

The Northern Territory Women's Legal Service submission on the Modernisation of the *Anti- Discrimination Act* Discussion Paper

CAWLS
Women's Legal Service



Katherine Womens Information & Legal Service Inc.

A community legal service initiative of Wurlu Wurlinjang Aboriginal Corporation and Katherine Regional Aboriginal Legal Aid Service funded by the Commonwealth Attorney General's department.



ABN 42 830 944 178

**TOP END WOMEN'S
LEGAL SERVICE INC.**

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22 January 2018

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

By email to: Policy.AGD@nt.gov.au

Dear Director,

**Submission to the Modernisation of the *Anti-Discrimination Act* Discussion Paper –
Women’s Legal Services of the Northern Territory**

Thank you for inviting comments on potential future amendments to the *Anti-Discrimination Act* (NT) (“the Act”). The Women’s Legal Services of the Northern Territory (“WLSNT”)¹ welcomes the opportunity to make a submission in response to the discussion paper released by the Department of Attorney-General and Justice Department in September 2017 (“the Discussion Paper”).

About WLSNT

WLSNT is constituted by three community legal centres focused on the advancement of women’s rights. We are funded by the Commonwealth Attorney General’s Department, Department of Prime Minister and Cabinet, and Northern Territory Government, respectively. We provide legal advice, casework, referrals, community legal education and advocacy to women in the Northern Territory (“NT”). Each service works in areas of civil law, including discrimination, domestic and family violence, family law, victims of crime compensation, sexual assault, tenancy, and consumer credit debts.

WLSNT Submission

WLSNT supports the amendments to the Act proposed in the Discussion Paper, such that the Act’s objectives are supported and the legislation provides contemporary and relevant protection from discrimination for all Territorians.

WLSNT is particularly concerned with the protections available under the Act for women in the NT, especially those who identify as Aboriginal and Torres Strait Islander, LGBTQI, women who are culturally and linguistically diverse, and those who experience domestic or family violence (“DFV”), and will make comments accordingly.

¹ Central Australian Women’s Legal Service Inc (“CAWLS”); Katherine Women’s Information & Legal Service Inc (“KWILS”); Top End Women’s Legal Service Inc. (“TEWLS”).

A. The Act should be amended to include DFV as a protected attribute

WLSNT strongly supports the proposed amendments to the Act to insert DFV as a protected attribute. A high proportion of WLSNT clients have had or are experiencing DFV. Our key submission seeks to reflect the consequential impacts this experience has on WLSNT clients.

It is appropriate that there be legislative protections in place which assist in reducing the impact of DFV in the NT. It is our view that including DFV as a protected attribute will alleviate the pressure on victims, encourage acknowledgement and support from the community, and providing greater recourse for those affected. WLSNT agrees with the comments of the National Association of Community Legal Centres that "creating a separate protected attribute for DFV would act as an educative function. In raising the awareness of DFV impacts to the community and businesses, those who have experienced or are experiencing DFV may feel more supported without fear of repercussions in other areas of their lives".²

(i) Issues of DFV in the workplace

Research into the implication of DFV in the workplace shows that 48% of those reporting DFV have had their work capacity affected.³ It is found that women experiencing DFV are likely to have lower personal incomes or a disrupted work history due to changes in their work performance, needing time off due to feeling tired or unwell, or changing jobs at short notice.⁴

In introducing the proposed amendment, a flow on affect may be created by encouraging workplaces to appropriately respond to situations of DFV, such as implementing policies or entitlements for staff to, for example, request leave to attend any necessary medical appointments or make a statement to police. The proposed amendment would also reflect the support of DFV in the *Fair Work Act 2009* (Cth), which allows employees the opportunity to request flexibility in work arrangements if they or a family member is experiencing violence from another member of the family.⁵

² National Association of Community Legal Centre, Submission to the Attorney-General's Department, *National Association of Community Legal Centres' Response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 39

<<https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%20National%20Association%20of%20Community%20Legal%20Service%20-%201%20Feb%202012.PDF>>.

³ Australian Human Rights Commission, *Fact Sheet: Domestic and family violence – a workplace issue, a discrimination issue*, 2014, Australian Human Rights Commission

<<http://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/fact-sheet-domestic-and-family-violence-workplace>>.

⁴ Ibid.

⁵ *Fair Work Act 2009* (Cth) s 65(1A).

