

## **Discussion Paper**

### **Modernisation of the *Anti-Discrimination Act***

**September 2017**

This paper has been prepared for internal government discussion purposes only and any views expressed are not to be taken to represent the views of the Northern Territory Government, the Northern Territory Attorney-General and Minister for Justice or the Department of the Attorney-General and Justice.

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## MAKING A COMMENT

The Department of the Attorney-General and Justice is seeking your comments on potential future amendments to the *Anti-Discrimination Act*.

Comments can be as short or informal as an email or letter, or can be a more substantial document. Comments do not have to address all aspects of the discussion paper nor are confined to the any of the proposed options as discussed in this paper.

Electronic copies of comments are preferred and should be sent whenever possible by email to [Policy.AGD@nt.gov.au](mailto:Policy.AGD@nt.gov.au).

Comments can also be sent to:

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The contact officer is Ms Sarah Witham.

**The closing date for comments on this Discussion Paper is 3 December 2017.**

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## INTRODUCTION

The *Anti-Discrimination Act* (the Act) came into effect on 1 August 1993. While some amendments have been made to the Act, including procedural reforms in 2015 to coincide with the conferral of jurisdiction under the Act on the Northern Territory Civil and Administrative Tribunal (NTCAT), the Act has not been comprehensively reviewed since its commencement.

Discrimination law is an evolving area of practice and the law needs to keep pace with contemporary standards and expectations. The Act is in urgent need of modernisation to support achieving the objects of the Act. Since the commencement of the Act, there has been a number of developments in discrimination laws in Australia that have informed some of the issues raised in this discussion paper.

In the ACT, the *Discrimination Act 1991* was amended by the *Discrimination Amendment Act 2016* following recommendations made by the ACT Law Reform Advisory Council. The amendments reformed the ACT *Discrimination Act 1991* to include new protected attributes (including accommodation status, intersex person status and domestic and family violence) and revise the application of vilification provisions to expand the list of attributes for which protections against vilification apply.

In Tasmania, the *Anti-Discrimination Act 1998* was amended by the *Anti-Discrimination Amendment Act 2012* to include gender identity as an attribute and the inclusion of all attributes into the anti-vilification provisions.

The Commonwealth's *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* introduced sexual orientation, gender identity and intersex status as protected attributes under the *Sex Discrimination Act 1984* (Cth).

Some of the issues that have been raised for consideration in the review of the Act are:

- modernising gender and sexuality protections and language in line with the *Sex Discrimination Act 1984* (Cth) and the current Government's commitments to support changes to the law to end discrimination against women of diverse sexualities accessing artificial fertilisation procedures;
- introducing new protections under the Act such as domestic violence, homelessness, lawful sexual activity and socioeconomic status;
- introducing specific anti-vilification laws prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status;
- extending coverage of the sexual harassment provisions to include all areas of public life;
- introducing a representative complaints model that enables organisations to bring complaints about acts of systemic discrimination on behalf of groups who may be limited in their ability to bring an individual complaint; and

- broadening the scope of clubs by removal of the requirement for clubs to sell or supply liquor for consumption on its premises.

Considerable work has also been done with the Northern Territory Anti-Discrimination Commissioner (ADC) to develop this material. It is anticipated that a review could be conducted and completed with legislation passed within 18 months.

# SUMMARY OF QUESTIONS

## Modernisation Reforms

1. Is updating the term sexuality to sexual orientation without labels appropriate? Are there any alternative suggestions?
2. Should the attribute of “gender identity” be included in the Act?
3. Should intersex status be included as an attribute under the Act?
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?
5. Should the Act create rights for people experiencing domestic violence in relation to public areas of life such as employment, education and accommodation?
6. Should the Act protect people against discrimination on the basis of their accommodation status?
7. Should “lawful sex work” be included as an attribute under the Act?
8. Should “socioeconomic status” be included as a protected attribute?
9. Should the Act be broadened to include specifically trained assistance animals such as therapeutic and psychiatric seizure alert animals?

## New Reforms

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?
11. Should the requirement for clubs to hold a liquor licence be removed?
12. Should the restriction of areas of activity on sexual harassment be removed?
13. Should the definition of “service” be amended to extend coverage to include the workers?

## Removing Content that Enshrines Discrimination

14. Should any exemptions for religious or cultural bodies be removed?
15. Should the exclusion of assisted reproductive treatment from services be removed?

## Clarifying and Miscellaneous Reforms

16. What are your views on expanding the definition of “work”?
17. Should section 24 be amended to clarify that it imposes a positive obligation?
18. Is the name “Equal Opportunity Commissioner” preferred to the name “Anti-Discrimination Commissioner”? Would the benefits of a new name outweigh the financial cost that comes with re-naming an office?
19. Is increasing the term of appointment of the ACD to five years appropriate? Should the term of appointment be for another period, if so what?

