



# Northern Territory Legal Aid Commission

## NORTHERN TERRITORY LEGAL AID COMMISSION SUBMISSION TO THE DEPARTMENT OF ATTORNEY-GENERAL AND JUSTICE ON THE MODERNISATION OF THE *ANTI-DISCRIMINATION ACT*

### Contents

INTRODUCTION AND SUMMARY OF RECOMMENDATIONS ..... 1

AMENDING TERMS IN THE ACT ..... 3

AMENDING AND INSERTING ADDITIONAL PROTECTED ATTRIBUTES ..... 4

EXCEPTIONS ..... 10

EXEMPTIONS FOR RELIGIOUS ORGANISATIONS ..... 10

NEW REFORMS – REPRESENTATIVE COMPLAINT MODEL ..... 11

NEW REFORMS – VILIFICATION ..... 12

NEW REFORMS – SEXUAL HARRASSMENT, “SERVICES” AND “WORK” ..... 12

SUBMISSIONS BEYOND THE SCOPE OF THE DISCUSSION PAPER..... 13

### Introduction and summary of recommendations

The Northern Territory Legal Aid Commission (NT Legal Aid) is an independent statutory body established under the *Legal Aid Act 1990* (NT) and is governed by a board of commissioners appointed by the Northern Territory Attorney-General. NT Legal Aid provides information, community legal education, legal advice, representation and assistance to people in a range of matters, including:

- civil law
- domestic violence, via the Domestic Violence Legal Service (DVLS)
- family law, including family dispute resolution
- child protection matters
- criminal law.

NT Legal Aid aims to ensure that the protection or assertion of the legal rights and interests of people in the Northern Territory (NT) are not prejudiced by reason of their inability to:

- obtain access to independent legal advice

- 1172
- afford the financial cost of appropriate legal representation
  - obtain access to the federal and territory legal systems
  - obtain adequate information about access to the law and legal system.

NT Legal Aid provides early intervention and prevention services pursuant to the *National Partnership Agreement on Legal Assistance Services* (the NPA) between the Australian and NT Governments. These services include legal information, education, referral, advice, advocacy and minor assistance.

NT Legal Aid also provides non-legal support services under the NPA, including social and clinical support services to:

- victims of domestic and family violence in the DVLS
- vulnerable clients in the Darwin family law practice
- youth clients in the Darwin criminal law practice
- respondents to domestic violence proceedings
- vulnerable clients in Alice Springs.

In addition, we have a community legal education and outreach function, which includes the development and delivery of information, resources and projects. We have offices in Darwin, Palmerston, Katherine, Tennant Creek and Alice Springs.

Unfortunately, NT Legal Aid is not funded to have a dedicated policy officer, and draws contributions for submissions from different sections and regional offices of NT Legal Aid, rather than developing comprehensive submissions. We thank the Department of Attorney-General and Justice for the opportunity to comment on potential future amendments to the *Anti-Discrimination Act* (the Act). While we offer the following comments in relation to the *Discussion Paper: Modernisation of the Anti-Discrimination Act* (the Discussion Paper), we strongly recommend that further opportunity for comment be provided on draft legislation.

For NT Legal Aid clients, discrimination can have a multitude of deleterious effects, including:

- impeding access to accommodation, employment, goods and services
- compounding social exclusion and stigmatisation
- mental and psychological effects.

NT Legal Aid's information, education, advice, case work and advocacy work involves regular interaction with the Act, which makes NT Legal Aid well placed to contribute insights into the proposed reforms. This submission makes recommendations for reform based on our work with clients, and focuses on providing examples and case studies arising from our work. We seek to give a voice to our clients who have experienced discrimination, including those who have and have not engaged with the ADC complaints process. Our submission responds only to matters raised in the Discussion Paper in which we have experience. In addition, we have commented on issues not raised in the Discussion Paper, but which we consider important areas in need of reform.

For clarity, NT Legal Aid does not follow the structure of the Discussion Paper. Instead, we begin with amending language, then move to substantive proposals including amendments to protected

attributes, exceptions and the removal of religious exemptions. Finally, we make submissions on a number of reforms not raised in the Discussion Paper.

NT Legal Aid makes the following recommendations for amendment to the Act, as discussed in more detail throughout the submission.

**Recommendation 1:** That protections relating to sexuality are modernised in line with the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) and that language is updated to reflect contemporary standards and international human rights obligations.