In support of our submissions, WLSNT refers to the following example of DFV discrimination:

Jean's story

"Jean had been working with her employer for over a year, and was highly regarded by her team and supervisors. Her husband came into the workplace angry one day and caused problems. After another incident at home she rang her employer to say she would be in a bit late as she had been delayed at the police station reporting a domestic violence incident. Her employer said that her abusive partner represented a work health and safety risk for other staff members and terminated her employment".⁶

Rachael's story

Rachael had been working at a restaurant as a kitchen hand for 5 months. Rachael witnessed the chef being argumentative and verbally violent to his wife over the telephone on a number of occasions. Rachael is a survivor of domestic violence from a previous relationship and was extremely distressed by the incident. She made an incident report to her duty manager and requested not to work on the same days as the chef in question. Shortly after this request, Rachael was advised that her employment was terminated.

Lois' story

Lois had been in a domestic violence relationship with her husband for over 10 years. Both were medical professionals and were working in the same hospital in a small town. After a particularly violent incident, Lois made the decision to report her husband to the police. A full non-contact domestic violence (DVO) order was taken out against him as a result. As this order restrained the husband from being in the same place as Lois, it was not possible for them to be at work at the same time. Lois's manager made a number of comments that the DVO was an inconvenience in the workplace. Sometime later Lois was advised that her contact would not be renewed.

(ii) *Issues of DFV in accommodation*

In our experience, DFV often results in the victim seeking safe accommodation through a crisis shelter. An individual seeking this type of accommodation may experience discrimination when later applying for a private rental due to the perception that the prospective tenant is unstable or is in a situation that poses a risk of safety.

A tenant experiencing DFV may also be placed on a tenancy blacklist due to incidents relating to DFV. Whilst tenancy blacklists are typically used to identify tenants who have issues with rental arrears or maintenance at the conclusion of a tenancy, DFV may affect a tenant's capacity to pay rent and required repairs. As there is a lack of regulations for tenancy blacklists in the NT,⁷ it is WLSNT's submission that it would be appropriate to provide another form of redress to tenants experiencing DFV.

⁶ ACT Human Rights Commission, *Family or Domestic Violence* (31 March 2017) ACT Human Rights Commission <<http://hrc.act.gov.au/discrimination/discrimination-act/family-domestic-violence/>>.

⁷ Mark Rigby and Kate O'Toole, *Lack of regulation means rental blacklist can 'last forever' for NT tenants* (5 June 2017), ABC News <<http://www.abc.net.au/news/2017-06-05/is-the-nt-australias-least-friendly-place-for-renters/8589022>>.

The proposed addition of DFV as an attribute would further supplement the current protections in place under the *Residential Tenancies Act* (NT) which creates an exclusion of vicarious liability upon a tenant for any acts caused as a result of DFV,⁸ and, the *Domestic and Family Violence Act* (NT) ("DFV Act") which allows a court to make orders to adjust a tenancy agreement to protect applicants of a domestic violence order.⁹

In support of our submissions, WLSNT refers to the following example where DFV discrimination can occur in an accommodation situation.

Holly's story

"Holly was being supported by a family violence refuge where she had been resident for five months to access a private rental property. The application process was proceeding with a real estate agency but when the agent discovered that she was exiting a family violence refuge she was told she could no longer apply for a tenancy. When questioned about the decision, the real estate agent said that she would not be a reliable tenant. The property was then allocated to a couple".¹⁰

Eliza's story

Eliza was living in a three-bedroom house with her two children. She was struggling with constant visits from family members. Some family members were violent and verbally abusive towards Eliza. Damage had been done to the house and complaints made about noise. Eliza requested a transfer to a smaller house as she felt that her family would not try to stay if there was not enough room. Eliza was advised that a transfer would not be successful because of the risk that the new house she moved to would also be damaged.

(iii) *Other legislative reforms*

In our submission, including DFV as a protected attribute will place the NT in line with other States and Territories that have already enacted, or engaged in discourse around enacting similar amendments to their respective anti-discrimination laws.

The ACT is at the forefront for a similar amendment to their anti-discrimination law. In 2016, amendments were made to the *Discrimination Act 1991* (ACT) ("Discrimination Act") which resulted in the inclusion of 'subjection to domestic or family violence' as a protected attribute.¹¹ We note that an issue with the Discrimination Act is that it does not define 'subjection to domestic or family violence' and thus, it does not clearly identify the types of DFV situations captured. Given the ACT amendment is recent, there is yet to be any case law on the application of the attribute, however, this also shows the amendment has not opened a floodgate of litigation.

