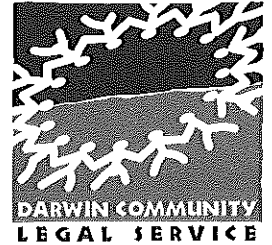


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31 January 2018

Director
Legal policy
Department of Attorney-General and Justice
GPO Box 1722
Darwin NT 0801

Dear Director,

Submission to the Modernisation of the *Anti-Discrimination Act*- Discussion Paper

The Darwin Community Legal Service (DCLS) is one of 200 community legal centres (CLCs) around Australia. Our organisation provides legal services to disadvantaged people, delivers community legal education, and undertakes law reform projects. Our vision is for a community where people can obtain legal and social justice.

DCLS welcomes the release of the Discussion paper, *Modernisation of the Anti-Discrimination Act* (the Discussion Paper) prepared by the Department of the Attorney-General and Minister for Justice dated September 2017, and the opportunity to comment on potential future amendments to the *Anti-Discrimination Act*. This Discussion Paper is timely and well-aligned to our strategic goals.

DCLS provides legal services to an increasing number of disadvantaged Territorians including to those who experience discrimination and it is within this context that DCLS makes its submission.

Please note that case studies referred to in our submission are actual DCLS cases. However, they have been de-identified, including their name changed to protect the privacy and confidentiality of our clients.

MODERNISATION REFORMS

Question 1

Is updating the term sexuality to sexual orientation without labels appropriate? Are there any alternative suggestions?

DCLS supports the term sexuality being updated to sexual orientation.

The Act currently defines "sexuality" as meaning "the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or



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transsexuality." While this provides some level of protection it requires reform to make it clear.

The term "transsexuality" in the definition is incorrect. Transsexuality is a gender identity issue not a sexual orientation issue, and should be removed from this definition.

'Sexual orientation' is a person's sexual orientation towards persons of the same sex, persons of a different sex or both persons of the same sex and persons of a different sex. Updating the term sexuality and the current definition of sexuality to reflect this would move away from using labels and provide for greater clarity and protection. This would also be in line with the reforms to the *Sex Discrimination Act 1984* (Cth). This would capture a person's identity more broadly than simply based on their sexual orientation.

Question 2

Should the attribute of "gender identity" be included in the Act?

Yes, DCLS supports the attribute of "gender identity" should be included in the Act. The Act currently uses the term "sex". The term "sex" is not defined in the Act and it is not clear whether gender identities outside male and female are protected.

'Gender' is a broader concept than "sex". Sex is based on traditional notions that all people can be classified as male or female, based on the existence of key biological features and does not recognise that some people are born with both male and female biological features.

Gender is not limited to biological sex assignment; it takes into account appearance, mannerisms and the social identity a person chooses for themselves, including to be something other than male or female. Gender refers to the way a person presents and is recognised within the community. A person's gender might include outward social markers, including their name, outward appearance, mannerisms and dress. A persons assigned biological sex and gender may not necessarily be the same. Some people may identify as a different gender to their assigned biological birth sex and some people may identify as neither male nor female.

The Act should be amended to include gender identity as a protected attribute rather than the existing attribute of "sex". Including gender identity as a protected attribute would provide clarity that people of diverse gender are protected. These changes would also ensure that the Act is consistent with the *Sex Discrimination Act 1984* (Cth) and ensure a more inclusive coverage.

Question 3

Should intersex status be included as an attribute under the Act?

DCLS supports the attribute of "intersex status" being included in the Act. Intersex is a biological characteristic and not a gender identity issue. An intersex person may face many barriers because of societal structures being male or female dominated.

It is unclear, the extent to which the attribute "sex" in the current Act includes intersex people and people of intersex status should be clearly protected, regardless of their sexual identity/orientation.

Question 4

Should vilification provisions be included in the Act? Should vilification be prohibited for attributes other than on the basis of race, such as disability, sexual orientation, religious belief, gender identity or intersex status?

DCLS supports vilification provisions being included in the Act and that it should be prohibited for all attributes.

The *Racial Discrimination Act 1975 (Cth)* already includes vilification and applies in the Northern Territory in relation to race discrimination. In the interests of consistency, vilification should constitute discrimination in respect of all protected attributes.

Vilification is an extreme form of discrimination intended to incite violence and hatred and protection should be available in the Northern Territory's *Anti-Discrimination Act*. It is consistent with primary prevention efforts by governments to reduce crime and adopt a more socially inclusive society.

