



**Community and Public Sector Union  
Submission:**

**Modernising the NT  
Anti-Discrimination Act**

**January 2018**

## OUTLINE OF SUBMISSION

The CPSU is a key union representing employees in the Northern Territory Public Service (**NTPS**) and in the Australian Public Service (**APS**) in NT. The CPSU welcomes the chance to comment on the reform of the *Anti-discrimination Act 1993 (NT) (Act)*.

The CPSU believes all people deserve dignity and respect and it is important that all people are protected from discrimination both in the workplace and in society. The CPSU commends the NT Government for modernising the *Anti-Discrimination Act 1993 (NT)* as it is important that protections against discrimination are inclusive and address the issues and potential sources of discrimination of the current day.

The CPSU submission does not address all the questions posed by the discussion paper. The fact that certain topics are not addressed by this submission should not be taken as disagreement to the proposals in the discussion paper. This submission focuses on the following issues:

- Protections for people experiencing domestic violence;
- Inclusion of the attribute of socioeconomic status;
- Updating the term 'sexuality' to 'sexual orientation';
- Inclusion of the attribute of 'gender identity';
- Inclusion of the attribute of 'intersex status';
- Expanding the definition of work;
- Expanding the definition of Service; and
- Introduction of a representative complaint model

### Recommendations

1. The Act be amended to create protections for people against direct and indirect discrimination due their experience of domestic violence. This should include a positive onus on employers to make reasonable adjustments to support employees.
2. That socioeconomic status be included as a protected attribute under the Act.
3. That the term 'sexuality' is updated to the more inclusive term 'sexual orientation' as defined in the *Sex Discrimination Act 1984 (Cth)*.
4. That the term 'sex' is updated to the more inclusive term 'gender identity' as defined in the *Discrimination Act 1991 (ACT)*.
5. That the term intersex status is included as a protected attribute under the Act.
6. That the definition of 'work' be expanded to ensure that it includes volunteers and other modern working arrangements.
7. That the Act be amended to ensure that people providing a service would be able to seek protection under the Act.
8. That a representative complaint model be introduced as proposed by the discussion paper.
9. That the Act be amended to provide an explicit right for a union to bring a complaint on behalf of one or more members.
10. That the drafting of a representative complaint model ensures that such a complaint under the Act would not deprive a person of the ability to lodge a general protections complaint under the *Fair Work Act 2009 (Cth)* .

## MODERNISATION REFORMS

### Domestic violence

The CPSU supports the Act being amended to create rights for people experiencing domestic violence in areas of life such as employment, education and accommodation.

There is an urgent and immediate need for anti-discrimination protections from discrimination for those affected by family and domestic violence within employment and public life. This is important given the seriousness and potentially devastating impact of family and domestic violence on citizens, workers and within our community. Family and domestic violence is a significant issue for citizens and workers in the NT as highlighted by reports that the 'victimisation rate in the NT is three times higher than anywhere else in Australia'.<sup>1</sup>

Family and domestic violence affects citizens in the workplace in many ways including financial stability and ability to maintain work (e.g. in terms of their ability to get to work, punctuality, leave requirements, being unwell and finding it hard to get work done, and quality of time at work). The workplace is also a place where those experiencing family and domestic violence can be targeted by the perpetrator. Research in 2011 found that 19% of Australian employees experiencing domestic violence reported harassment at their place of work.<sup>2</sup> Family and domestic violence and its repercussions can also cause 'financial poverty for women through disruption to work, absenteeism and likelihood of resigning or being terminated' (Access Economics 2004; ADFVC 2012).

Protections against discrimination based on family and domestic violence are also necessary on the grounds of preventing gender discrimination. The reality is that the vast bulk of victims are female. For example the NT submission in to the Federal Senate Inquiry into family and domestic violence indicates that in 2011, 82% of victims were female.<sup>3</sup>

As the NT anti-discrimination reform discussion paper suggests, deciding to provide protections for domestic and family domestic violence as a protected attribute would provide practical and real improvements for those affected by family and domestic violence. Anti-discrimination protections can mitigate against discrimination that occurs as a result of family and domestic violence, and also affect how comfortable those experiencing family and domestic violence are in accessing support.