⁸ *Residential Tenancies Act* (NT) s 12.

⁹ *Domestic and Family Violence Act* (NT) s 23.

¹⁰ ACT Human Rights Commission, *Family or Domestic Violence* (31 March 2017) ACT Human Rights Commission < <http://hrc.act.gov.au/discrimination/discrimination-act/family-domestic-violence/>>.

¹¹ *Discrimination Act 1991* (ACT), s 7(1)(x).

(iv) *Suggestions on the implementation of the amendment*

If DFV is made an attribute for the purpose of the Act, WLSNT is of the view that a definition of 'domestic and family violence' must be included to create clarity of its application. Influence can be drawn from the DFV Act; whilst the DFV Act does not explicitly define 'domestic and family violence', concepts of what is considered 'domestic violence' is provided, and, 'domestic relationships' are defined.¹² WLSNT suggests that the Act should consider the meanings provided in the DFV Act to prevent inconsistency of legislation. The Act's definition could provide a general definition of the effect of DFV and/or refer to the DFV Act to provide examples of the types of DFV behavior. A similar structure is provided in section 4AB of the *Family Law Act 1975* (Cth), which outlines the definition of 'family violence'.

WLSNT further submits that the attribute should apply to persons who have experienced or are experiencing DFV, as well as those who are supporting a family member who is experiencing DFV. This would align with other reforms that encourage an insertion of an attribute protecting those who are "a victim of DFV"¹³ or hold "a status of victim/survivor of family violence".¹⁴

B. A representative complaint model should be introduced into the Act

The WLSNT often come across issues that are apparent with more than one client. This normally occurs with housing matters or complaints about government agencies. We find that the re-occurring issues are not normally identified and addressed until it becomes prominent.

It is WLSNT submission that including a representative complaints model process will allow WLSNT and other community representative organisations to better advocate for their clients. We believe issues such as systematic errors will be better identified through a representative complaint process rather than individual complaints.

We often find that some clients are reluctant to pursue a complaint if it requires disclosure of their personal details; this may occur with clients who are suffering DFV or whose matters are sensitive. We believe the process proposed in the Discussion Paper will overcome this issue as it will allow clients to become involved whilst remaining anonymous. Further, providing protection of identity may encourage more clients to become engaged and result in greater change without causing further damage to the client's situation.

¹² *Domestic and Family Violence Act* (NT) s 5.

¹³ In 2017, the South Australian Government made a commitment to draft legislation amending the *Equal Opportunity Act 1984* (SA), making it illegal to discriminate against a person on the grounds of being 'a victim of DFV'; see further Government of South Australia, *Consultation Response Domestic Violence Discussion Paper October 2017* (2017) <https://www.agd.sa.gov.au/sites/g/files/net2876/f/160421_1192_dv_consultationresponse_v12.pdf>.

¹⁴ Victoria is yet to update the *Equal Opportunity Act 2010* (Vic) to include DFV as a protected attribute. In their 2015 submission to the Royal Commission into Family Violence, the Victorian Equal Opportunity and Human Rights Commission recommended that the *Equal Opportunity Act 2010* (Vic) be amended to insert a new protected attribute of "status of victim/survivor of family violence"; See further Victoria Equal Opportunity & Human Rights Commission, Submission to the Royal Commission into Family Violence, 28 May 2015 <<http://www.rcfv.com.au/getattachment/0618D125-07EB-4BBA-BDEC-B72BBC7BFD81/Victorian-Equal-Opportunity-and-Human-Rights-Commission>>.

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

WLSNT supports the introduction of accommodation status as a protected attribute under the Act. By way of context, some WLSNT clients are either currently in or resort to some form of unstable accommodation. This often occurs with clients who leave incarceration and turn to 'long grassing', or women experiencing DFV who enter into a women's/crisis shelter or temporary accommodation. It is our experience that clients in this situation may be faced with unreasonable barriers, particularly in relation to accessing goods and services; for example, clients without a fixed residential address may have trouble accessing a service that requires this information. It has also been found that accommodation status may result in the direct discrimination of a person being treated unfavorably as opposed to someone with a fixed address.¹⁵

According to a 2016 Report by the Australian Institute of Health and Welfare,¹⁶ over 8,000 people in the NT accessed homelessness services between 2015-2016. This equates to a rate of one in 30 Territorians, which is substantially higher than the national figure of one in 85. Whilst these statistics show the need to protect one's accommodation status, there is currently no forms of legislative protection in the NT.