In the absence of a specific provision, Northern Territory legislation currently covers harassment as a form of discrimination on the basis of any attribute and vilification complaints could potentially be made under this provision. Restitution for harassment includes damages and public apologies.

Question 5

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

DCLS supports that the inclusion of the attribute of "domestic violence" in the Act. Domestic violence is a serious societal issue and those who are subject to it should be supported against discrimination, including in employment, education, accommodation and accessing services generally. By including it as an attribute, it would also provide an important community education component, recognising that certain behaviour is unacceptable and support of the victims/survivors is necessary to minimise future harm and cost to the individuals involved and to society as a whole. We note it is included as an attribute in the ACT legislation and being considered for inclusion in other jurisdictions.

Aboriginal women and children comprise 75% of the victims of Family and Domestic Violence in the Northern Territory¹ and have the highest rates of domestic violence resulting in hospitalisation or death anywhere in Australia. It is therefore appropriate that the Northern Territory *Anti-Discrimination Act* should recognise this and the

¹ Australian Bureau of Statistics,
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2016~Main%20Features~Victims%20of%20Family%20and%20Domestic%20Violence%20Related%20Offences~6>, 2017.

special vulnerability and consequent disadvantage faced by those experiencing, or who have experienced, domestic violence.

The focus on domestic and family violence has the potential to²:

- Decrease social and economic costs of violence against women
- Strengthen existing discrimination protections
- Would serve to complement strategies both at the Federal level (National Plan to reduce Violence against Women and their Children) and locally, *Safe, Respected and Free from Violence*), as well as internationally (Conventions on the Elimination of All Forms of Discrimination Against Women).

Our experience has indicated that discrimination in housing is a particular issue for domestic violence victims. It can be difficult for victims of domestic violence and their children to secure new housing. The limited number of refuges and the lack of social housing can further exacerbate the risk of homelessness.

We are particularly concerned with real estate agents and landlords listing victims of domestic violence on a residential tenancy database or providing adverse verbal references because of a domestic violence incident. If a residential tenancy database listing is made because of an incident involving domestic violence, discrimination based on this listing may restrict the victim's prospects of securing adequate housing. The situations where the victim is disadvantaged and subsequently discriminated against include:

- property damage resulting from the conduct of the offender, or where
- rental arrears arising where a party is unable to sustain the tenancy alone once the abusive partner leaves,
- defaults resulting from the victim being unable to maintain regular employment because of their circumstances, or
- the abusive partner refusing to agree to have the victim removed from the tenancy agreement once the person leaves the abusive relationship.

In other Australian jurisdictions, it is prohibited to put a victim of domestic violence on a residential tenancy database based on an incident of domestic violence. This is not the case in the NT, where stronger protections for such discrimination are needed.

Case Study A:

Mrs Jing shared a tenancy agreement as a co-tenant with her husband Mr Jing who was a perpetrator of domestic violence against her. Fearing for her safety Mrs Jing relocated interstate. Mr Jing would not co-operate in removing her name from the lease. Mr Jing fell behind in rent then abandoned the premises. As both tenants were jointly and severally liable and Mrs Jing was unable to pay any more rent, both tenants were placed on a residential tenancy database. When Mrs Jing returned to the NT to seek rental accommodation she was refused accommodation on the basis of the listing.

² Australian Human Rights Commission, Fact Sheet: Domestic and family violence – a workplace issue, a discrimination issue.

Case Study B:

Ms Stuart, fleeing domestic violence, obtained private rental accommodation that did not permit her 13-year old daughter with a disability to stay overnight. There was a blanket policy that did not allow anyone else at all to stay at the accommodation overnight.

This failed to take into account that Ms Stuart had an abusive husband who was sporadic in allowing her access to her child and that ideally, she should have been able to have the option to allow her daughter to stay overnight at the accommodation when the client was concerned about the daughter's safety.

Question 6

Should the Act protect people against discrimination on the basis of their accommodation status?

DCLS recommends that the Act should protect people from discrimination on the basis of their accommodation status, given the Northern Territory has 15 times the national average rate of homelessness.³ People who are homeless are often unable to gain access to services because of their status and this just perpetuates a downward cycle.