#### Recent industrial reforms

The foundational work of academics, bodies such as the Australian Domestic and Family Violence Clearinghouse (ADFVC) and unions, as well as the Australian Law Reform Commission (ALRC), has been instrumental in securing major workplace reforms for employees affected by family violence. As part of the National Plan to Reduce Violence Against Women and their Children, there has already been progress in providing additional support and entitlements to employees affected by family or domestic violence including through amendments to the National Employment Standards in the *Fair Work Act 2009 (Cth)* (*FW Act*) to broaden the group of employees that can request flexible working

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<sup>1</sup> NT Government, [Domestic, Family and Sexual Violence Reduction Framework 2018-2028](#)

<sup>2</sup> UNSW Gendered Violence Unit <https://www.arts.unsw.edu.au/research/gendered-violence-research-network/gendered-violence-work/>

<sup>3</sup> NT Government, [Submission to Senate Inquiry into Domestic Violence in Australia, No. 158, November 2014](https://www.humanrights.gov.au/sites/default/files/57.2%20Northern%20Territory%20submission%20to%20the%20Inquiry%20into%20Domestic%20Violence.pdf) <https://www.humanrights.gov.au/sites/default/files/57.2%20Northern%20Territory%20submission%20to%20the%20Inquiry%20into%20Domestic%20Violence.pdf>

arrangements to include those who are experiencing family violence or who are caring or supporting a family or household member who is experiencing family violence.

Work is also underway to include specific leave provisions and other entitlements in enterprise agreements and modern awards. There are now numerous agreements, awards and policies across Australia which provide employees experiencing domestic or family violence with a access to a variety of entitlements, including paid leave, flexible work arrangements and other support mechanisms. Estimates from the UNSW Family and Gendered Violence unit indicate that around 1.6 million Australian employees are covered by family and domestic violence clauses in an award or agreement.<sup>4</sup> This includes the Northern Territory government which currently provides leave through a by-law, and also in the new NTPS enterprise agreement recently agreed to by employees.

Although these are important reforms, there is still no general right to dedicated leave and other arrangements on family and domestic violence grounds for employees who are not covered by an enterprise agreement that includes these provisions. Nor do the protections in the FW Act or the vast majority of enterprise agreement provisions include protection against discrimination on the grounds of family and domestic violence.<sup>5</sup>

There are also limits on the availability of flexible working arrangements in the FW Act and limited rights to challenge a decision by an employer not to grant these arrangements. Providing discrimination protection would provide greater onus on an employer to make reasonable adjustments and allow flexible working arrangements where an employee has experienced family and domestic violence, and provide an avenue for employees to pursue where reasonable adjustment is not made.

Providing discrimination as a status protected from discrimination would make it more likely that those experiencing family and domestic violence would seek or access support in the workplace. As the UNSW Family and Gendered Violence Unit research states, this protection 'would serve an important normative function, signalling that domestic violence is unacceptable and acknowledging the harm experienced by victims can be exacerbated by negative attitudes and inflexible policies'.

CPSU members requiring assistance due to family and domestic violence can find it difficult to obtain sufficient support in the workplace, either due to a lack of clear support from the employer or because of a fear of discrimination. These employees can become marginalised and disempowered. For example where an employee does not feel able to access support when experiencing family and domestic violence, they may take unauthorised leave or find themselves being performance managed for the amount of leave they take.

#### Recommendations about extending discrimination protection

The CPSU recommends extending discrimination protection to provide an avenue for employees to deal with direct discrimination and indirect discrimination, which would require employers to better support employees. The CPSU also recommends a specific positive onus on employers to make reasonable adjustments to support employees affected by family and domestic violence. The CPSU

<sup>4</sup> UNSW Family and Gendered Violence Unit, <https://www.arts.unsw.edu.au/research/gendered-violence-research-network/gendered-violence-work/>

