

# Submission on Modernisation of the NT Anti-Discrimination Act



February 2018



## About AMSANT

The Aboriginal Medical Services Alliance of the NT is the peak body for the community controlled Aboriginal primary health care (PHC) sector in the Northern Territory (NT). We have 25 member services providing Aboriginal comprehensive primary health care (CPHC) right across the NT from Darwin to the most remote regions. AMSANT has been established for 20 years and has a major policy and advocacy role at the NT and national levels, including as a partner with the Commonwealth and NT governments in the Northern Territory Aboriginal Health Forum (NTAHF).

AMSANT advocates for equity in health, focusing on supporting the provision of high quality comprehensive primary health care services for Aboriginal communities. Our organisation also embraces a social and cultural determinants of health perspective which recognises that health and wellbeing are profoundly affected by a range of interacting economic, social and cultural factors.

AMSANT has chosen to engage with the proposed reforms to the Anti-Discrimination Act, as set out in the discussion paper, because we recognise discrimination is one of these key determinants of health, and impacts significantly and disproportionately on Aboriginal people in the NT. However, due to the breadth of the proposed reforms we have chosen to respond only to selected questions within the discussion paper that are related to the experience and expertise of our organisation and its members.

AMSANT is aware that other organisations within the community who have the relevant expertise to respond to other aspects of the proposed reforms will also be making submissions through this consultation process. In particular, we would express our support for the submission of Rainbow Territory relating to gender and sexuality protections as set in out in their responses to questions 1, 2, 3 and 21. We would also refer this review to the submissions of APO NT and NAAJA in relation to questions 16, 17 and 22.

## Introduction

AMSANT supports the intent of the proposed reforms to bring the NT's Anti-Discrimination Act (the Act) into line with contemporary standards and expectations, and establish greater consistency with jurisdictional developments in similar legislation. Protecting people from the harms of discrimination is an appropriate object of government legislation, as recognised by the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination.

Laws are not only about legal protections and remedies, they set standards of conduct and play an educative role about what is deemed acceptable in our society. It is our hope that the proposed reforms will help to set norms that discourage people from discriminating against others, and encourage people to speak out publicly against various forms of discrimination.

However, we would emphasise that legislative reform must be considered as just one aspect of a far more comprehensive response to discrimination in our communities. It is essential that system and population level change is pursued, rather than relying solely on the capacity that the Act provides to respond to particular incidents of prejudice.

AMSANT advocates for an evidence-based approach to reducing discrimination that would incorporate preventative action through efficient public health interventions, as well as strategic approaches that aim to transform discriminatory cultures and behaviours within institutions and systems over the long-term. The growing body of evidence on discrimination in Australia would suggest that interventions targeting organisational and community settings are particularly needed as there is a high prevalence of discrimination experienced in these settings (Ferdinand et al. 2012; Victorian Equal Opportunity Commission 2013).

The Anti-Discrimination Commission is currently under-resourced and under-staffed such that they are unable to adequately exercise important functions, such as own motion investigations. If the intent of the proposed reforms is truly to protect vulnerable Territorians from discrimination, additional resourcing must be allocated to the Commission so that it can perform effectively in its existing functions, as well as to deal with the potential increase in complaints that may result from any legislative amendments.

Within the context of the NT, the unacceptable levels of inequality that exist between Aboriginal and non-Aboriginal Territorians cannot be overlooked in a discussion about discrimination. A recent study exploring race relations through in-depth interviews with Aboriginal people living in or regularly visiting Darwin, found that respondents felt stereotyped, judged and patronised by non-Aboriginal community members on a daily basis, and identified their daily experience as one of loss (Habibis et al. 2016).

This last comment in particular is consistent with AMSANT's position that the most complex health, mental health, substance use, justice and child protection issues within Aboriginal communities throughout Australia can be better understood in the context of historical and transgenerational trauma. Colonisation, dispossession and displacement from traditional lands, loss of culture, the separation of families through past government policies, high levels of incarceration, and ongoing discrimination and racism have all contributed to continuing disadvantage, poor health and poor social outcomes for many Aboriginal people.

Importantly however, culture and spirituality have been identified as central to addressing intergenerational trauma through supporting resilience and positive social and emotional wellbeing (Gee et al. 2014). It is not surprising then, that in the previously mentioned study examining race relations in Darwin, respondents identified that people who discriminated against them were ignorant of the depth and richness of Aboriginal culture and its strengths, and that in order to improve race relations, non-Aboriginal people need to take responsibility to learn more about Aboriginal culture (Habibis et al. 2016).