We would welcome an extension of the current definition of 'accommodation status' to include homelessness, current or previous social housing, and those transitioning to permanent accommodation. We also advocate inclusion of situations where a person is refused access to accommodation on the sole basis that they have, or because of their association with someone who has, made a complaint against the real estate agent, landlord or accommodation provider. This is of particular concern in the NT where there are many small towns and communities where limited accommodation options exist or where there are service provider monopolies.

Standard tenancy application forms often question whether a tenant is on the "government-housing list", or the tenant intends to use the Territory Housing Bond Assistance. We submit that the question has no relevance and this can be used to vet against those who are on the social housing list.

³ NT Shelter, <https://ntshelter.org.au/housing-issues/>

Case Study C:

Mr Knight lived in a small town and had a relative who made a complaint against the landlord over an issue unrelated to the tenancy. The property manager had a good rapport with the landlord and also a monopoly being the only real estate agency operating in town. The agent terminated the tenancy at the end of the fixed term and refused to lease to Mr Knight any other property the real estate was managing. The tenant had a young family and their home was this town. They were now facing the prospect of homelessness or having to leave their hometown as they could not access accommodation.

Question 7

Should "lawful sex work" be included as an attribute under the Act?

DCLS recommends that the Act should be amended to protect against discrimination on the basis of all forms of sexual activity whether current or past. This should not be limited to sex workers only whether they are working lawfully or unlawfully.

Discrimination can also exist against people that are not providing sexual services for payment or reward but are part of alternative sexual communities or trade sex in kind. It can also extend to people that experience reputational loss due to sexual activity such as the exposure of an affair or private information, photos or videos (eg. by an ex-partner in revenge). Discrimination can also extend to the family, friends, or anyone associated with the person being discriminated against. Discrimination can adversely impact the life and wellbeing of those affected by it with no expiry date by which such stops. This hinders any ability for those being discriminated against to depart from any stigma associated with the sexual activity even if such sexual activity is no longer participated or of relevance to their lives. Discrimination can be overt or subtle and can adversely impact upon various areas including access to goods and services, accommodation and employment.

Question 8

Should "socioeconomic status" be included as a protected attribute?

DCLS supports including socioeconomic status as a protected attribute.

This denial of access to services due to perceptions as to a person's social and /or economic limitations only serves to further disadvantage those already marginalised. As mentioned above, one of the areas that tends to be referenced as both an indicator of socioeconomic status and a potential basis for discrimination is work.

Case study D:

Mr Palmer complained that he felt that he was not getting equal access to employment options or training subsidised by the employment provider because they were 'pigeonholing' them on the basis of how he looked and that this was related to his socioeconomic circumstances.

Question 9

Should the Act be broadened to include specifically trained assistance animals such as therapeutic and psychiatric seizure alert animals?

DCLS supports the broadening of the Act to include specifically trained assistance animals such as therapeutic and psychiatric seizure alert animals. Research indicates that support animals are valuable in supporting the wellbeing of individuals with certain conditions or disabilities⁴. These animals, whilst often wearing formal vests or identifying features that indicate they are a support animal, are often not accepted as an assistance animal.

The definition of "guide dog" should be broadened to also include specifically trained and registered assistance animals. These animals are also crucial to ensuring the safety and wellbeing of their owner.

Case study E:

Ms Cullen was discriminated against in the area of both employment and accommodation due to having an assistance dog for an anxiety condition. The dog sensed the onset of attacks and played an important part in preventing and alleviating severe anxiety attacks. Croco was trained, certified and registered and wore an identifying vest but our client reported that Croco would often be excluded on the basis of being in 'an area not accessible to pets'.

Ms Cullen had both employment applications and accommodation refused because of her requirement to have an assistance animal close by, despite these being places where accommodations could have been reasonably made.

Question 10

Should a representative complaint model process be introduced into the Act? Should there be any variations to the process of the complaint model as described above?

DCLS supports a representative complaint model process being introduced into the Act. The Act currently only permits an individual aggrieved by prohibited conduct or a

⁴ The Health Benefits of Companion Animals, www.nps.gov/goga/learn/management/upload/Comment-4704-attachment_.pdf

person, authorised in writing by the Commissioner, on behalf of an aggrieved individual to make a complaint under the act.

A representative complaint model could enable access to justice and broader resolutions on behalf of a group of people identified as having a protected attribute under the Act, rather than requiring the processing of individual complaints. It is an effective way of ensuring cultural change, addressing systemic issues and acting to prevent further discrimination without wasting resources.