WLSNT is of the view that including accommodation as a protected attribute under the Act will create equal opportunity for the community, as well as influencing further support. For example, service providers may be encouraged to provide support and alternatives to those affected, this may include accepting the details of the temporary accommodation or allowing a forwarding/alternative address to be provided.

WLSNT notes that division 4 of the Act currently provides protection in areas of accommodation. To avoid any confusion, we submit that a clear distinction between the protections should be provided in any amendments to the Act arising from the Discussion Paper. In our submission, this distinction should include defining 'accommodation status' or using an alternative term such as 'housing status'.¹⁷ Influence can be drawn from the ACT Discrimination Act which defines 'accommodation status' as:

- (a) a tenant; and
- (b) an occupant within the meaning of the *Residential Tenancies Act 1997*; and
- (c) in receipt of, or waiting to receive, housing assistance within the meaning of *Housing Assistance Act 2007*; and
- (d) homeless.¹⁸

¹⁵ Lynch, Philip and Stagolla, Bella, 'Promoting equality: homelessness and discrimination' [2002] 7(2) Deakin Law Review, 301.

¹⁶ AIHW, *Specialist homelessness service 2015-16* (15 December 2016), Australian Government, Australian Institute of Health and Welfare <<https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services/contents/policy-framework-for-reducing-homelessness-and-service-response>>.

¹⁷ Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/homelessness-human-rights-issue#fnB52>>.

¹⁸ *Discrimination Act 1991* (ACT) Endnotes, Dictionary.

A person's accommodation status may create assumptions about their character, lifestyle or their ability to pay for goods and services.¹⁹ In situations of homelessness, this discrimination can further entrench homelessness, further impacting an individual's ability to access secure accommodation and support services.²⁰ Implementing a protection such as the proposed accommodation attribute may assist in improving a person's circumstances and support them to take account of their life situation.²¹

D. Socioeconomic status – an alternative attribute?

In our submission, an alternative to including 'accommodation status' as protected attribute could be to prohibit discrimination based on a person's 'socioeconomic status'. Socioeconomic status is the social standing or class of an individual or group. It is often measured as a combination of education, income and occupation.²² There are currently no laws in Australia which provide protection against discrimination of a person's socioeconomic status, however, submissions have been made to include 'social status' as a protected attribute.²³

WLSNT notes the wide scope of socioeconomic status, which can include, but is not limited to, employment, housing or financial means. If this attribute were to be included in amendments to the Act, it is our submission that the relevant definition would need to be carefully drafted to ensure the intended parts of the community are captured. For example, if socioeconomic status includes those who are 'financially disadvantaged', this term will need to be further defined. The introduction of this attribute may cause confusion and an overlap of the legislation if 'accommodation' is made a protected attribute.

WLSNT suggests limiting the attributes to the specific traits, such as accommodation status and employment status, rather than inserting an 'umbrella' term such as 'socioeconomic status'.²⁴ Without further guidance on this amendment, WLSNT cannot provide further comment.

¹⁹ Julie Gardner, Final report to Victorian Government, *An Equality Act for a Fairer Victoria Equal Opportunity Review Final Report*, June 2008, 96 <http://www.daru.org.au/wp/wp-content/uploads/2013/03/An-Equality-Act-for-a-Fairer-Victoria_20082.pdf>.

²⁰ ACT Law Reform Advisory Council, Community Consultation Paper, Review of the *Discrimination Act 1991* (ACT), 11 April 2014 <http://cdn.justice.act.gov.au/resources/uploads/LRAC_Consultation_Paper1.pdf>.

²¹ Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/homelessness-human-rights-issue#fnB52>>.

²² American Psychological Association, *Socioeconomic Status*, American Psychological Association <<http://www.apa.org/topics/socioeconomic-status/>>.

²³ Julie Gardner, Final report to Victorian Government, *An Equality Act for a Fairer Victoria Equal Opportunity Review Final Report*, June 2008, 94 <http://www.daru.org.au/wp/wp-content/uploads/2013/03/An-Equality-Act-for-a-Fairer-Victoria_20082.pdf>.

²⁴ Ibid.