**Recommendation 2:** That the Act includes prohibitions on vilification to protect marginalised and vulnerable members of the Northern Territory community.

**Recommendation 3:** That the Act includes protections for victims of family and domestic violence.

**Recommendation 4:** That protected attributes are broadened to include accommodation status, socio-economic status, sex work (or occupation, trade or calling), immigration status, physical features and the use of trained assistance animals for mental health and other conditions.

**Recommendation 5:** To capture intersectional discrimination, a provision should be inserted into the Act which clarifies that any discriminatory conduct under the Act includes discrimination on the basis of one or a combination of protected attributes.

**Recommendation 6:** That the Act is amended to include a new representative complaints model to ensure greater access to justice, and more effectively respond to systemic discrimination.

**Recommendation 7:** That restrictions on sexual harassment are removed and that the definition of service is extended to cover workers. The requirement for clubs to hold a liquor licence should also be removed.

**Recommendation 8:** That exemptions applying to religious organisations are removed to ensure the health, welfare and safety of the most vulnerable people in the community.

**Recommendation 9:** That exclusions relating to assisted reproductive technology are removed.

**Recommendation 10:** That the definitions of “work”, “parenthood” and “marital status” are broadened and modernised.

## AMENDING TERMS IN THE ACT

Clearer, simpler and more consistent language in the Act will make it easier for individuals, organisations and businesses to understand their rights and obligations. Through increased understanding, those with obligations would be more able to implement systems to prevent discrimination, while those affected by discrimination will be more cognisant of their rights.

Modernising the language throughout the Act will also ensure that the Act is inclusive and aligns with contemporary values.

In the following section, we make particular recommendations about language in the Act. We also note, more generally, the gendered language used throughout the Act. We recommend that the amending Act remove gendered language to the greatest extent possible.

***Carer responsibilities***

The term “parenthood” should be replaced with “family, kinship or carer responsibilities”.

***Clubs***

The definition of “clubs” should be amended to remove the requirement for clubs to hold a liquor license.

***Gender identity***

The term “sex” should be removed from the Act and replaced with a broad and conceptual definition of “gender identity”. On this, we support the submission of Rainbow Territory.

***Man and woman***

The defined terms “man” and “woman” should be repealed.

***Relationship status***

The term “marital status” should be replaced with “relationship status”.

***Service***

The definition of service should be extended to include employees of service providers.

***Sexual orientation***

The term “sexuality” should be removed from the Act, and replaced with “sexual orientation”. By providing a conceptual definition, the current binaries and labels such as “homosexuality” and “lesbian” can be removed.

The term “transsexuality” should also be removed from the Act.

***Work***

The definition of “work” should be expanded to include volunteer work and informal work, such as domestic duties.

**Amending and inserting additional protected attributes**

A clear list of protected attributes is necessary to demarcate merely unfair treatment from that which constitutes unlawful discrimination. Unfortunately, the attributes protected by the current Act, and those included in the Discussion Paper, do not reflect the breadth of discrimination that occurs in the Northern Territory today. The attributes protected under the Act should be expanded and included in a non-exhaustive list. NT Legal Aid suggests the following amendments and additions.

### *Sex characteristics*

The Act should be amended to include “sex characteristics” as a protected attribute. This would bring anti-discrimination protections in line with the Yogyakarta Principles, which provide for recognition of diverse experiences of intersex status. Accordingly, “sex characteristics” should be defined as “each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.”

NT Legal Aid supports the use of inclusive language, and a shift away from traditional or medical definitions of intersex status which focus on deficits or, in the words of Organisation Intersex International Australia Limited, “what we don’t have or what we lack”.<sup>1</sup> NT Legal Aid believes that an expansive definition is required to protect intersex persons who do not necessarily identify as “intersex” but nevertheless experience discrimination due to the existence of sex characteristics that are neither completely male nor female.

We refer to and support the submission of Rainbow Territory in respect of this attribute.

### *Domestic Violence*

The Act should be amended to include status as a victim of domestic or family violence as a protected attribute. Those experiencing domestic or family violence should have protected rights in relation to public areas of life such as employment, education and accommodation.