<sup>5</sup> UNSW Family and Gendered Violence Unit, Submission to the Senate Standing Committee on Education, Employment & Workplace Relations Inquiry into the Fair Work Amendment Bill 2013, [https://www.arts.unsw.edu.au/media/FASSFile/Submission to the Senate Standing Committee on Education Workplace Relations Inquiry into the Fair Work Amendment Bill 2013.pdf](https://www.arts.unsw.edu.au/media/FASSFile/Submission%20to%20the%20Senate%20Standing%20Committee%20on%20Education%20Workplace%20Relations%20Inquiry%20into%20the%20Fair%20Work%20Amendment%20Bill%202013.pdf)

supports the form of recommendation developed by the Family and Domestic Violence Clearing house which reads 'duty holders should have a standalone obligation to make reasonable adjustments up to the point of undue hardship'.<sup>6</sup>

This would encourage employers to implement policies to better support employees who are experiencing family and domestic violence and make an effort to facilitate flexible working requests, develop safety plans, provide practical support to employees, and provide leave.

#### Accommodation and Education

There is a strong connection between being able to access and maintain housing and being able to continue to work and maintain stability. The CPSU recommends that protection against discrimination on the grounds of family and domestic violence be extended to accommodation in order to prevent citizens having their situation made more precarious through unfair discrimination without legal recourse. Education also is an important public component of life that has links between long term financial situation, mobility and prosperity. It would be beneficial for protection against discrimination on the grounds of family and domestic violence be extended to both these arenas.

RECOMMENDATION 1: The Act be amended to create protections for people against direct and indirect discrimination due their experience of domestic violence. This should include a positive onus on employers to make reasonable adjustments to support employees.

### **Socio-economic status**

The CPSU supports socio economic status being included as a protected attribute because those experiencing discrimination on other grounds are also more likely to be in poverty. This is a very real issue in Australia today, with income inequality at its greatest level in 70 years and a majority of Australians experiencing a decline in living standards and job security.<sup>7</sup>

Discrimination on the grounds of socio-economic status can entrench and exacerbate cycles of poverty. The intersectionality of socio-economic status with other protected factors makes this particularly important to address.

By creating a protected status around socio-economic status, this would then provide a positive requirement for agencies and organisations to consider disadvantage from direct and indirect discrimination for socio-economic reasons and require that they manage policies and interactions in a way that reduces this disempowerment. This would be a powerful benefit for those who are disadvantaged in society.

RECOMMENDATION 2: That socioeconomic status be included as a protected attribute under the Act.

<sup>6</sup> [https://www.arts.unsw.edu.au/media/FASSFile/Submission\\_to\\_Consolidation\\_of\\_Commonwealth\\_AntiDiscrimination\\_Laws\\_Discussion\\_Paper\\_\\_Improving\\_Protection\\_for\\_Victims\\_of\\_Domestic\\_Violence.pdf](https://www.arts.unsw.edu.au/media/FASSFile/Submission_to_Consolidation_of_Commonwealth_AntiDiscrimination_Laws_Discussion_Paper__Improving_Protection_for_Victims_of_Domestic_Violence.pdf)

<sup>7</sup> <https://www.actu.org.au/actu-media/media-releases/2017/new-actu-report-rising-inequality-an-australian-reality>

## Gender and Sexual Orientation

The CPSU believes all people deserve dignity and respect, both in the workplace and in society. Our union has a long and proud history of campaigning for equality and inclusiveness, and opposing discrimination. The CPSU proudly supported reforms for marriage equality, and continues to fight for gender equality and diversity.

The CPSU supports the submission of Rainbow Territory.

Sexual Orientation, Gender Identity and Intersex (SOGII) rights are about ensuring equal application of human rights to all people, regardless of their sexual orientation, gender identity and intersex status. These rights are provided in international treaties to which Australia is a party. While the status of SOGII rights in Australia has been steadily progressing in recent years, LGBTQI communities continue to come up against unjust discrimination and barriers to fair and equal treatment in a range of areas of public life, including work.