## Modernising Language

20. Should definitions of “man” and “woman” be repealed?
21. Should the term “parenthood” be replaced with “carer responsibilities”?
22. Should the term “marital status” be replaced with “relationship status”?

## MODERNISATION REFORMS

### GENDER AND SEXUALITY PROTECTIONS

In 2013, the Commonwealth amended the *Sex Discrimination Act 1984* (Cth) to make it illegal to discriminate against people on the basis of their gender identity, sexual orientation, or intersex status.

The Act currently provides some level of protection but requires reform to make it clear that gender identity, sexual orientation and intersex status are protected by the Act in line with the reforms to the *Sex Discrimination Act 1984* (Cth). Clearly recognising gender identity and intersex status as protected attributes will achieve this.

The Australian Human Rights Commission ‘Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights National, National Consultation Report 2015’ found that state and territory anti-discrimination law provides an incomplete and inconsistent protection from discrimination on the grounds of sexual orientation, gender identity and intersex status.<sup>1</sup>

#### Sexual Orientation

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.

The Act currently uses the term sexuality and identifies particular sexual orientations using terms such as “homosexuality” and “lesbian.” The *Sex Discrimination Act 1984* (Cth) removed specific terms preferring to keep the definition general. This approach moves away from using labels.

The Act also includes the term “transsexuality” in the definition, which is incorrect. Transsexuality is a gender identity issue not a sexual orientation issue, and should be removed from this definition. The term transsexuality is also an old fashion term.

#### Alternative approaches

The term sexuality could be replaced with the term sexual orientation and could be defined in line with *Sex Discrimination Act 1984* (Cth)

#### What difference should it make?

Modernising the term sexuality to sexual orientation and changing the definition will ensure the Act uses up-to-date terminology that is consistent with the *Sex Discrimination Act 1984* (Cth).

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<sup>1</sup> Australian Human Rights Commission Resilient Individuals: Sexual Orientation Gender Identity and Intersex Rights National Consultation Report 2015, page 71-72.

## Question 1

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

### **Gender Identity**

The Act currently uses the term “sex” rather than gender identity. The term “sex” is not defined in the Act leaving the question of whether gender identities outside male and female categorisation 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. It also recognises that a person’s 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.

### **Alternative approaches**

The Act could be amended to include gender identity as a protected attribute rather than the existing attribute of “sex”.

### **What difference should it make?**

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 2

Should the attribute of “gender identity” be included in the Act?

### **Intersex Status**

An intersex person will have biological variations on the traditional biological assignment of male and female. An intersex person may face many barriers in accessing equal opportunities because of the pervasive binary view of sex, which influences many aspects of life including systems, physical structures and processes. For example it is common that most forms ask if someone is male or female. It is presently unclear the extent to which the attribute “sex” in the current Act includes intersex people.

## Alternative approaches

The Act could be amended to include intersex status as a protected attribute.

### What difference should it make?

Intersex status was introduced into the *Sex Discrimination Act 1984* (Cth) to recognise that intersex is a biological characteristic and not a gender identity issue. Including intersex status ensures that the Act is consistent with the *Sex Discrimination Act 1984* (Cth) and is a more inclusive term than “sex”.

### Question 3

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

## VILIFICATION

All jurisdictions except the Territory have enacted legislation that makes public incitement to acts of racial hatred either an unlawful act or a criminal offence or both. Territorians who experience vilification because of their race only have protections and rights under the *Racial Discrimination Act 1975* (Cth). There is currently no Territory law providing the equivalent rights and protection, aside from criminal laws that may cover some conduct (for example, the threat to kill). Territorians who experience vilification need to lodge a complaint under the *Racial Discrimination Act 1975* (Cth) with the Australian Human Rights Commission in Sydney to obtain protection.

There are also no federal or Territory laws that protect against vilification on the basis of religious belief, disability, sexual orientation, gender identity or any other attribute under the Act.

### Alternative approach

The Act could be amended to make it unlawful for a person to do an act, other than in private (for example at home), if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of a characteristic of that person or they are a members of the group on the basis of race, disability, sexual orientation, religious belief, gender identity or intersex status.

To balance these protections, the Act could also be amended by including appropriate exemptions to cover acts done “reasonably and in good faith” to allow for free and fair speech on related topics. For example, this could include artistic works, statements made for any genuine academic, artistic or scientific purpose or in the public interest. These exemptions would also extend to publishing a fair and accurate report of any event or matter of public interest or a fair comment on any event or matter of public interest if it is a genuine belief held by the person making the comment.