Representative bodies are often better equipped to advocate and lodge complaints under the Act than an individual, who may be reluctant to come forward for a number of reasons such as lack of awareness of pathways for resolution or fear of reprisal. A pattern of behaviour often provides evidence for individual occurrences, whereas on their own it may be difficult to substantiate.

Case Study F:

Mr Fay belonged to a local sporting club whose elderly members felt that they were being discriminated against due to policy changes of a governing body. Various individual members of the sporting club lodged separate complaints with the Anti-Discrimination Commissioner regarding the same complaint, they had wanted to lodge a single complaint but were prevented from doing so under the Act.

Question 11

Should the requirement for clubs to hold a liquor licence be removed?

DCLS supports a wider definition of clubs under the Act. A person who is discriminated against by a club should not be excluded from seeking resolution solely on the basis that the 'club' does not have a liquor licence. Many smaller clubs do not have liquor licences due to their size or alcohol may not fit within the scope of their organisation, particularly where children may be involved or where the club may have deemed this inappropriate.

Case Study G:

Mr Daw, an older person, complained about a sporting organisation that contrary to their constitution had unfairly excluded him on the basis of age. Mr Daw was not able to lodge a complaint under the Act because the club did not sell or supply liquor for consumption on its premises.

Question 12

Should the restriction of areas of activity on sexual harassment be removed?

DCLS supports the removal of the restrictions in relation to the prohibition on sexual harassment as the restrictions have the potential to create uncertainty.

Question 13

Should the definition of "service" be amended to extend coverage to include the workers?

DCLS supports the definition of "service" being amended to extend coverage to include workers, including volunteer workers.

Employees are currently protected under the *Fair Work Act 2009 (Cth)* from discrimination, and under workplace health and safety legislation in relation to unsafe work environments, but they may be reluctant to complain about their employer. The expanded protection under the *Anti-Discrimination Act* would provide a better option for redress and prevention where customers are discriminating against service providers.

Case study H:

Dr Brinkin an employee surgeon at Royal Hospital was subjected to racially offensive comments from a customer. Dr Brinkin was reluctant to take action against his employer for indirect responsibility for the customer's actions.

Question 14

Should any exemptions for religious or cultural bodies be removed?

DCLS supports the basic assumption that the right to freedom from discrimination should be unfettered and only subject to exceptions where there is a substantive case made out that an exception would overwhelmingly be in the public interest.

Question 15

Should the exclusion of assisted reproductive treatment (ART) from services be removed?

DCLS supports inclusion of an artificial fertilisation procedure as a service under the Act.

CLARIFYING AND MISCELLANEOUS REFORMS

Question 16

What are your views on expanding the definition of "work"?

DCLS considers that expanding the definition of "work" to ensure that volunteers are included is vital. This would assist to recognise that the people who put in the effort and time to volunteer in organisations, such as sporting clubs have the ability to feel like they have the right to be respected, valued and treated appropriately, fairly and equally.

The definition should also apply to those who are working under the direction of others, even though they may technically be self-employed or sub-contracting. At arm's length arrangements are sometimes used to get around the protections and entitlements available to employees.

The current definition which includes guidance, vocational or occupational training or retraining does not appear to include that of a person who is in receipt of employment related Centrelink payments whereby they are required to participate in a program such as a "Work for the Dole". The inclusion of "volunteer" may allow for this inclusion, although consideration should be given to the inclusion of rewording the whole definition to also specifically include these workers given that their inclusion as employees depends on the government policy of the day. The current interpretation at Section 4 of the Anti-Discrimination Act could be read to be inclusive terms. It is worded to use the word 'includes', and each separate sub-section is clearly meant to be independent.

Case Study I:

Mr Ang contacted us to explore the potential discrimination of being forced to do more hours than he could do on Work for the Dole. The person was being exploited on the basis that the work was out of town so the work ended up being full days, rather than the maximum 25 hours a week. This same person wanted to continue their study but could not do so, or comply with the requirement to look for work, due to the hours being forced on them on the program.

Case Study J:

Mr Batchelor, technically self-employed but engaged on a regular hours arrangement, was being forced by the primary contractor to do additional hours and not being paid for them. The client had English as a second language and was not familiar with workplace rights and felt he was being taken advantage of due to his race.