NT Legal Aid notes that in the Northern Territory, the rate of hospitalisation for domestic and family violence is up to 86 times higher for Aboriginal women.<sup>2</sup> In central Australia, this figure is 95 times more likely for Aboriginal women. The National Plan to Reduce Violence against Women and their Children 2010-2022 cites a 2009 National Aboriginal and Torres Strait Island Social Survey as finding that around a quarter of all Aboriginal women have experienced physical violence in the last 12 months and that nearly all of them knew their perpetrator.<sup>3</sup>

In our experience, Aboriginal clients experiencing domestic and family violence face additional barriers to accessing justice, stemming from social disadvantage (in housing, employment, income and health), cross-cultural issues, remoteness and language issues. NT Legal Aid believes that anti-discrimination protections may go some way to addressing this disadvantage.

NT Legal Aid supports a definition of domestic violence based on the *Domestic and Family Violence Act 2007* (NT) and the *Family Law Act 1975* (Cth). Crucially, this definition should be non-exhaustive and include a range of family and living arrangements.

Any definition should also encompass the non-consensual distribution of intimate images, or threats to distribute images of this nature. The distribution of these images (or threats to do so) can be used to coerce, control, abuse, blackmail, or intimidate another person, particularly in the context of domestic

---

<sup>1</sup> Organisation Intersex International Australia Limited, *What is intersex?* (2 August 2013) Organisation Intersex International <<https://oii.org.au/18106/what-is-intersex>>

<sup>2</sup> Hannah McGlade, *Indigenous women subject to horrifying levels of violence* (20 June 2016) The Australian <<https://www.theaustralian.com.au/opinion/indigenous-women-subject-to-horrifying-levels-of-violence/news-story/f0fa9afc26a618bc4bc9d6a7d6e5adc2>>

<sup>3</sup> Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children (2010-2022)* <[https://www.dss.gov.au/sites/default/files/documents/08\\_2014/national\\_plan\\_accessible.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan_accessible.pdf)>

and family violence. The distribution of such images has the potential to impact a victim's employment, and should therefore be covered by protections against discrimination.

We note and support the submission of NT Shelter in relation to this attribute.

### ***Disability***

The protected attribute of "impairment" should be amended and replaced with disability to better reflect contemporary standards.

Disability should be defined broadly in line with the *Discrimination Act 1991* (ACT)<sup>4</sup> to encompass:

- behaviour that is a symptom or manifestation of a disability
- a disability that a person may have in the future
- a physical, sensory, learning and intellectual disability
- mental illness, mental conditions, disease, illness or disorder
- work related injury
- temporary or permanent disability
- past disability.

To the extent possible, references to disability should use inclusive, person-centred language, reflecting a social model of disability rather than traditional medical models.<sup>5</sup>

### ***Gender Identity***

The protected attribute of sex should be removed and replaced with gender identity.

NT Legal Aid strongly supports the submission of Rainbow Territory, which advocates for the adoption of the definition provided in the *Discrimination Act 1991* (ACT), including the accompanying note.<sup>6</sup> This approach recognises that discrimination can occur if a person is subjected to unfavourable treatment on the basis that they used to be a person of the opposite gender identity.

NT Legal Aid supports the omission of any reference to surgical intervention and notes that definitions should encompass expressions of gender including dress, speech or mannerisms. As Rainbow Territory correctly points out, transgender people experience extremely high levels of discrimination and marginalisation and it is critical to provide permanent protections in this area.

### ***Accommodation Status***

The Act should be amended to include accommodation status as a protected attribute.

Accommodation status could include being a tenant, an occupant (within the meaning of NT tenancy legislation), being in receipt of or waiting to receive public housing, or being homeless. Homelessness should be defined in accordance with the wide statistical definition of homelessness provided by the Australian Bureau of Statistics definition. This includes living arrangements in a dwelling that is

<sup>4</sup> *Discrimination Act 1991* (Act), s 2, 7(a).

<sup>5</sup> See for example, Australian Network on Disability, 'Inclusive Language: Understanding Disability' <<http://www.and.org.au/pages/inclusive-language.html>>

<sup>6</sup> *Discrimination Act 1991* (Act), s 2, 7(a).

1183

inadequate, has no or insufficient tenure, or does not allow a person to have control of or access to space for social relations.<sup>7</sup>

The UN Special Rapporteur on Adequate Housing has said, “homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status.”<sup>8</sup> This highlights the need for protections encompassing intersectional discrimination, as discussed below.

NT Legal Aid supports the submission of NT Shelter in respect of this attribute.