The Australian Human Rights Commission's *'Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights' National Consultation Report 2015* identified a range of significant challenges affecting our LGBTQI communities including:

- Poor community understanding and visibility of the distinct issues that affect people on the basis of SOGII status – particularly gender identity and intersex status.
- State-sanctioned structural discrimination on basis of SOGII status – with implications in legitimising institutional and interpersonal discrimination.
- Unacceptable high rates of marginalisation, bullying, harassment and violence.

To address these and other issues identified in the Report, the AHRC called for a variety of responses at the Commonwealth and state and territory levels, including specific law reform.

At the state and territory level the Report recommended specific law reforms, including a review of the coverage of SOGII issues in anti-discrimination laws and for these laws to be amended as appropriate to ensure they are inclusive of different SOGII issues (AHRC Report, page 2)

The CPSU supports reform to make clear that gender identity, sexual orientation and intersex status are protected in the *Anti-Discrimination Act 1993 (NT)* in line with the reforms to the *Sex Discrimination Act 1984 (Cth)*.

### Is updating the term sexuality to sexual orientation without labels appropriate?

The CPSU supports updating the discrimination ground of 'sexuality' with the more inclusive 'sexual orientation'. The CPSU considers by adopting the term 'sexual orientation' and a general definition, rather than particular labels, the Act will reflect up-to-date terminology which is considered more accurate and inclusive.

The CPSU notes that the Rainbow Territory's submission supports the use of the term sexual orientation, however notes a preference for a definition which differs from that in the *Sex Discrimination Act 1984 (Cth)* in order to afford protection to sexual minorities such as people who identify as asexual, as well as for people who identify as gay, lesbian and bisexual. The CPSU supports the Rainbow Territory's recommended definition for sexual orientation.

**RECOMMENDATION 3:** That the term 'sexuality' is updated to the more inclusive term 'sexual orientation' as defined in the Rainbow Territory submission.

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

The CPSU supports updating the discrimination ground of 'sex' with the more inclusive 'gender identity'.

The CPSU accepts 'gender' is a broader concept than 'sex', and is not limited to biological sex assignment. Gender encompasses appearance, mannerisms, social identity, how a person presents and is recognised in their community. Gender recognises that a person's assigned biological sex and gender may not be the same, and that some individuals may not identify as male or female.

The CPSU considers that adopting 'gender identity' as a protected attribute will make clear that people of diverse gender are protected under the Act. The CPSU notes that the Rainbow Territory's submission recommends that gender identity be defined as per the definition contained in the *Discrimination Act 1991 (ACT)*. The CPSU supports the Rainbow Territory's recommended definition for gender identity.

RECOMMENDATION 4: That the term 'sex' is updated to the more inclusive term 'gender identity' as defined in the *Discrimination Act 1991 (ACT)*.

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

The CPSU supports the inclusion of 'intersex status' as a protected attribute under the Act.

The CPSU accepts that an intersex person will have biological variations on traditional biological sex assignment of male and female, and may face unjust discrimination due to the binary view of sex that is largely held by society. The CPSU notes intersex status was adopted under the *Sex Discrimination Act 1984 (Cth)* to recognise intersex as a biological characteristic and not a gender identity issue.

The CPSU views the adoption of 'intersex status' in the Act as a more inclusive term than 'sex', and ensures consistency with the *Sex Discrimination Act 1984 (Cth)*.

RECOMMENDATION 5: That the term intersex status is included as a protected attribute under the Act.

**EXPANSION OF THE DEFINITION OF 'WORK'**

The CPSU supports the proposal to expand the current definition of work to explicitly clarify the inclusion of "volunteers, shared workplaces and anything akin to a work arrangement".

Workplaces comprised of a mix of paid workers and volunteers are prevalent within the community sector. Volunteers will include categories of workers such as unpaid student interns working for fixed period, long term periodic volunteers (i.e. people working 1 evening a week over a long period of time), and people seconded to workplaces from other organisations.

The CPSU agrees that the fact volunteers give their time and labour freely should have no bearing whatsoever on their right to the same protection from discrimination as paid workers. The CPSU also

agrees that expanding the definition as proposed will assist in providing community organisations with a clear understanding that their obligations under the Act apply to volunteers.