If the NT Government is serious about transforming cultures of discrimination that exist in the NT it must be acknowledged that legislative reform is only the first step in a much more comprehensive process.

## Discrimination and its impacts on health

### Mental and Physical health

It is now well established that discrimination and racism directly affect mental health with the impact increasing in line with the frequency of the experiences of discrimination. The unpredictable and anxiety-provoking nature of the racial discriminatory experiences, (which may be dismissed by others as trivial or not important), may lead a person to feeling as if there is something wrong with them (Williams 2015). Chronic and ongoing concerns of these experiences may lead to a person being vigilant to being avoidant of such experiences and over time this may extend to further re-traumatisation (Carter 2007). It is not surprising therefore that there is a consistent association between racism and poorer mental health outcomes.

More subtle experiences of racism strongly linked to poor mental health outcomes include feelings of being left out and avoided; a form of social exclusion that results from both direct and indirect racism. Ongoing harmful effects of racism including anxiety and depression continue long after exposure to racist incidents and that individuals also experience anxiety on behalf of relatives and loved ones.

Chronic exposure to racism can lead to excessive stress, which can also have physical health effects, with potential impacts on the immune, endocrine and cardiovascular systems, and links have been established between discrimination and obesity, inflammation and chronic disease (Pascoe 2009). Analysis of the 2012-13 Australian Aboriginal and Torres Strait Islander Health Survey found that Indigenous Australians with high/very high levels of psychological distress were 1.3 times as likely to report having circulatory disease and 1.8 times as likely to report having kidney disease (ABS 2013).

### Recommendation 1:

That investment be made to ensure proper resourcing of accessible primary health care services to prevent discrimination and alleviate its impacts where it occurs.

### Social Determinants of health

Racism is a key social determinant of health for Aboriginal people, and can impact significantly on individuals' ability to achieve their full capabilities. This is because there are significant and numerous indirect impacts that stem from the experience of racism and discrimination, including engagement in unhealthy activities such as smoking, alcohol and drug use, and disengagement from healthy activities including sleep, exercise, and taking medications.

Discrimination also contributes to reduced access to societal resources and services such as education, employment, housing and medical care which impact on health and wellbeing. The 2012-13 Australian ATSI Health Survey revealed that 35% of those who reported that they had been treated badly said they usually responded to discrimination by avoiding the person or situation (ABS 2013). Institutionalised forms of discrimination can manifest when those charged with delivering services, or developing policies and

procedures lack awareness of Aboriginal culture, or carry inaccurate assumptions and prejudices about Aboriginal people.

This has obvious implications for Aboriginal people in the NT who are likely to be reluctant to seek much-needed health, housing, welfare or other services from providers they perceive to be unwelcoming or who they feel may hold negative stereotypes about them. In this way, racism also has flow on effects for individuals' social cohesion and for workforce participation, productivity and educational achievement.

### Recommendation 2:

That indirect impacts of discrimination, including access to societal resources, be properly considered and measures adopted in order to challenge institutional and systematic forms of discrimination.

### Law and justice

The impact of discrimination in reducing access to legal services should be of particular concern to this consultation. A strong view that emerged from the *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations* research project was that the criminal justice system itself is deeply racist, unfairly punitive and does nothing to address underlying causes of offending (Habibis et al. 2016). This must be an essential consideration of this consultation process, as the potential positive impacts of modernising the Anti-Discrimination Act through this process will be severely limited if the very people who it is designed to protect feel unable or unwilling to access legal assistance.

The Indigenous Needs Legal Project, which conducted fieldwork with eight communities in the NT in 2011, found that 80% of people interviewed who identified themselves as victims of discrimination did *not* seek legal assistance in response to it. It also suggested that many participants in this survey viewed discrimination as not an actionable legal event, but rather as an intolerable but entrenched and expected part of life (Allison et al. 2012).

This reflects the need for both system-level change within legal institutions, as well as adequate resourcing of community legal education and access to quality, culturally responsive legal services. It is important that work is done to improve awareness among the community of their legal rights in relation to the reforms sought after through this process.