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E. The Act should be updated to protect Territorians from vilification and discrimination on the grounds of sexual orientation, gender identity and intersex status

We submit that laws in the NT should protect all Territorians from vilification. WLSNT supports the introduction of anti-vilification provisions that prohibit offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity or intersex status. Such provisions could mirror the *Anti-Discrimination Act 1998* (Tas), which prohibits conduct that, 'offends, humiliates, intimidates' as attributes on the basis of the same attributes against which a person must not discriminate against another.²⁵

WLSNT notes recent reporting by Jano Gibson, Australian Broadcasting Corporation that provided the example of the presence of a homophobic slur on an overpass near Darwin that drew links between same-sex marriage and child abuse. While police could charge the offender with vandalism offences, there was no avenue under NT law for the Anti-Discrimination Commissioner to pursue that individual for potentially vilifying the LGBTIQ community.²⁶

A further concerning example is the 2016 mobile phone app "Survival Island 3: Australia Story 3D), which encouraged players in a colonist fantasy to bludgeon Aboriginal people to death. WLSNT notes comments from Commissioner Sally Sievers, who stated "we got lots of calls and lots of mentions about that but because we didn't have vilification legislation, all we were able to do was refer those people off to the Australian Human Rights Commission."²⁷

Protection from vilification under the NT Act would mean the above-mentioned kinds of acts could be dealt with by NT law and provide local recourse to Territory victims of vilification.

F. The exclusion of assisted reproductive treatment from services should be removed

WLSNT submits the NT should follow the example set by South Australia ("SA") and amend the Act to remove the carrying out of an artificial fertilisation procedure as an exempt provision of service. The Statutes Amendment (Surrogacy Eligibility) Bill passed in February 2017, as part of a suite of South Australian reforms, including equal adoption laws, which came into effect in early 2017.²⁸ This amendment reflects a broader national trend of removing laws that discriminate against LGBTIQ Australians, with Queensland passing a bill repealing the 'gay panic defence' for murder charges earlier this year.²⁹

²⁵ *Anti-Discrimination Act 1998* (Tas) s 17(1).

²⁶ Jano Gibson, *NT Government considers introducing anti-vilification laws for race, sexual orientation, disability*, 4 September 2017, ABC News <<http://www.abc.net.au/news/2017-09-04/nt-government-considers-introducing-anti-vilification/8869174>>.

²⁷ Jano Gibson, *NT Government considers introducing anti-vilification laws for race, sexual orientation, disability*, 4 September 2017, ABC News <<http://www.abc.net.au/news/2017-09-04/nt-government-considers-introducing-anti-vilification/8869174>>.

²⁸ Human Rights Law Centre, *Same sex couples in South Australia have access to IVF and unpaid surrogacy*, 28 February 2017, Human Rights Law Centre <<https://www.hrlc.org.au/news/2017/2/28/same-sex-couples-in-south-australia-to-have-access-to-ivf-and-unpaid-surrogacy>>.

²⁹ Stefan Ambruster, *Queensland abolishes 'gay panic' defence to murder*, 22 March 2017, SBS <<http://www.sbs.com.au/news/article/2017/03/22/queensland-abolishes-gay-panic-defence-murder>>.

The NT remains the only jurisdiction in the country where assisted reproductive treatment providers are legislatively permitted to discriminate against people on the basis of sex, gender identity or marital status. Repromed, the only provider in the NT, is a South Australian Company who have said that the recent SA law change means that they cannot discriminate against potential customers in the NT.³⁰ To provide certainty for LGBTIQ Territorians, the Act should be amended to formally effect this change in the NT.

Conclusion

WLSNT strongly supports and recommends amendments to the Act to bring the NT in line with other Australian jurisdictions. We support amendments that will serve to protect Territorians who may suffer discrimination because they have experienced or are experiencing DFV, on the basis of their accommodation, because of their sexuality, or otherwise. Further, we support the introduction of a representative model process and anti-vilification provisions to the Act, and the removal of the exclusion of assisted reproductive treatment from services.

We thank you for your consideration of the above. Should you wish to discuss this submission further, please do not hesitate to contact Ms. Vanessa Lethlean [REDACTED]

Yours faithfully,
Northern Territory Women's Legal Services

[REDACTED]
Vanessa Lethlean
Managing Solicitor
Top End Women's Legal Service Inc

³⁰ George Hiltch, *Gay couples denied access to IVF after refusing to claim infertility, NT advocacy group says*, 25 June 2017, ABC News <<http://www.abc.net.au/news/2017-06-24/gay-couples-refused-ivf-in-nt-forced-to-go-interstate/8648890>>.