The changing nature of work in the Australian economy more generally, also shows an increasing reliance by employers on sub-contractors, labour hire, and 'gig' workers. These developments, especially the rise of a 'gig economy' pose fundamental challenges to traditional models for regulating work and setting minimum standards.<sup>8</sup>

In the CPSU's experience, there has been an concerning increase recently in the number of Commonwealth Government agencies making use of outsourcing and labour hire contractors to perform work previously undertaken by permanent public servants.

A recent report by the Australian National Audit Office indicated that contract procurement in the public sector was worth as much as \$47.4 billion in 2016-2017.<sup>9</sup> To get an idea of the scale of government job outsourcing, early this year it was reported that there were more consultants, contractors and labour hire staff in the Department Defence than permanent APS employees.<sup>10</sup>

These types of work arrangements have the effect of undercutting and confusing employee rights and protections in the workplace. Further, as the discussion paper points out, these work arrangements are no longer limited to traditional employer / employee relationships.

Similar to the examples cited in the discussion paper, public service workplaces today increasingly include people working for a number of different entities or organisations, sub-contractors and labour hire firms – all working collectively. For example the Department of Human Services is engaging 1,000 staff through a labour hire arrangement to undertake compliance work in the department. These people will be working alongside APS employees doing the same work but for different employers on different conditions.

In the specific context of anti-discrimination law, the CPSU agrees that the current wording in the Act may prove unclear, if not deficient, in circumstances where the prohibited conduct occurred between two workers who were ostensibly engaged by different employers or working for different companies.

In light of the foregoing, the CPSU submits that broadening the definition of work to include non-traditional work arrangements is an important step to keep pace with changes and anticipate further work arrangement in public sector service delivery.

**RECOMMENDATION 6:** That the definition of 'work' to ensure that it includes volunteers and other modern working arrangements.

<sup>8</sup> 'Regulating work in the gig economy: What are the options?' Andrew Stewart, Jim Stanford *The Economic and Labour Relations Review*, Vol 28, Issue 3, pp. 420 – 437, First Published August 7, 2017

<sup>9</sup> ANAO Report No.19 2017–18, Australian Government Procurement Contract Reporting, p 6.

<sup>10</sup> Noel Towell (2017, 20 February). Consultants and contractors now outnumber public servants in Defence Department.

Canberra Times. Retrieved from <http://www.canberratimes.com.au/national/public-service/consultants-and-contractors-nowoutnumber-public-servants-in-defence-department-20170216-guf561.html>



## **Amendment to the definition of ‘services’**

The discussion paper points out, 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.

As a union representing tens of thousands of public servants who provide services to the public, the CPSU has a particular interest in seeing anti-discrimination protection extended to cover frontline customer service staff in their daily interaction with members of the public.

Public sector job losses and increasing workloads have led to increased pressure on public servants.

For example, between 2010-11 and 2016-17, the federal government cut 5,547 or 16% of jobs in the Department of Human Services. At the same time incidents of customer aggression have risen significantly, with increasing numbers of DHS offices requiring permanent security guards.<sup>11</sup>

Customer aggression and discrimination is a real issue for both call centre and face-to-face Centrelink workers. Anecdotal evidence from CPSU members indicates the front-line public servants routinely experience racial, sexual and gender-based discrimination from highly stressed and frustrated customers in the performance of their daily work. The CPSU agrees that in these increasingly pressured work environments, where the employer has statutory determined processing times and standards, employees are increasingly exposed to abuse.

In this work environment there is a real possibility that these workers can become reluctant to take assertive action in the face of discrimination, out of fear of the repercussions from their employer and the subsequent implications for their perceived performance, and even their job security. Broadening the definition of “services” in the act to protect service providers, will give employees more confidence to speak up against discrimination they suffer and will also provide a stronger onus on employers to take action in defence of employees who suffer such discrimination.

Therefore, in line with discussion paper, the CPSU supports the being amended so that people providing a service would also be able to seek protection under the Act.

**RECOMMENDATION 7:** That the Act be amended to ensure that people providing a service would be able to seek protection under the Act.