Moreover, it is important to remember that a reluctance to seek out legal recourse in response to an incident of discrimination may be as much due to a situation of poverty or disadvantage as it is to a lack of understanding about legal systems or rights. That is to say that experiencing discrimination may be considered a lesser priority to other, more urgent, problems such as housing eviction, removal of children or potential incarceration.

In this way, we can see how some of the most vulnerable members of our communities may become stuck in a damaging feedback loop where disadvantage leads to failure to access assistance, which in turn leads to further disadvantage. Evidence would suggest that without having effective avenues to challenge



discrimination through law, victims of discrimination are left vulnerable to responding in ways that leave them in danger of contact with the criminal justice system (Schwartz and Cunneen 2009). For example, if a victim of discrimination feels their only grounds for recourse is to respond with physical violence.

Through this process of reform, we recommend that additional funding be provided to Aboriginal legal services as well as the Anti-Discrimination Commission itself. Aboriginal legal services in particular provide direct legal assistance and representative support to vulnerable members of our community, in addition to providing community legal education, support for law and justice groups and initiatives that aim to work between mainstream and Aboriginal law.

### **Recommendation 3:**

That improved access to effective legal assistance be facilitated through adequate resourcing of Aboriginal Legal Services, and the Anti-Discrimination Commission itself.

## **The role of Community Control and Empowerment**

Control of life circumstances and empowerment are critical determinants of health and wellbeing, underpinning the ability of individuals to participate and engage productively in the community and for communities to prosper. Conversely, lack of control over life circumstances causes stress and anxiety, increased feelings of frustration and is a strong predictor of morbidity and mortality (Daniel et al. 2006) and associated incidence of chronic illness (Lubkin and Larson 2013).

A review of international research indicates the effectiveness of empowerment strategies to improve health and reduce health disparities, with outcomes at psychological, organisational, community and population levels, and in relation to socially excluded populations (Wallerstein 2006). It is not surprising therefore that one of the solutions to improving race relations as identified by respondents in the *Telling It Like It Is* research project, was that there should be more Aboriginal control and involvement in decisions about the city of Darwin (Habibis et al. 2016).

Both the Aboriginal community-controlled health sector (ACCHS), and Aboriginal Torres Strait Islander Legal Services (ATSILS) embody the principle of community control, and have demonstrated their success through improved, culturally safe service delivery and health and wellbeing outcomes for Aboriginal communities (Rowley et al. 2008).

The importance of culturally safe service delivery is increasingly recognised by both Government and non-Government service providers and it has been a positive development to see increasing adoption of frameworks and more recently Reconciliation Action Plans (RAP) across different organisations and institutions. However, there needs to be increased accountability in relation to these processes. As such, we support the recommendation of NAAJA to nominate an Aboriginal-identifying co-commissioner whose role would be to focus on the institutionalised and systematic discrimination suffered by Aboriginal people and communities. This could include the auditing of organisations on their cultural frameworks, for example.

#### Recommendation 4:

That an Aboriginal-identified co-commissioner be established with the aim of identifying and transforming institutionalised and systematic discrimination suffered by Aboriginal people and communities.

## Response to Discussion Paper Questions

### 4. Should vilification provisions be included in the Act?

AMSANT agrees with the inclusion of vilification provisions in the Act and recommends that all protected attributes which are identified within the Act should be covered by this provision.

The introduction of racial vilification provisions into the Commonwealth's Racial Discrimination Act in 1995 occurred partly in response to the findings of the Royal Commission into Aboriginal Deaths in Custody Report of 1991, which found that victims of race based violence and harassment had little recourse to civil remedies through law. Recommendation 213 of that Report called for governments to "legislate to proscribe racial vilification and to provide conciliation mechanism for dealing with complaints of racial vilification..." Nearly three decades after this report was handed down, the introduction of these provisions into NT legislation is clearly overdue.

It is important to note – particularly in consideration of discussions in the community and media which took place at the time of the Inquiry into the Operation of the Commonwealth Racial Discrimination Act in late 2016 – that Article 19 (3) of the ICCPR recognises the right to freedom of speech is not absolute and may be subject to certain restrictions, including where necessary to respect the rights and reputations of others.

AMSANT believes that properly considered and worded anti-vilification provisions will not unduly impede freedom of speech in the NT, and refers to Part 6 of the ACT Discrimination Act 1991 to provide a model for these provisions.

#### Recommendation 5:

That vilification provisions be included in the Act, and that Part 6 of the ACT Discrimination Act 1991 be used as a model for this legislation. All protected attributes identified within the Act should be protected under the vilification provisions.