### ***Sex work***

The Discussion Paper queries whether “lawful sex work” should be included as an attribute under the Act. In the Northern Territory, only a small percentage of sex workers register with police under a registered escort agency, thereby rendering the majority of sex work unlawful. Sex workers should be protected from discrimination in public areas of life, irrespective of the lawfulness of their work.

Accordingly, NT Legal Aid strongly supports the submission of the Sex Worker Outreach Program (SWOP NT) in relation to the inclusion of “sex work” and “sex worker” as a protected attribute in the Act. NT Legal Aid also supports clarification of terms used to ensure that the protection extends to past and current sex workers and their families.

### ***Case study***

*Judy lived in a caravan park in Darwin. Judy’s neighbor informed the owner of the park that Judy was a sex worker. Two weeks later, Judy received a notice to vacate the premises. When she confronted the park owner, he said that he does not want people with “undesirable lifestyles” residing in the park. Judy approached NT Legal Aid for advice, worrying that she didn’t have anywhere else to live.*

### ***Sexual orientation***

The protected attribute of sexuality should be removed from the Act, and replaced with sexual orientation.

NT Legal Aid supports adoption of the definition of “sexual orientation” provided in the Yogyakarta Principles, which is taken to mean “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” This adequately covers sexual minorities and reflects a shift away from potentially offensive or inaccurate labels.

NT Legal Aid refers to and supports the submission of Rainbow Territory.

---

<sup>7</sup> Australian Bureau of Statistics, Information Paper: Statistical Definition of Homelessness <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4922.0Main%20Features22012>>

<sup>8</sup> M Kothari, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (E/CN.4/2005/48), [3].

1184

### ***Socioeconomic status***

The Act should be amended to include the protected attribute of socioeconomic status, which could be defined to include a person's status as unemployed, in receipt of social security allowances or pensions, being employed part-time temporarily or on a casual basis, receiving compensation or performing contract work.

NT Legal Aid notes that in 2014-15, approximately 36 per cent of Aboriginal people aged 15 and over had incomes in the bottom 20 per cent of equivalised gross weekly household incomes, compared with 16% of non-Aboriginal people in the same age bracket. Gross weekly incomes for Aboriginal people in remote areas is significantly lower than those in major cities (\$400 per week compared to \$671 per week), and Aboriginal people suffer grossly disproportionate rates of disadvantage against all measures of socio-economic status.<sup>9</sup>

NT Legal Aid believes that protections relating to socio-economic status could go some way to addressing the systemic disadvantage and discrimination faced by the majority of our Aboriginal clients. More broadly, this avenue of redress may assist in reducing the burden of entrenched inequality that is carried by many low income earners and Centrelink recipients.

### ***Immigration status***

The Act should be amended to include immigration status as a protected attribute.

The need for greater protections for migrants was highlighted by the UN Committee on Economic, Social and Cultural Rights, in its 5<sup>th</sup> Periodic Report on Australia. It stated, "The Committee is concerned about the working conditions of migrant workers, particularly those on temporary visas (approximately 1.8 million workers on temporary visas), who receive lower wages and work for longer hours, especially in the construction, agricultural and hospitality industries. The Committee is also concerned that due to fear of dismissal, detention or deportation, many of those workers refrain from seeking redress, which contributes to increased exploitation by employers (art. 7)."<sup>10</sup>

If a general exception clause is inserted into the Act [see below at page 9], a person's visa status may be taken into consideration if it is reasonable in the circumstances, having regard to any relevant factors. We also note that where a visa condition or Commonwealth restriction places conditions prohibiting the holder of a visa from working, it is not lawful to employ them and so would not be unlawful discrimination.

#### *Case studies*

*A real estate agent refused to lease properties to any person present in Australia on a visa.*

<sup>9</sup> See, for e.g, Australian Institute of Health and Welfare, Australia's welfare 2017, accessed online at <https://www.aihw.gov.au/reports/australias-welfare/australias-welfare-2017/contents/table-of-contents>, 20 January 2018.

<sup>10</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, 11 July 2017, E/C.12/AUS/CO/5, p 5.



### ***Physical features***

The Act should be amended to include physical features as a protected attribute. Physical features include height, weight, size, shape or other bodily characteristics. This would place the new Act in line with the *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic).