## What difference should it make?

Protection under the Act from vilification will provide legal redress against extreme or pervasive vilification that is essential for Territorians to maintain the right to live their lives free from harassment, psychological distress, hurt, anger and anxiety that exists in society.

Providing appropriate exemptions recognises that we live in a free and democratic society with a right to voice opinions in a respectful manner.

### 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?

## ADDITIONAL ATTRIBUTES

In line with discrimination reforms interstate and to reflect current issues being faced in the Northern Territory, the attributes of domestic violence, accommodation status, lawful sexual activity and socioeconomic status are considered for inclusion as new attributes in the Act.

### Domestic Violence

Individuals living in or seeking to leave a domestic or family violence situation are highly vulnerable. At present, domestic violence discrimination only has limited protection under the attribute of marital status.

### Alternative approaches

Providing domestic violence as an attribute under the Act would create rights for people experiencing domestic or family violence in relation to public areas of life such as employment, education and accommodation. Including domestic violence as an attribute would create a number of protections for individuals including a positive obligation that employers reasonably accommodate leave or work hour changes to enable workers to make appropriate accommodation arrangements, protect workers from being dismissed or not employed because they are living in a domestic or family violence situation, prevent the removal of children from education institutions because of domestic or family violence and prevent refusal of accommodation.

## What difference should it make?

Legislative backing to ensure continued employment, education and housing are vital to ensure safe decisions are made that will support the greater family needs, including children. Breaking the domestic and family violence cycle in the Territory requires a community response and cannot rely on individual responses only. Including domestic violence as an attribute is part of a broader community solution.

## 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?

### **Accommodation Status**

There is currently no protection under the Act for discrimination experienced as a result of a person's accommodation status. A significant percentage of Territorians are homeless<sup>2</sup>, living without permanent shelter, couch surfing or living in overcrowded accommodation. Often discrimination occurs where a person is treated less favourably because of stereotyped perceptions of homeless people. For example, it is often assumed the person has a drinking problem or a mental health issue and is therefore dangerous.

Accommodation status is a significant issue as it can prevent a person from accessing various public services. For example, not being able to meet requirements to access a service because inquiries can only be made online or require a residential address. It is common for people without a permanent home to carry what few belongings they have with them at all times. In these circumstances, restrictions from accessing public services may occur because there is nowhere for belongings to be placed, or they are not allowed to be brought in with the person and the person fears they will be stolen if asked to leave their belongings in an unsecure area or outside.

### **Alternative approaches**

Including accommodation status as an attribute under the Act would provide rights for people without a permanent home to have equal access to the areas covered by the Act (work, goods, services and facilities, accommodation, education, superannuation and insurance and clubs) without unreasonable barriers.

Homelessness is intended to cover individuals without a home who may be living rough as well as individuals who may have no permanent address and who are moving from place to place, for example couch surfing.

## Question 6

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

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<sup>2</sup> 731 of every 10,000 Territorians are homeless, 15 times the national average, a majority are aboriginal. About 85% are living in overcrowded accommodation, about 40 in every 10,000 sleep rough or in improvised shelter. Australian Bureau of Statistics (ABS) 2049.0 Census of Population and Housing Estimating homelessness, 2011.

## **Lawful sexual activity**

Lawful sexual activity refers to a person's status as a lawfully employed sex worker, whether or not self-employed. Australia is signatory to a number of International Covenants that protect sex industry workers from discrimination. One of these is the Universal Declaration of Human Rights that states "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Other relevant international covenants to which Australia is a signatory are the International Labor Organisations Employment Policy and the Convention to Eliminate All Forms of Discrimination Against Women.

Queensland, Tasmania and Victoria include "lawful sexual activity" as a protected ground of discrimination. The ACT is the only jurisdiction that prohibits discrimination on the basis of "profession, occupation, trade or calling".

## **Alternative approaches**

The NT could include a "lawful sex work" as an attribute under the Act.

## **What difference should it make?**

Sex workers may experience discrimination on the basis of their occupation in areas such as goods and services, accommodation and seeking other employment. Discrimination of sex workers often occurs due to negative stigma attached to the occupation based on stereotyped views around drug use and assumed health status. Recognition of "lawful sex work" would provide equal rights for sex industry workers to participate on the same footing as everyone else in public life.

## **Question 7**

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

## **Socioeconomic status**

A number of social and economic factors may interfere with a person's ability to gain equal access to the areas of public life covered by the Act, such as education, employment and services. Discrimination may cause further social and economic disadvantage and result in further inequity.

## **Alternative approach**

The Act could be amended to include socioeconomic status as a protected attribute to provide maximum protection to people who experience discrimination because of their socioeconomic status.

## What difference should it make?

Society could benefit from an increased focus on the foundations of socioeconomic inequities. Introducing socioeconomic status as a protected attribute could reduce the barriers for people resulting from their socioeconomic status.

