incite hatred or contempt for people of a gay sexuality. Prima facie, it could be said that the politician has vilified a group of people on the basis of their sexuality. The politician may genuinely hold the views he or she expressed and think they are commenting in the public interest, but the comments may be entirely unreasonable and based on false information. Given

[4] *Levy v Victoria* (1997) 189 CLR 579 at 622
[5] *Ibid*. at 623.

that the defence for vilification found in section 66(2)(c) of the Act requires the comment to be both reasonable AND honest, the comments would not fall within this defence as they are entirely unreasonable.

13. Although CLA would disagree with the view expressed by the politician in the hypothetical above, we would strongly defend the right of the politician to make those comments.

14. Arguably, that hypothetical demonstrates how the existing provisions contravene the implied Constitutional right to political communication: the law is restricting political communication (offending the first limb of the test in *Lange*) and is not "reasonably appropriate and adapted" as it effectively prohibits political discussion on a matter that is of public interest where it is not reasonable (thus offending the second limb of the test).

15. It is not "appropriate and adapted" because, given that the section 66(2)(c) defence requires the comment to be both reasonable AND honest, it has the practical effect of only protecting speech that is reasonable, i.e. the reasonable viewpoint in any debate. The right to political communication is obviously intended to protect a diversity of competing viewpoints in a political debate, not just reasonable ones. To reiterate the words of McHugh J in *Levy v Victoria,* the right to political communication "also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications."[6]

16. Accordingly, CLA is of the view that the vilification provisions in section 66 of the *Discrimination Act* are already too broad in scope and unduly impinge upon an individual's implied constitutional right to political communication.

17. Section 66(2) needs to be either repealed or narrowed in scope so as not to interfere with political communication. Reform of the Act needs to be undertaken before there can be any suggestion of amending it to further

[6] *Levy v Victoria* (1997) 189 CLR 579 at 623

extend the scope of vilification provisions and potentially even further subvert political communication.

Freedom of Expression in the Human Rights Act

18. As well as having to conform with the implied constitutional right to political communication, any amendments to the *Discrimination Act* will need to be compatible with the *Human Rights Act 2004* (ACT). The most likely area of inconsistency will be with sections 16(1) and 16(2) of the *Human Rights Act* – the right to freedom of expression. These sections provide that:

> *16 (1) Everyone has the right to hold opinions without interference.*
>
> *16 (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.*

19. These sections are subject to, and constrained by, section 28 of the *Human Rights Act* which provides that:

> *Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.*

20. CLA submits that the freedom of expression is one of the most fundamental rights in society. It is one our most precious freedoms which should not be intruded upon unless exceptional circumstances exist. It therefore follows that only in the most exceptional circumstances will it be appropriate that section 28 of the *Human Rights Act* be invoked to constrain the right to free expression contained within section 16.

21. In determining the limits of the right to free expression in the *Human Rights Act,* section 31(1) of that Act provides "international law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right."

22. CLA notes that the Human Rights Office Discussion Paper has canvassed case law from European and Canada, much of which is helpful. The Discussion Paper did not, however, touch on the considerable and extensive jurisprudence of the U.S. Supreme Court in determining the nature and extent of the right to free speech. CLA believes that any discussion on the topic is incomplete without reference to some of the decisions of that Court.

23. The U.S. Supreme Court has consistently held in cases such as *FCC* v *Pacifica Foundation* and *Reno* v *American Civil Liberties Union* that "it is well established that speech may not be prohibited because it concerns subjects offending our sensibilities"[7] and "the fact that society may find speech offensive is not a sufficient reason for suppressing it."[8]

24. At the centre of the First Amendment Constitutional right to free speech in America is currently the "imminent lawless action doctrine." In *Brandenburg v Ohio* the U.S. Supreme Court has held that:

> The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[9]

25. CLA agrees with the U.S. Supreme Court's formulation on the limits of free speech in *Brandenburg*, which continues to be applied today. It provides large scope for free speech, but limits it where it is shown that it will cause damage. Where speech causes deep offence or discomfort, the best response is more free speech – in the case of racial or religious vilification the best recourse is further free speech which exposes the bigotry and ignorance which racial and religious vilification is founded upon.

26. Moreover, in *Ashcroft v Free Speech Coalition* the U.S. Supreme Court held that

[7] *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745 (1978)
[8] *Reno* v. *American Civil Liberties Union,* 521 U.S. 844, 874 (1997)
[9] *Brandenburg v Ohio* 395 U.S. 444, 1969.

> The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley* v. *Georgia*, 394 U.S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.[10]

27. In *Church of Scientology v Sweden* the European Court of Human Rights held that free speech may be restrained where comments are so severe that it prevents groups from manifesting their beliefs.[11] To extrapolate and apply this test to the ACT *Human Rights Act* in the context of the current debate it would be something as follows: It is only appropriate to limit freedom of expression where the exercise of that right is preventing someone from manifesting their religious beliefs.

28. CLA is of the view that section 66 of the *Discrimination Act 1991* (ACT) does not satisfy the standards set by both the U.S. Supreme Court and the European Court of Human Rights for banning speech.