### ***Assistance animals***

The Act only provides protection to those requiring aid of assistance animals under the “impairment” attribute.<sup>11</sup> The protection is narrowly applied to those with visual, hearing or mobility impairments, and who use a guide dog.

The Act should be amended by inserting a stand alone of requiring “the aid of an assistance animal.” This attribute captures the broad range of people who have various disabilities, including mental health related illnesses. “Assistance animal” could be defined as certified or specifically trained animals, including those certified under the law of another state or territory.

It is important that the definition of “assistance animal” is broad, so as to include animals who have undergone or are undergoing training, but are not certified or accredited.

#### ***Case study***

*Jayden uses an assistance dog to help manage his severe anxiety. The dog is undergoing training whilst in Jayden’s care, so it can respond to his particular symptoms and mannerisms. While the dog is being trained by an accredited trainer, it is not yet certified. When Jayden attended his local café with the assistance dog, he was asked to leave. The staff member told Jayden that only certified guide dogs were permitted inside the café.*

### **Intersectional discrimination**

To capture intersectional discrimination, a provision should be inserted into the Act which clarifies that any discriminatory conduct under the Act includes discrimination on the basis of one or a combination of protected attributes.<sup>12</sup>

Intersectional discrimination occurs on the basis of a combination of protected attributes. Intersectional discrimination should be addressed in the Act to provide greater protection against discrimination on multiple grounds. Access to justice may be impeded for victims of intersectional discrimination, who under the current Act are required to particularise the discrimination on the basis of one, rather than a combination of protected attributes. NT Legal Aid clients have been treated unfavourably on the basis of a number of attributes, which cannot be clearly separated from one another.

#### ***Case study***

*John was recently released from Darwin Correctional Centre. He is on the waiting list for Public housing, but approached NT Legal Aid for assistance to find private rental accommodation. John is an Aboriginal man with acquired brain injury. He believes that his rental applications are being rejected because of a combination of race, disability and accommodation factors.*

<sup>11</sup> See *Anti-Discrimination Act* s 21(1).

<sup>12</sup> See, for example, *Human Rights Act 1985*(Can) s 3.1.

## EXCEPTIONS

Exceptions are 'defences' to complaints of discrimination. Currently there are a range of different exceptions applying to different areas of public life and attributes. The myriad exceptions create inconsistency, complexity and an unnecessary hierarchy of protected attributes. Accordingly, the various exceptions should be replaced with a general exceptions clause which enables competing rights to be balanced in a nuanced and proportionate way. The effect of the clause would be to make discrimination not unlawful where the respondent can establish that the conduct was a necessary and proportionate means of achieving a legitimate end or purpose.

## EXEMPTIONS FOR RELIGIOUS ORGANISATIONS

NT Legal Aid supports the removal of exemptions that allow religious organisations to engage in discriminatory conduct in education, employment and service delivery. Broad religious exemptions operate contrary to the fundamental right to freedom from discrimination,<sup>13</sup> and have the potential to undermine the effectiveness of anti-discrimination legislation.

It is important to recognise that legislation has a legitimating as well as regulatory function. Anti-discrimination exemptions can serve to entrench negative behaviours and attitudes towards vulnerable individuals and perpetuate disadvantage. While NT Legal Aid supports the need to protect freedom of religion, this freedom is not absolute and must be balanced against other rights and freedoms, particularly the right to equality, freedom of participation in public life and full protection of the law. In this balancing exercise, ensuring the health, welfare and safety of vulnerable people is paramount.

NT Legal Aid believes in particular that the removal of s 37A would be an important step towards protecting LGBTI individuals working in educational institutions in the Northern Territory, and notes with particular concern the case studies collected by Rainbow Territory. NT Legal Aid believes that people have the right to employment that is free from discrimination. We note that such protections are important in areas where there is limited choice of employment available to those workers.<sup>14</sup>

In line with the approach in the discussion paper, NT Legal Aid supports the repeal of s 40(2A). This provision has the potential to restrict access to education for students who are not of a prescribed religious doctrine, which may disproportionately children in remote areas of the Northern Territory.

NT Legal Aid also supports repeal of s 40(3), which allows religious-based accommodation providers to discriminate against people if this is in accordance with the particular religious doctrine and necessary to avoid offending religious sensitivities. While NT Legal Aid believes that accommodation providers should be supported in their operations, this provision can operate to exclude vulnerable individuals in need of assistance.