### Question 8

Should “socioeconomic status” be included as a protected attribute?

## RIGHTS FOR CARER ASSISTANCE ANIMALS

The Act currently protects discrimination against a person with a guide dog who has a visual, hearing or mobility impairment. However, it is recognised that there are a range of people with other disabilities who also obtain valuable assistance from appropriately trained animals, other than guide dogs. Increasingly assistance animals are being used to support mental wellbeing in cases of PTSD, anxiety and other mental health related illness, neurological conditions such as Asperger’s Syndrome and physical issues such as seizure.

### Alternative approaches

To modernise the Act to keep pace with contemporary standards and expectations, the definition of guide dog could be expanded to include all assistance animals required by people who identify as having a disability. The definition of assistance animals could be expanded to include therapeutic and psychiatric seizure alert animals or accredited animals or specifically trained animals as prescribed by regulations.

Existing liability provisions that provide for guide dog owners to be responsible for any damage caused could be extended to include any damage or injury from an assistance animal. Amendments would need to be restricted to certified or specifically trained animals so that it does not extend to people training their own assistance animals. Amendments could also specify that it includes assistance animals certified under a law of another state or territory to make it clear they are covered by the Act.

## What difference should it make?

Recognising a broader use of assistance animals is appropriate to keep pace with contemporary standards and expectations.

### Question 9

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

## NEW REFORMS

### REPRESENTATIVE COMPLAINT MODEL

Currently it is only possible for an individual who has experienced discrimination to make a complaint under the Act. Individual complaints are important for individuals to assert their rights to redress discrimination they personally experience. However, an individual complaint model does not suit all complaints or all complainants. Sometimes a more systemic approach is required such as a representative complaint model. There is currently no power to lodge representative complaints.

A representative complaint model allows representative bodies to bring a complaint about discrimination on behalf of a group of people identified as having a protected attribute under the Act. Some examples of the types of complaints that could be made under a representative complaint model include a complaint by a non-government disability organisation about a businesses practice that negatively impacts on their members; or a complaint by an organisation established to represent the interests of Northern Territory Aboriginal people regarding an act, practice, policy, program or process that impacts Northern Territory Aboriginal people as a group.

#### Alternative approaches

A representative complaint model could be introduced that enables organisations to bring complaints about acts of systemic discrimination on behalf of groups who may be limited in their ability to bring an individual complaint. A representative complaint could be lodged without obtaining individual consent of each person who may assist the subject of the complaint.

After a written complaint is lodged by an organisation, the ADC would need to determine if the complaint can be accepted for consideration. Requirements for a valid complaint could include an allegation of one or more acts, practices, policies, programs or processes that may be unlawful discrimination under the Act. The complaint would be required to include as much detail as possible of the alleged conduct. If not accepted, the complaint would be declined and where appropriate referred to another avenue of recourse.

If a complaint is accepted, the process could include a requirement for compulsory conciliation. The ADC's role in conciliation could include directing who should attend conciliation. Compulsory conciliation provides an option for the parties involved to find a practical resolution to the issues raised by the complainant.

If the matter does not settle at conciliation, the ADC could commence an investigation. The powers of the ADC during an investigation could include seeking written submissions from any party; compelling witnesses (including anonymous statements where appropriate); and compelling information.

The ADC would then consider the information and prepare a written report setting out the views and recommendations where necessary. After the party adversely affected by the report has been given an opportunity to comment on the report, the ADC could decide to release the report publicly and make public comment on its content. In order to make the organisation responsible, the ADC could require the organisation to make a public announcement to explain the changes or actions the organisation proposes to take in response to the report to address the complaint within a specified period of time.

The written report containing the ADC's findings could be used as evidence to support the lodging of an individual complaint.

### **What difference should it make?**

The value of a representative complaint model is the ability to obtain greater systemic reach than the individual complaint model, and enables issues for particularly vulnerable groups to be properly considered. It also enables the ADC to better meet the objectives of the Act of "equality of opportunity".

### **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?

## **BROADENING THE SCOPE OF CLUBS**

The Act provides that a club cannot discriminate on any of the prohibited grounds such as race, sex, sexuality, age or marital status. Exemptions are permitted if the club is of a type only suitable to one particular sex, or if it is impracticable for there to be simultaneous enjoyment by club members of a different sex provided different sexes are provided for separately.

The Act defines clubs as ones established for social, literary, cultural, political, sporting, athletic, recreation or community service purposes or any other similar lawful purpose. The definition of club includes an association (either incorporated or unincorporated) with more than 30 members that sells or supplies liquor for consumption on its premises.