### 5. Should the Act create rights for people experiencing domestic violence in relation to public areas of life such as employment, education and accommodation?

AMSANT supports the addition of domestic violence as a protected attribute under the Act, however, we recommend using the term 'family violence'.

It is AMSANT's position that the term 'family violence' better captures the ways that violence reverberates through the community. It is imperative that legal and social service systems recognise that family violence may occur within an extended family and through kinship systems, and can include non-physical types of abuse, including emotional abuse. Use of the term 'family violence' indicates a preference for holistic, community based solutions, not just those directed simply at intimate domestic violence between domestic partners.

The situation of family violence in the NT is dire. The Northern Territory Emergency Response: Evaluation Report 2011 reported that of Indigenous people aged 15 years and above living in remote and very remote parts of the NT, 34 per cent reported family violence as being a concern in their community. This is in comparison to 25 per cent of non-Indigenous people (Department of Families, Housing, Community Services and Indigenous Affairs 2011). Other research has suggested that Aboriginal women and girls are 35 times more likely to be hospitalised due to domestic and family violence related assaults than other Australian women and girls (Department of Social Services 2013).

Introducing the protections as proposed in the discussion paper would ensure flexibility in the workplace or education regarding leave, flexible time arrangements and the capacity to attend appointments as required relating to the impact of the violence. It would also place more emphasis on accommodating the particular needs of individuals affected by family or domestic violence in employment and educational settings, security of employment and access to education as well as access to accommodation.

In keeping with the principle of community control and two-way solutions, we would also like to refer to a recent proposal from the community of Galiwin'ku to establish a Yolngu community authority to prevent family violence which proposes the sharing of authority and decision-making power, with the aim of establishing respect for and recognition of each other's law in order to work together (Suttle and Dhurrkay 2016). AMSANT would suggest that this is an example of the kind of community development work that must be engaged with to bolster and give meaning to the intentions of the proposed reforms to the Anti-Discrimination Act.

#### **Recommendation 6:**

That 'family violence' be included as a protected attribute under the Act, rather than domestic violence.

### **6. Should the Act protect people against discrimination on the basis of their accommodation status?**

AMSANT supports the introduction of accommodation status as a protected attribute under the Act.

Adequate housing has long been recognised as a basic human right and as one of a number of interrelated factors which impacts on the health, development and wellbeing of individuals and communities (Vicki-Ann Ware 2013). Access to stable and adequate housing 'enables adults and children to engage in the



wider community – socially, recreationally and economically, and can influence both their physical and mental health' (AIHW 2012).

The Northern Territory has by far the highest rates of homelessness and overcrowding in Australia – 731 people per 10,000 people in the 2011 Census compared to a national average of 49 per 10,000 (ABS 2012). The definition of homelessness captured by these statistics includes those living in an inadequate dwelling and those living in severely crowded. According to 2011 Census data, 85% of homeless people in the Northern Territory were in severely crowded dwellings, 91% of those dwellings were in very remote locations and 98% of those living in severely overcrowded houses were Indigenous (Ibid.).

A study examining the views and experiences of Aboriginal people living in the 'Long Grass'<sup>1</sup> in Darwin found a significant lack of empathy for the life circumstances of the people studied. Aboriginal people in public places were usually regarded with suspicion by mainstream society and perceived to be: irresponsible, choosing a morally corrupt lifestyle, a source of contagion, neglectful of their children, and engaging in unhealthy social behaviours including alcohol abuse (Holmes and McRae-Williams 2008). As already outlined in this submission, the impacts of this kind of discrimination can be understood to exacerbate existing mental and physical health issues as well as severely limit the ability of this group of people to access services.

AMSANT would again emphasise that while we support the introduction of legislation that would provide protections for people who are homeless or living temporary or overcrowded accommodation, it is important that the context and broader systematic issues that lead to homelessness are properly considered and addressed to provide practical effect to the outcomes this legislative amendments seeks to achieve.

The fabric of Aboriginal traditional land tenure has been altered and substantially replaced with a western model of private property. This model has been imposed on a group which traditionally have a much more communal understanding of space and place (Baillie and Wayte 2006). The complexities of these value systems must not be underestimated however, particularly within communities and urban centres where the intermingling of different kinship and language groups alters traditional dynamics. This is equally true of the overcrowding issue, which is primarily driven by a historical shortage of housing in the Northern Territory, however strong kinship obligations also contribute (NAAJA 2016). That is, overcrowded Aboriginal households often take in homeless family members, and in doing so, perform a broader public service. This can blur the lines between overcrowding and homelessness and distort understandings of those experiencing homelessness.