---

<sup>13</sup> International Covenant on Civil and Political Rights, Art 2,3,24,25,26.

<sup>14</sup> See submission of Rainbow Territory, which cites approximately 1500 roles in the NT where the s37A exemption applies.

*Case study*

*Trisha is a transgendered woman who has experienced domestic violence. She is on the waiting list for public housing, and cannot find emergency accommodation. Trisha's support worker finds her accommodation at a religious-based service provider, but when she attends the facility, she is told that there are no places available. Trisha believes that she was refused accommodation because she is transgender.*

NT Legal Aid supports the submission of Rainbow Territory in relation to the clarification of s 51(d) to ensure that this exemption does not operate to exclude students from educational institutions on the basis of sexual orientation, gender identity or sex characteristics.

NT Legal Aid acknowledges that many religious providers in the Northern Territory play a crucial role in offering services and assistance to our clients. While we accept that discrimination by these bodies is not widespread, we support the removal of exemptions on the basis that they are incongruous to the objects of anti-discrimination law, and inconsistent with many of our international human rights obligations.

## NEW REFORMS - REPRESENTATIVE COMPLAINT MODEL

A representative complaint model should be introduced into the Act, enabling organisations with a public interest in a particular matter to commence and pursue discrimination on behalf of aggrieved persons.

The following have been stated concerns in relation to discrimination law and practise in Australia:<sup>15</sup>

- power dynamics between complainants and respondents and their impact on outcomes of conciliation;
- the individualised focus and reactive (rather than proactive) model of dispute resolution;
- increasing formalism in conciliation conferences and the role of lawyers in this;
- the nature of a confidential process in privatising conflict and behaviour from public scrutiny.

A representative complaint model could minimise a number of these concerns. The NT's Anti-Discrimination regime currently burdens individual complainants with the task of enforcing rights through individual complaints. Those individuals often grapple with a power asymmetry which renders the process intimidating and may create perceptions of unfairness.

NT Legal Aid has observed that clients regularly present with discrimination complaints regarding a recurring issue of systemic discrimination affecting a large group of people. A representative complaint model would be particularly beneficial in this context. The model would benefit community legal centres, the ADC, and some respondents from a resourcing perspective, by enabling a larger number of similar complaints to be conciliated at once.

The AHRC Act currently allows complaints to be lodged with the Commission by representative bodies on behalf of one or more persons aggrieved by an alleged act of unlawful discrimination. This

---

<sup>15</sup> Anna Chapman, "Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution" 2000(22) Sydney Law Review 321, 322.

may be a useful example to consider. However, we note there are barriers for representative bodies where the complaint is not resolved at the Commission stage, as representatives may not be considered 'affected persons' aggrieved by the discrimination, and therefore do not have legal standing in court.

### **OWN MOTION PROCEEDINGS**

We also recommend that a provision be inserted to enable the ADC to initiate own motion proceedings against anyone who has been the subject of multiple discrimination complaints, or is suspected of engaging in systemic discrimination. This would reduce the burden on individuals and representative complainants to combat systemic discrimination, which is made particularly difficult by the under-resourcing of legal services and the risks of adverse costs orders. The Commission's investigative powers would require appropriate enforcement powers.

### **NEW REFORMS - VILIFICATION**

The Act should be amended to include vilification provisions. However prohibitions on vilification should be extended to cover all protected attributes, including the additional attributes proposed in this submission. It is insufficient for vilification protections to apply to some attributes and not others, and such an approach is incongruent with the objects and purpose of the Act. The rationale that underpins vilification protections for attributes such as race is equally important for all attributes. Failing to extend vilification protections to all attributes in the Act would unnecessarily and unfairly create a hierarchy of attributes.

NT Legal Aid supports the submission of Rainbow Territory and notes, with regret, the lack of redress available to members of the LGBTI community in response to offensive and vilifying commentary during the same sex marriage debate.

NT Legal Aid supports the adoption of a stand-alone provision in the form proposed by the discussion paper, with the inclusion of a prohibition against inciting hatred, in line with the Tasmanian anti-discrimination model.<sup>16</sup> In line with vilification provisions adopted by the ACT, vilification provisions could be qualified by the requirement that the act is done "other than in private", in order to avoid uncertainty about the legal meaning of "public". Similarly, exemptions could be modelled on the ACT legislation.<sup>17</sup>

### **NEW REFORMS - SEXUAL HARRASSMENT, "SERVICES" AND "WORK"**

NT Legal Aid supports the removal of current restrictions with respect to sexual harassment. This would better reflect the range of scenarios in which sexual harassment occurs, and the modern range of employment avenues available to individuals.