The definition of club in the Act was based on the definition of club as originally introduced by the Commonwealth House of Representatives in the Sex Discrimination Bill 1983. In 1983, the focus of the Sex Discrimination Bill was to eliminate all forms of discrimination against women arising from the ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

Article 2 of the Convention required all Australian jurisdictions to take all appropriate measures, in particular in the areas of political, social, economic and culture, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality

with men. Australian society up until the 1980s included public bars that refused to serve women or “gentlemen’s clubs” established in towns in lieu of pubs that strictly forbid entry to women. It was against this social fabric that the Commonwealth decided to eliminate discrimination from clubs that sold or supplied liquor for consumption on its premises.

The reasons for the restriction to the scope of clubs was very specific to needs at the time the legislation was created and there appears to be no logical reason to continue to narrow clubs in this way. Expanding the definition of clubs will ensure protection of members in a range of settings not currently available such as sporting clubs. Sport is a key part of public life. It is important that groups protected by the Act have an equal opportunity to engage in this aspect of life.

### **Alternative approaches**

The definition of club could be amended to remove the requirement that clubs be limited to those who sell liquor. If this occurs, the Act will be broadened to cover a larger number of clubs and associations.

### **What difference should it make?**

This amendment will better reflect modern society’s use and expectation from clubs and associations. Currently the requirement for a club to hold a liquor licence restricts the application of discrimination law to a limited number of clubs and associations. The distinction based on whether a club or association holds a liquor licence is no longer relevant.

### **Question 11**

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

## **SEXUAL HARRASMENT**

The Act prohibits sexual harassment of a person in any of the areas of activity in Part 4 of the Act. Currently these areas of activity are work, goods, services and facilities, accommodation, education, clubs, superannuation and insurance. However, consideration needs to be given to whether sexual harassment should continue to be restricted by area of activity.

The scope of the prohibition against sexual harassment in employment is particularly unclear. The concept of work is less fixed than it was in 1992. People’s employment obligations are not always as clear and employees may work in environments where there are cross-overs in other areas of life. The current law and the extent of the rights and obligations for employers and employees are unclear. For example, in the 2016 decision of *Smyth v NTT & Kerr*, the ADC was satisfied that the sexually harassing conduct had occurred but was not satisfied in all instances that the requisite nexus to work was established.

Issues also arise for people working in service industries such as the hospitality industry because the area of “service” only currently applies to people receiving the service. (Please also see reforms proposed in this paper in regards to changing the definition of “services”).

### **Alternative approaches**

Anti-discrimination legislation in Queensland and Tasmania do not restrict sexual harassment by area of activity.

### **What difference should it make?**

Removing the restriction of area of activity for the prohibition of sexual harassment will remove the complexity and uncertainty about when such conduct is unlawful and provides for greater protection and prevention for individuals who may be exposed to such conduct.

### **Question 12**

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

## **THE DEFINITION OF “SERVICES”**

In the area of “goods, services and facilities”, only customers are protected, not the service providers themselves. Providers of services who experience discrimination from customers have no protection under the Act. Currently a worker’s rights in this context only exist in criminal law or work safety laws. This is of concern for industries such as the hospitality industry e.g. pubs and clubs.<sup>3</sup> If a customer or client is considered important to a business or organisation, there can be a significant imbalance of power in their relationship with an employee and that relationship may be open to abuse, particularly if the client is important to the business or it directly impacts on the worker’s salary. Many workers may feel reluctant to take assertive action, out of fear of the repercussions from their employer.

Consideration also needs to be given to amending the definition of “services” to clarify that it includes services provided by the police. It is likely that the Act already covers services by police. Making it explicit in the Act will avoid litigation over the issue and provide a clear message to the community about the standard of conduct they can expect from police officers.

### **Alternative approaches**

The Act could be amended so that people providing a service would also be able to seek protection under the Act. For example, a taxi driver being subjected to racially offensive comments directed personally to the racial group they belong may have rights against a

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<sup>3</sup> A recent study by United Voice found that 89% of hospitality staff (90% of which were women) in Australia had been sexually harassed: United Voice Media Release, 28 April 2017, [http://www.unitedvoicevic.org.au/hospo\\_sexual\\_harassment\\_survey](http://www.unitedvoicevic.org.au/hospo_sexual_harassment_survey) accessed on 16 June 2017.

passenger. Another example is a female working in a bar who is sexually harassed by a customer.

The Act could also be amended to make it clear that “services” include services provided by police.

### **What difference should it make?**

Extending the coverage would allow for workers to have the same protection as applies to customers or clients.

