

Anti-vilification

The Anti-Discrimination Amendment Bill 2022 (the Bill) proposes to prohibit vilification through prohibiting offensive behaviour, being an act done by a person that is reasonably likely to offend, insult, humiliate or intimidate other persons or a group of people because of an attribute.

Vilification is “saying or writing abusive or disparaging things about someone or something, in order to cause others to have a bad opinion of them”.

Why does the Northern Territory need to prohibit vilification?

Vilification has real, pervasive and deeply harmful impacts for people who are targeted. Often this conduct is online but it can also happen in everyday life.

The Northern Territory is the only jurisdiction in Australia without legislation that makes public incitement to acts of racial hatred either an unlawful act, a criminal offence, or both. There are also no protections from vilification on the basis of religious belief or activity, disability, sexual orientation, gender identity or any other attribute otherwise protected from discrimination under the Act.

Amendments to the Act will mean that all attributes in the Act will be protected from vilification.

What do proposed sections 20A and 20B prohibiting vilification do?

Section 20A Offensive behaviour because of an attribute

Proposed section 20A will prohibit an act done by a person that is reasonably likely to offend, insult, humiliate or intimidate another person or group of people because of an attribute of the other person (or a group of people).

The provision is a civil prohibition, not a criminal offence. A complaint about vilification can be made to the Anti-Discrimination Commissioner who will assess the complaint to determine whether the complaint can be accepted and evaluated under the Act.

This provision is modelled on section 18C of the *Racial Discrimination Act 1975* (Cth) which has been interpreted by the courts to apply only to serious incidents, or conduct that has a ‘profound and serious effect not to be likened to mere slights’.

While the courts have given the words ‘offend’ and ‘insult’ their ordinary meaning, they must be assessed in their context, and also with regard to the objectives of the legislation. This means a complaint is assessed by considering the conduct on a case by case basis before a complaint can be accepted and evaluated under the Act.

The test in section 20A is also objective in nature. It requires the effect of the alleged act to be assessed from the perspective of the ordinary, reasonable member of the relevant group that was targeted – this

means a complaint from someone who is unreasonably sensitive to a statement is unlikely to succeed and therefore unlikely to be accepted.

The conduct must also occur in the public space, either through communicating to the public, in a public place or in the sight or hearing of people in a public place. For religious bodies, conduct within a church, mosque or other place of worship (that are a public place) done as part of religious observance or practice in the church, mosque or other place of worship would likely be within the exemption in section 51(d) of the Act. The Act does not apply to religious observance or practices by religious bodies.

Section 20B Exemptions to section 20A

Proposed section 20B provides a broad exemption that is modelled on the corresponding exemption in section 18C of the Racial Discrimination Act. It means that anything said or done that is reasonable and in good faith:

- as part of an artistic work, or
- for genuine academic, artistic or scientific purpose or in genuine purpose of public interest, or
- in the fair and accurate reporting or fair comment of an event of matter of public interest is exempt from the prohibition in section 20A.

The courts have held that 'good faith' has both subjective and objective elements. To establish 'good faith', the subjective purpose of the person must be assessed (e.g. did the person act dishonestly). Objectively, the degree of harm likely to be caused (how serious was it) and the extent to which the conduct may be vilifying conduct is assessed.

There is no single definition of 'in the public interest' but the concept refers to the benefit of the public as a whole, or for the good order of society and well-being of its members, as distinct from the interests of an individual or individuals.

Will the prohibition on vilification capture online content?

Yes. The prohibition applies to 'words, sounds, images or writing communicated to the public' (section 20A(3)(a)).

What about free speech?

The purposes of vilification laws are directly linked to the harms that the laws seek to prevent. Vilification can cause serious and long-term psychological harm to the people and groups that it targets. It also promotes discriminatory attitudes and beliefs, which can lead to an increase in acts of discrimination, prejudice and violence against people holding protected attributes.

The prohibition of vilification does not actually prohibit certain people or groups from speaking – they only prohibit certain forms of hateful expression being said in public and have no application to purely private conversations or conduct.

What about religious freedom? Shouldn't speech promoting religious belief be included in the exemption?

Section 20B does not explicitly exempt statements of religious belief from the application of the prohibition in section 20A, so vilification that arises from religious beliefs may be captured by the prohibition.

It is unlikely that vilifying conduct that arises from religious belief would be considered to be 'a matter of public interest' as the statement is likely to reflect the views of a narrowly defined group of people, rather than the public in general. However, whether a statement is a 'matter of public interest', would ultimately depend on what was said, and would be a matter for the Anti-Discrimination Commissioner to assess.