<sup>16</sup> *Anti-Discrimination Act 1998* (Tas), s 19.

<sup>17</sup> *Anti-Discrimination Act 1991* (ACT), s 67A.

Through its advice work, NT Legal Aid is aware of instances of discrimination and harassment against employees of services on the basis of their gender identity, race and sexual orientation. Under the current legislation, these individuals have limited recourse.

NT Legal Aid also supports amendment to this definition to clarify that “service” includes services provided by the Police and correctional services officers. This would reflect case law<sup>18</sup> and address ambiguity in the application of the current legislation.

Many NT Legal Aid clients engage in volunteer work to assist their transition to paid employment, while others engage in this work for social participation and to build their community. NT Legal Aid believes that marginalised individuals should be supported to participate in all aspects of community life, including volunteering.

## SUBMISSIONS BEYOND THE SCOPE OF THE DISCUSSION PAPER

### OBJECTS OF THE ACT

The objects of the Act should be amended to clearly state the aims of eliminating discrimination, promoting the right to equality and striving towards the realisation of substantive equality in the Northern Territory. It should also state that the Act is intended to be interpreted in accordance with Australia’s obligations under the International Human Rights Law instruments to which it is a party, including:

- International Convention on Civil and Political Rights
- International Convention on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities (CRPD), and
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The objects of the Act have a real impact on how the Act is framed and interpreted. Pursuant to the *Acts Interpretation Act 1901* (Cth), courts and tribunals are required to prefer ‘the interpretation that would best achieve the purpose or object of the Act.’<sup>19</sup>

### THE LEGAL TEST FOR DISCRIMINATION

#### Direct discrimination

At present, only direct discrimination is unlawful under the Act. The Act provides two definitions of direct discrimination. First, in s 20(1) it uses the test contained in the *Racial Discrimination Act 1975* (Cth), based on distinction, restriction, exclusion or preference made on the basis of an attribute that

<sup>18</sup> See, for example, *Commissioner of Police (NSW) v Mohamed and Others* (2009) 262 ALR 519; *Commissioner for Police, NSW v Estate of Russell* [2002] NSWCA 272.

<sup>19</sup> *Acts Interpretation Act 1901* (Cth), s 15AA.

1190

has the effect of nullifying or impairing equality of opportunity. However, this is not a self-contained definition and can lead to considerable uncertainty. Second, in s 20(2) discrimination is defined using the *comparator test*, which requires the applicant to prove *inter alia* that they were treated less favourably than someone without their attribute. Difficulties arise in applying the comparator test, because it requires a person in materially the same circumstances as the complainant (the comparator) be identified to prove the less favourable treatment. When a suitable comparator can not be found, courts must invent a hypothetical comparator and then suppose how such a person might have been treated by the respondent. This test is overly rigid and complex, and creates uncertainties, increased legal costs and barriers to justice for all parties.

The definition of direct discrimination should be amended to insert the *detriment test*. This more simply provides that discrimination occurs where a person is treated unfavourably because of a protected attribute.

NT Legal Aid recognises that the effectiveness of the Act depends in large part on the respondent's ability to ascertain their duties under the law and comply with these duties. To this end, it is imperative that direct discrimination is more clearly defined.

#### **Indirect discrimination**

Indirect discrimination occurs where an apparently neutral condition disadvantages those with a particular attribute. Indirect discrimination is not currently protected under the Act. It is protected in all other states and territories. Indirect discrimination could be defined as occurring where: a duty holder requires people to comply with a condition, requirement or practice; the requirement disadvantages members of a group who share a protected attribute; and the requirement or condition is not reasonable in the circumstances.

The question of whether the relevant factual circumstances are 'reasonable' should be considered within a human rights framework. That is, whether the factual circumstance giving rise to the discrimination complaint (i.e. the condition, requirement or practice) is a necessary and proportionate means of achieving a legitimate end or purpose.

#### **A unified test for discrimination**

In order to provide effective protections against direct and indirect discrimination, NT Legal Aid supports a unified test for discrimination, which includes the above tests for direct and indirect discriminations.