In practice, it is likely that the option of bringing a formal complaint will not always be available as the complaint process requires the identity and contact details of that person. However the existence of the right will enable individuals to exercise their right at the time of contact. In an employment context, it will enable employees to exercise their right and for employers to support them. For example, if a patron at a bar sexually harasses a staff member, that staff member will be able to tell the patron to stop, that what they are doing is unlawful. Their manager will be able to support this. The establishment will be able to develop policies and provide information to patrons about appropriate behaviour in their establishment. This will support employers to provide safe workplaces for their staff.

Clarifying that services includes police will reduce potential litigation and clarify for the community the standard of conduct they can expect from the police.

### **Question 13**

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

# REMOVING CONTENT THAT ENSHRINES DISCRIMINATION

## RELIGIOUS EXEMPTIONS

Religious or cultural bodies currently have exemptions under the Act for certain attributes and areas if in line with the religious doctrines necessary to avoid offending the cultural or religious sensitivities of people of that particular culture or religion. The exemptions apply automatically for religious organisations and do not require any justification by the religious organisation as to why the exemption should apply.

To promote equality of opportunity for all Territorians, the removal of some of these exemptions is being considered.

### Alternative approaches

The Act could be amended to remove the current exemptions for religious bodies in the areas of religious educational institutions, accommodation under the direction or control of a body established for religious purposes and access to religious sites. Religious or cultural bodies would instead be required to apply for an exemption with the ADC and justify why their service requires a particular exemption.

One of exemptions that could be removed is section 30(2) that permits religious schools to exclude prospective students who are not of that religion.

Another exemption that could be removed is section 37A that permits religious schools to discriminate against employees on the grounds of religious beliefs, activity or sexuality if done in good faith to avoid offending the religious sensitivities of people of the particular religion. For example, under this exemption a religious school could justify not employing a prospective employee on the basis that they identify as LGBTI, if the religious doctrine does not support LGBTI relationships.

In the area of accommodation there are two exemptions that could be removed. Section 40(2A) that permits religious educational authorities as accommodation providers to restrict use of the accommodation to people of that religion and section 40(3) that provides an exemption for discrimination if necessary to avoid offending the religious sensitivities of people of the religion.

In respect to access to cultural or religious sites section 43 could also be removed. Section 43 permits restricted access to land, building or place of cultural or religious significance on the basis of sex, age, race or religion if it is in line with the religious doctrine or necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion. It is noted that protection of Aboriginal sacred sites is available through existing provisions in the *Northern Territory Aboriginal Sacred Sites Act*.

However, exemptions relating to discriminatory acts that are permitted or necessitated by legislation would remain. These include ordination of priests, ministers of religion or members of a religious order (including training or education), selection or appointment of people to perform functions in relation to any religious observance or practice and an act or body established for religious purposes if the act is done as part of any religious observance or practice.

### **What difference should it make?**

Removal of these exemptions would make the system fairer by ensuring people of certain attributes have the same opportunities under the Act. It would also ensure that cultural and religious bodies are more accountable for their actions and more inclusive.

### **Question 14**

Should any exemptions for religious or cultural bodies be removed?

## **ASSISTED REPRODUCTIVE TREATMENT EXCLUSION FROM SERVICES**

Assisted reproductive treatment (ART) is any medical procedure that enables artificial fertilisation of the human ovum, including IVF.

There are no ART laws in the NT that govern the right to access ART. Victoria, Western Australia and South Australia are the only jurisdictions in Australia with legislation that requires satisfying certain criteria to access ART. Therefore, in the NT the only limitations on accessing ART are found in the Act.

The NT Department of Health does not offer ART and does not currently have a position on eligibility for ART services. In the NT, the only place where you can receive ART is through a private company called Repromed, based within the Darwin Private Hospital. Repromed is a South Australian company with local clinicians who are registered in SA, thus the availability of services in the NT is influenced by South Australian legislation.

The recent passing of the *Statutes Amendment (Surrogacy Eligibility) Act 2017 (SA)* removed barriers to same-sex couples and transgender people from accessing ART. It also made it clear that relationship status was not considered a barrier. Under the South Australia *Assisted Reproductive Treatment Act 1988*, the following registration requirement must be satisfied before ART services can be provided:

- (i) if it appears to be unlikely that, in the person's circumstances, the person will become pregnant other than by an assisted reproductive treatment;
- (ii) if there appears to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child conceived naturally;

- (iii) if the donor died and his partner was fertilised or an embryo had been recreated, and the donor provided consent, any directions of the donor complied with and assisted reproductive treatment is provided for the benefit of a woman who was living with the donor on a genuine domestic basis;
- (iv) for the purposes of a recognised surrogacy agreement;
- (v) where a person suffers from an illness or other medical condition that may result in, or the appropriate treatment of which may result in, the person becoming infertile at a future time.

The Act prohibits discrimination from occurring in the provision of services. ART is a service that is specifically exempted in the Act. This means that providers of ART services in the NT are permitted to discriminate against people on the basis of sex, gender identity or marital status.