It is important that this consultation process recognises that within the mainstream policy and service delivery paradigm the social and cultural context of Aboriginal communities is frequently seen as a barrier or problem to be overcome or circumvented. This means that rather than working with Aboriginal

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<sup>1</sup> 'Staying in the Long Grass' is a locally specific terminology used by Holmes and McRae-Williams 2008 in their study to describe people living rough in Darwin. We recognise that this term is considered offensive to some members of the community and use it only in reference to this particular study.

communities in a way that respects cultural values and draws strength from Aboriginal knowledge systems and practices, current systems commonly and primarily perceive culture in terms of deficit. Challenging this paradigm must be a central feature of any attempts to reduce discrimination for Aboriginal people in the NT

### Recommendation 7:

That 'accommodation status' be included as a protected attribute under the Act.

## 8. Should "socioeconomic status" be included as a protected attribute?

AMSANT supports the inclusion of 'socioeconomic status' as a protected attribute in the Act.

While most Aboriginal people in the NT experience positive wellbeing and engagement with their families, communities and culture, it is also the case that many people's lives are marked by profound disadvantage, including experience of intergenerational poverty and trauma, overcrowded housing, poor educational attainment and unemployment.

The contribution of the social and cultural determinants to the health gap between Indigenous and non-Indigenous Australians is significant, with Australian research suggesting that socio-economic factors accounted for between one-third and one-half of the gap in health status between Indigenous and non-Indigenous Australians (Booth and Carroll 2005).

In the Northern Territory, the Aboriginal community experiences social determinants standards which are generally below those of Indigenous people in other jurisdictions:

- There remain very high rates of overcrowding (55% across the NT rising to 62% in remote areas in 2012) which are much higher than national Indigenous rates (23%) and remote rates outside the NT (45%).
- The proportion of houses classified as being of an acceptable standard dropped from 72% to 64% from 2004 to 2012.
- NAPLAN scores remain very poor for Aboriginal children and school attendance actually fell in 2013 in higher grades. Year 12 graduation rates were still much lower although improving.
- ABS data suggests that in 2011 Aboriginal and Torres Strait Islander people aged 15-64 were more than three times as likely as non-Indigenous people in the same age group to be unemployed (ABS 2011).
- Poverty levels remain very high with high rates of food insecurity (34%), and lower rates of Aboriginal labour participation than in other jurisdictions (AIHW 2015).

Given that this unacceptably high levels of disadvantage exists alongside an overwhelming burden of discrimination within Aboriginal communities in the NT, the addition of this attribute within the Act could provide protection for some of the most vulnerable members of our community.

We would again emphasise, however, that without effective action on the social and cultural determinants the protection that this attribute could provide will remain limited.

**Recommendation 8:**

That 'socioeconomic status' be included as a protected attribute under the Act.

**10. Should a representative complaint model process be introduced into the Act?**

AMSANT supports the introduction of a representative complaints model process into the Act.

As already indicated, the evidence would suggest that there is a high prevalence of discrimination experienced in organisational and community settings, and the impacts of this kind of systematic discrimination are likely to be much broader and entrenched than might be captured through the investigation of individual incidents of prejudice. The introduction of this model would provide the potential to address some of the examples of systemic and institutionalised discrimination that have been identified in this submission.

As previously mentioned, we understand that the Commission currently had the legal capacity to bring forward own motion complaints, but that this does not occur due to a lack of resourcing. We recommend that proper resourcing be provided to enable the Anti-Discrimination Commissioner to exercise this power and conduct investigations into incidences that may have been brought forward informally.

However, we are somewhat concerned that the discussion paper does not suggest that wherever possible consent should be obtained from the people on behalf of whom the complaint is made. It is essential that there are proper mechanisms in place to ensure the protection of information and suitable governance structures to ensure information is used appropriately. It is essential that adequate protections and provisions are in place to ensure that this model is able to operate in the best interests of the people who have experienced discrimination.

**Recommendation 9:**

That a representative complaints model process be introduced into the Act, with appropriate considerations to ensure consent is obtained wherever possible and that the privacy and information of the people on behalf of whom the complaint is made are protected.

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