The Act should clarify that direct and indirect discrimination are not mutually exclusive. That is, a complainant should not be required to particularise their complaint as one form of discrimination to the exclusion of the other. This would reduce difficulty in making complaints.

#### **A BURDEN-SHIFTING MODEL**

Under the Act, the burden of proof is entirely on the complainant. The burden of proof only shifts to the respondent when proving an exception. This is onerous for applicants, who often lack access to relevant evidence (any physical evidence which does exist is likely to remain the property of the

respondent), and lack the financial and other resources to do so.<sup>20</sup> It is also unfair and difficult for applicants to prove the respondent's state of mind.

This also discords with indirect discrimination claims under the ADA, SDA, DDA and Act and Qld legislation, employment-related discrimination claims under the *Fair Work Act* and discrimination claims in comparable jurisdictions. Under these models, complainants must make out a prima facie case of discrimination. After this, the respondent must explain or defend their behaviour. This burden-shifting model is a fairer approach, particularly given the power imbalance which often exists between complainants and respondents.

Note Committee on the Elimination of Racial Discrimination recently called on Australia to: "Remove persistent barriers in access to justice by victims of racial discrimination, including by reversing the burden of proof in civil proceedings involving racial discrimination."<sup>21</sup>

## **SPECIAL MEASURES**

The Act's special measures provision requires amendment. Special measures are indispensable to achieving substantive equality and eliminating discrimination, because, unlike formal equality models which aim to treat all people the same way, special measures "take into account the differences of individuals and groups and try to remove barriers that are created by systemic or long standing discrimination, to ultimately achieve more equal outcomes."<sup>22</sup>

However, as in the 2007 NTER legislation, special measures can involve restrictions being imposed on persons with protected attributes, such as race. For this reason, it is imperative that the Act be amended to impose a requirement that consultation with beneficiaries be conducted.

## **APPLICATION OF DISCRIMINATION LAW**

Under the Act, protection from discrimination is only extended to certain areas and activities of public life, such as work and accessing goods, services and facilities. The discussion paper proposed extending sexual harassment protections to all areas of public life, and extending the Act to services received as well as provided. Our view is that application of the protections should be extended for all attributes. A simpler, less prescriptive example can be taken from Tasmania, which prohibits discrimination by or against a person engaged in any activity, as long as it is 'in connection with' specific areas of public life.<sup>23</sup> Alternatively, the Act could protect against discrimination in political, economic, social, cultural or any other field of public life. It could then specify that public life includes but is not limited to work, education, the supply of goods and services, accommodation, clubs, the delivery of government programs and so on.

---

<sup>20</sup> See Allen, 'Reducing The Burden of Proving Discrimination n Australia,' 31 *Sydney Law Review* (2009) 578, 580.

<sup>21</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20, 8 December 2017, 4.

<sup>22</sup> Human Rights Law Centre, 'Submission: Realising the Right to Equality (2012) p 16.

<sup>23</sup> *Anti-Discrimination Act 1998* (Tas) s 22(1).

## **RESOURCING REQUIRED**

The ADC, legal aid bodies, and community legal centres must be adequately funded and supported to effectively perform their functions in relation to the Act. Without appropriate resourcing, the ADC may be compromised in its ability to perform its functions fairly, swiftly and consistently, and legal services will not be able to ensure that complainants have access to the process.

## **A HUMAN RIGHTS ACT FOR THE NORTHERN TERRITORY**

NT Legal Aid supports the introduction of a Human Rights Act for the Northern Territory. This would create an obligation on government and individuals performing public functions to promote and protect human rights in the performance of those functions.

In line with models adopted in other jurisdictions, a Northern Territory Human Rights Act could enshrine common law rights as well as a selection of rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, including the right to education (in line with ACT human rights legislation) and the cultural rights of Aboriginal peoples (in line with the Victorian Charter of rights). An Act could also provide an 'opt in' mechanism to allow private entities to commit to these principles.

As seen in the ACT, the provision of a freestanding cause of action, even in the absence of damages, can have positive effects on marginalised individuals who wish to have their rights recognised in an institutional setting.

NT Legal Aid believes that a human rights act could improve law and policy making by requiring decision makers to explicitly turn their minds to the human rights implications of their decisions, and serve to further promote a human rights culture in the Northern Territory.

NT Legal Aid would welcome consideration of this measure, including further consultation as appropriate.