### **Alternative approaches**

The Act could be amended to remove the current exemption that the provision of a service does not include the carrying out of an artificial fertilisation procedure.

### **What difference should it make?**

An amendment of this nature would ensure there are fewer additional barriers placed on people who are in same sex or de facto relationships, single and transgender people, who would like to access ART in the NT. These changes would also ensure that the Act is consistent with the *Sex Discrimination Act 1984* (Cth) and the *Assisted Reproductive Treatment Act 1988* (SA).

### **Question 15**

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

## CLARIFYING AND MISCELLANEOUS REFORMS

### WORK INCLUDES VOLUNTEERS AND MODERN WORKPLACES

It is unclear whether the current definition of “work” includes volunteers. The Act currently defines “work” as including being in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment); under a contract for services; remunerated in whole or in part on a commission basis; under a statutory appointment; by a person with an impairment in a sheltered workshop; and under a guidance program, vocational training program or other occupational training or retraining program. This definition is not exhaustive and may include volunteer work.

Further, workplaces have evolved since the introduction of the Act and work arrangements are no longer limited to a traditional employer/employee relationships. It is common that workers today work for a number of different entities or organisations but they work collectively, for example subcontractors on a construction site.

The definition of work is intended to cover a broad range of working environments such as subcontractor arrangements. A common issue that arises is whether prohibited conduct occurred at “work” for the purposes of the Act because it occurred between two workers who were engaged by different employers or are working for different companies.

Lastly is the issue of organisations who legally structure their workplaces to get around legal obligations such as the Act. The Act provides important rights and it is important that those rights are not lost because someone is engaged in what, to all extent and purposes, looks and feels like a work arrangement but is legally set up to be a different type of arrangement.

#### Alternative approaches

The definition of “work” could be amended to clarify that it includes a “volunteer”, shared workplaces and anything akin to a work arrangement.

#### What difference will this make?

Clarifying the categorisation of a “volunteer” would ensure that expectations of the same professional conduct apply to a “volunteer” as they do to a person in paid employment. Volunteers give their time freely and should not be subjected to discrimination. It is important that organisations have a clear understanding as to whether the obligations under the Act apply to volunteer workers.

Including volunteers or people in non-traditional work arrangements in the definition of work would provide the same protections currently provided to workers. It would also include the new protections for workers also being considered in this discussion paper such as work includes “at work” and the definition of “services”.

## Question 16

What are your views on expanding the definition of “work”?

### **FAILURE TO ACCOMMODATE A SPECIAL NEED**

Section 24(1) of the Act provides that “A person shall not fail or refuse to accommodate a special need<sup>4</sup> that another person has because of an attribute.<sup>5</sup>” Whether a person has unreasonably failed to provide for a special need depends on the relevant circumstances of the case including but not limited to:

- the nature of the special need;
- the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
- the disruption that accommodating the special need may cause;
- the nature of any benefit or detriment to all persons concerned.

Section 24 creates a positive duty on the employer, service provider, educator and accommodator etcetera. The wording of the section should be amended to clearly articulate this.

### **Alternative Approaches**

The wording in section 24 could be amended to express this obligation more clearly.

### **What difference should it make?**

A clear statement of this kind encourages a proactive response to equal opportunity rather than a reactive response. It means the starting point is that the accommodation is required unless there are reasonable grounds upon which to not make the accommodation. It will mean that action taken is not limited to complaints made to the ADC.

## Question 17

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

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<sup>4</sup> A special need must relate to an attribute the person complaining has. For example a student who uses a mobility device such as a wheelchair will have a special need for ramp access or flat graduated pavements to enter and use the school’s facilities. A failure to provide this would create a barrier for that student in having equal access compared to others (who do not use a wheelchair) in accessing an education. Disability and education are areas protected by the Act.

<sup>5</sup> Please note that it is assumed, based on the overall structure of the Act and its objectives, that section 24, as with other sections, is limited to the areas of public life in s28 of the Act. Section 24 applies to all attributes in s19. Examples of types of complaints under this section are:

- disability (a range of disability, physical, mental health, neurological disorders (Asperger’s Syndrome)) access issues (at work, while receiving a service and in education);
- accommodations at work for parents;
- accommodations at work for pregnancy or breastfeeding;
- accommodations based on race (e.g. language, cultural).

# ANTI-DISCRIMINATION COMMISSIONER AMENDMENTS

## Re-naming of the Anti-Discrimination Commissioner

The review of the Act is an opportune time to consider changing the name of the “Anti-Discrimination Commissioner” to be the “Equal Opportunity Commissioner”. Equal opportunity is more positive wording and reflects better the work being done by the ADC. This would require the “office of the Anti-Discrimination Commissioner” to also be re-named to the “office of the Equal Opportunity Commissioner”. A new name will not change the functions or the work of the ADC. There would not be any impact upon complaints currently going through a complaint process.