Case Study K:

Ms Cass was being discriminated against as a volunteer, being asked to do more hours than they could cope with and being bullied, and the client felt this was primarily due to their age. As it was not considered to be 'work', they were considered to be a volunteer, they were forced to leave. Essentially club committee members said, 'if you don't like it, you're only a volunteer, just leave'.

Question 17

Should section 24 be amended to clarify that it imposes a positive obligation?

DCLS supports that Section 24 be amended to clarify that it creates a positive duty on the employer, service provider, educator and accommodation provider etcetera to reasonably accommodate for the special need that another person has because of a protected attribute.

Question 18

Is the name "Equal Opportunity Commissioner" preferred to the name of "Anti-Discrimination Commissioner"? Would the benefits of a new name outweigh the financial cost that comes with re-naming an office?

DCLS acknowledges that "Anti-Discrimination Commissioner" connotes a role as enforcer and protector of anti-discrimination/human rights laws generally and is a responsive role. A change to "Equal Opportunity Commissioner" may change the focus of the role to a more pro-active role and expand its remit and would need further consideration and resources. There are currently other organisations who fulfil the broader role and intersections and duplication may be an issue.

The term Anti-Discrimination Commissioner is currently readily understood in the Northern Territory and any name change is likely to lead to confusion, people may not understand this new name and may detrimentally think that they no longer are protected on the basis of discrimination. Additionally, the current name infers some punitive enforcement for breaches, and instils the notion of positive upholding of acceptable behaviours and values. Therefore, the words 'Anti-Discrimination' clearly signifies and draws the link that certain conduct is discriminatory in nature and will not be tolerated.

Question 19

Is increasing the term of appointment of the ADC to five years appropriate? Should the term of appointment be for another period, if so, what?

It is important that the Commissioner is independent from the political process and has reasonable security and freedom from political interference in the role and is able to influence broader cultural change, which takes time. DCLS supports a fixed term that is more in line with those of other jurisdictions.

MODERNISING LANGUAGE

Question 20

Should definitions of "man" and "woman" be repealed?

DCLS recommends that the definitions of "man" and "woman" be repealed to permit the meaning of "man" and "woman" to be interpreted in accordance with evolving social norms.

Question 21

Should the term "parenthood" be replaced with "carer responsibilities"?

DCLS supports the change of term from "parenthood" to "carer responsibilities" to recognise the multitude of carer arrangements that exist outside the traditional mother, father families. In the NT, grandparents and other commonly either formally or informally step in to assist and assume primary parental responsibilities for the care of young children.

Case Study L:

We have represented and assisted many grandparents that find these terms difficult. An example is a grandmother who had permanent care with court orders of two grandchildren. She was the full-time carer and, effectively, had parental responsibility. She had the requirement to look for work because the children were of an age where she had an exemption to look for work, but the employers would not consider the care requirements that she had. This client was confused by the term "parenthood" and did not realise that she was able to make a complaint as a 'parent'.

Question 22

Should the term "marital status" be replaced with "relationship status"?

DCLS supports replacing the term "marital status" with "relationship status," which more accurately reflects the multi relationship and living arrangements for parties outside the traditional 'married', "single" or 'divorced' categories.

Additional Area of Reform

We would like the Attorney-General to consider the clarification of appeal rights of decisions by the Commissioner under *section 66A* (initial assessment) and in relation to interim orders under *section 101*. An accessible right of review needs to be available in relation to these decisions.

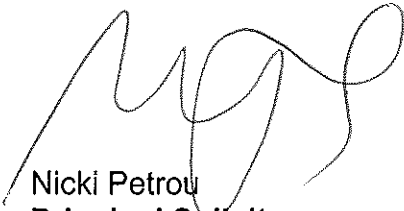
Conclusion

DCLS appreciates the opportunity to contribute to this Discussion Paper. We support the need for broad reforms to the Act to better reflect, protect and promote current societal accepted behaviours. Additionally, we support that these proposed reforms will bring the NT in line with other Australian jurisdictions.

Thank you for considering our submission. Should you wish to discuss this further, please do not hesitate to contact Nicki Petrou or Linda Weatherhead on 08 8982 111 or by email: nicki@dcls.org.au or linda@dcls.org.au.

Your sincerely

DARWIN COMMUNITY LEGAL SERVICE INC.

A handwritten signature in black ink, appearing to read 'Nicki Petrou', written in a cursive style.

Nicki Petrou
Principal Solicitor