29. With respect to the "imminent lawlessness" approach enunciated by the U.S. Supreme Court's test, the conduct prohibited in section 66 cannot be said to incite imminent lawlessness – it does not follow that because speech may incite hatred, ridicule or contempt that imminent lawlessness will necessary ensue.

30. Further, CLA believes it is arguable that the provisions of section 66 also fall foul of the reasoning of the Court in *Ashcroft v Free Speech Coalition.* Section 66 does not prohibit the conduct of inciting hatred, contempt or ridicule per se; it only prohibits such conduct when it is accompanied by reference to race, sexuality, transexuality and Aids/HIV status. As such, the motives and thoughts of the accused person are fundamental to whether vilification has occurred – but for the manifestation of their racist/sexist thoughts in addition to inciting hatred contempt or ridicule, there would be no unlawful conduct to speak of. Accordingly, it might be said that restricting speech in this manner is, by default, attempting to control certain thoughts; and as the Court notes, the freedom to think is the beginning of

[10] *Ashcroft v Free Speech Coalition*
[11] *Church of Scientology v Sweden,* App. No. 8282/98.

freedom itself, and as speech is the beginning of thought, it must be vigilantly protected.

31. Similarly, the conduct prohibited in section 66 does not satisfy the test established by the European Court of Human Rights in *Church of Scientology v Sweden* - it does not follow that because speech or conduct may incite hatred, ridicule or contempt that a person or group cannot manifest the beliefs or practices implicit in the grounds protected in section 66 (i.e sexuality, race etc.). For example, just because someone may use speech in a manner that incites severe ridicule of homosexuals, it does not follow that a homosexual person cannot therefore pursue a homosexual lifestyle.

32. Accordingly, CLA is of the view that section 66 of the *Discrimination Act* in its current form is inconsistent with the right of freedom of expression contained in section 66 of the *Human Rights Act.* Section 66 should either be repealed, or amended to make it compatible with the right to freedom of expression.

"RACIALLY OFFENSIVE" OR "INCITEMENT TO RACIAL HATRED"?

33. CLA makes the following comments and recommendations on the basis that section 66 of the Discrimination Act will be maintained in similar terms to its present formulation.

34. The Human Rights Office Discussion paper asks the question as to what is the appropriate 'bar' or threshold that must be satisfied before a complaint of racial of religious vilification is made out.[12] The Discussion Paper points to section 18C of the *Racial Discrimination Act 1975* (Cth) which prohibits racially offensive behavior but does not contain an element of incitement, and suggests that the removal of the requirement to demonstrate incitement would be advantageous.[13]

[12] Human Rights Office Discussion Paper, p 4.
[13] Pp 6-7.

35. CLA disagrees with this view, and submits that the requirement to show incitement should be maintained. CLA accepts that this will make complaints harder to uphold, but that is as it should be. A lower standard would make it easier for a finding (that someone has acted in a racial or religiously offensive manner) easier to secure.

36. It is important to remember that a finding that a person has breached vilification legislation may have a serious impact on an accused. Although the provision would not provide criminal sanction, it may nonetheless have a substantial detrimental effect. Such a finding has the effect of labeling someone a racist, and may affect that person's reputation which in turn may affect their employment prospects or have other economic impacts. It may affect their social standing or relationships with family and friends. It is not a finding that should be taken or made lightly.

37. CLA is of the view that it would be disproportionate for a person to be subject to these consequences when the level of mental culpability on their part that must be shown is low.

38. The existing vilification provisions contained in section 66 of the *Discrimination Act 1991* (ACT) might be said to be "strict liability' provisions in the sense that they do not require any proof of fault on the part of the accused. Given the lack of criminal sanction, CLA does not suggest that a high standard of subjective fault is required. However, provisions akin to section 18C of the Commonwealth *Racial Discrimination Act* require little if any fault at all. CLA is of the view that some degree of fault should be required.

39. Accordingly, CLA recommends that either the requirement to show incitement should be retained, which would be assessed on an objective standard, or, in the alternative, there be no requirement to show incitement but a requirement to show that the accused intended that their conduct would lead to the hatred, ridicule or contempt of the designated classes of people.

PUBLIC PLACE REQUIREMENT

40. CLA believes that a public act/place requirement in section 65 of the *Discrimination Act* be maintained. As discussed above, CLA is already of the view that the vilification provisions impinge on the right to freedom of expression. To remove or relax the public/place requirement and hence render someone liable to acts done in private would make the vilification provisions even more intrusive and unjustifiable.

41. Section 12 of the *Racial and Religious Tolerance Act 2001* (Vic) provides a limitation on when a person may be found to have engaged in vilification. That section provides that:

> *12(1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.*

42. CLA believes that this safeguard goes some way to limiting the intrusion into the right to freedom of expression.

43. If the vilification provisions of the *Discrimination Act* are to be maintained in terms similar to what they are now, then CLA recommends that an exception similar to that contained in section 12 of the *Racial and Religious Tolerance Act 2001* (Vic) be added.

ENDS ***ENDS*** ***ENDS***

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