## Alternative approaches

The Act could be amended to change the name of the “Anti-Discrimination Commissioner” to be the “Equal Opportunity Commissioner” .

## What difference should this make?

A name change to the Equal Opportunity Commissioner will more accurately reflect the scope of the work undertaken by the ADC; encourages public awareness of functions beyond those related to complaints; and communicates a broader role in promoting practices that promote equality of opportunity and inclusion.

## Question 18

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

## Extending term of Anti-Discrimination Commissioner’s appointment

The Act provides that the ADC is to be appointed for a term no longer than 3 years. In comparison to the other jurisdictions that have terms between five to seven years, a term of three years is relatively short.

In the Australian Capital Territory, Tasmania and South Australia, Commissioners are appointed for five year terms. In Queensland, Western Australia and New South Wales, Commissioners are appointed for seven year terms. Terms are also seven years for Commissioners appointed under the *Australian Human Rights Commission Act 1986* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Age Discrimination Act 2004* (Cth) and the *Disability Discrimination Act 1992* (Cth).

In the Territory, the Information Commissioner, the Commissioner of Public Interest Disclosure and the Children’s Commissioner are appointed for five year terms. In comparison, the Commissioner for Consumer Affairs does not have any limits on the

appointment term and the Ombudsman is appointed for seven years without any ability for re-appointment.

### **Alternative approach**

The term of appointment for the ADC could be increased to five years to be in-line with a majority of the Commissioners appointed under other anti-discrimination legislation and other independent statutory offices in the Territory.

### **What difference should it make?**

Increasing the term of appointment will provide greater certainty to the ADC office holder. A longer term of appointment could also provide greater certainty to complainants going through the complaints process. It would also reduce the amount of red tape that surrounds the appointment of office holders by reducing the frequency of the appointment process.

### **Question 19**

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

## **MODERNISING LANGUAGE**

It is proposed that the language in the Act be modernised generally to be gender neutral and remove offensive language.

In particular it is proposed that the terms “man” and “woman” be amended as follows.

### **Repeal the definition of ‘man’ and ‘woman’**

The Act provides definitions for the terms “man” and “woman”. “Man” is defined as “a member of the male sex irrespective of age” and “woman” is defined as “a member of the female sex irrespective of age”.

The definitions in the Act were modelled on the definition of ‘man’ and ‘woman’ as defined in the *Sex Discrimination Act 1983* (Cth) at the time the Act was drafted. In 2013, the *Sex Discrimination Act 1983* was amended to repeal the definitions to ensure that “man” and “woman” were not interpreted so narrowly so as to exclude, for example, transgender women from accessing protections from discrimination on the basis of other attributes contained in the Act.

References to “man” and “woman” as they appear in the *Sex Discrimination Act 1983* (Cth) are to now take their ordinary meaning. It was also not intended by the Commonwealth that the removal of the reference to “irrespective of age” is to limit the application of the *Sex Discrimination Act* to adults only.

## **Alternative Approach**

The Act could be amended by repealing the definitions of “man” and “woman”.

### **What Difference Should It Make**

Repealing the definitions will allow for the ordinary meaning of “man” and “woman” to be applied to the Act. This is a flexible way of allowing the Act to accommodate a changing society as the ordinary meaning will naturally incorporate those changes.

## **Question 20**

Should definitions of “man” and “woman” be repealed?

## **Carer responsibility**

The Act currently protects discrimination experienced because of parenthood which is defined as “whether or not a person is a parent” and includes a step-parent, adoptive parent, foster parent, guardian and a person who provides care, nurturing and support to a child. While the definition is quite broad, it fails to take into account that many people have caring relationships outside this paradigm that impacts on their ability to participate equally in life. Examples include caring for a spouse or parent. Carers perform an important role for the community and it is important that they are protected under the Act.

## **Alternative approaches**

The Act could be amended to replace “parenthood” with “carer responsibilities”.

### **What difference will this make?**

Provide protection for all carers.

## **Question 21**

Should the term “parenthood” be replaced with “carer responsibilities”?

## **Relationship status**

The Act currently provides protection for “marital status.” Marital status includes a range of relationships beyond married couples and includes who you are or have been married to and if you are single. The term marital status is misleading as it does not reflect the true extent of this protection. The protection is broader than married couples.

## **Alternative approaches**

“Marital status” could be replaced with the term “relationship status”.

## What difference will this make?

The term “relationship status” is more likely to be understood by people seeking to rely on the rights the Act provides.

### Question 22

Should the term “marital status” be replaced with “relationship status”?

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