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<sup>11</sup> Marie Sansom (2015, 31 August). Centrelink staff deal with 24 aggressive incidents a day. Government News. Retrieved from <http://www.governmentnews.com.au/2015/08/centrelink-staff-deal-with-24-aggressive-incidents-a-day/>

## INTRODUCTION OF A REPRESENTATIVE COMPLAINT MODEL

The CPSU supports the introduction of a representative complaint model that would allow representative groups such as unions and other organisations to bring a complaint on behalf of a group of people.

While an individual complaint model is suitable in many situations, there are other situations where it may not be effective. These may include people engaged on insecure working arrangements who do not want to go out on a limb and identify themselves. It may also include instances of discrimination that are systematic or structural and have a potential impact beyond individuals. Representative bodies are generally best placed to identify broader issues that affect many people and to bring these to the Commission's attention.

The CPSU notes that the Tasmanian and Western Australian jurisdictions already specifically allow unions to bring complaints on behalf of a member or groups of members that they represent.

### Broad representative complaints

The discussion paper proposes that a representative complaint could be lodged without obtaining individual consent of each person who may assist the subject of the complaint. The CPSU supports this proposal. We note that the test in the Tasmanian *Anti-discrimination Act 1998* is that a union may represent a class of members if the Commissioner is satisfied that a majority of the members are likely to consent.<sup>12</sup> Industry wide discrimination issues could potentially affect large numbers of people in different workplaces. It would be impractical for a representative to receive written consent of each person represented in such a matter.

The CPSU supports the model proposed in the discussion paper that would involve compulsory conciliation and then an ADC investigation if the matter doesn't settle at conciliation, which may result in a publicly issued report. The CPSU also supports the proposal that such a report could be used as evidence to support the lodging of an individual complaint. In addition to this, submissions, evidence and findings of fact in the ADC investigation should also be admissible to support an individual complaint. This would avoid a doubling up of processes and make it easier for individuals to apply for a remedy when a finding of discrimination has already been made.

### Representatives making complaints on behalf of individuals

In addition to representatives being able to lodge a representative complaint about broad systemic issues that may result in a public report, unions and other representative bodies should also be able to lodge complaints on behalf of an individual or multiple people they represent that may be referred to the Civil and Administrative Tribunal for a specific remedy.

The CPSU notes that the Western Australian and Tasmanian Acts permit unions to bring complaints that can be referred to the relevant Tribunal on behalf of members.<sup>13</sup> The current Act allows representative to make a complaint on behalf of another person if authorised in writing by the commissioner. It also allows for complaints to be heard jointly if arising out of the same facts. The CPSU recommends that it be made clearer that a union can bring a complaint on behalf of one or more members.

<sup>12</sup> *Anti-discrimination Act 1998 (Tas)*, s60(1)(c)

<sup>13</sup> *Anti-discrimination Act 1998 (Tas)*, s60(1)(c); *Equal Opportunity Act 1984 (WA)*, s83(1)(c)

### Interaction with the Fair Work Act

A provision allowing for broad representative complaints would need to be crafted so that a complaint made by a representative body would not prevent a person bringing a complaint for discrimination under the Fair Work Act. Section 734 of the Fair Work Act states:

- (1) *A person must not make a general protections court application in relation to conduct that does not involve the dismissal of the person if:*
- a. an application or complaint under an anti-discrimination law has been made by, or on behalf of, the person in relation to the conduct; and*
  - b. the application or complaint has not:*
    - i. been withdrawn by the person who made the application; or*
    - ii. failed for want of jurisdiction.*

Given that the representative model imposed would not provide for specific remedies or in many cases even a specific determination in relation to a person, it should not prohibit a person from seeking other avenues to do this. This is especially important if, as recommended, a complaint may be lodged without each individual's direct consent.

RECOMMENDATION 8: That a representative complaint more be introduced as proposed by the discussion paper.

RECOMMENDATION 9: That the Act be amended to provide an explicit right for a union to bring a complaint on behalf of one or more members.

RECOMMENDATION 10: That the drafting of a representative complaint model ensures that such a complaint under the Act would not deprive a person of the ability to lodge a general protections complaint under the Fair Work Act 2009.