

Wednesday 31 January 2018

PRIVATE & CONFIDENTIAL

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Dear Ms Daniel Yee,

MODERNISATION OF THE ANTI-DISCRIMINATION ACT

We welcome an opportunity to comment on these important reforms.

The *Anti-Discrimination Act* (the Act) is beneficial legislation created to meet Australia's international obligations¹ in relation to the elimination of discrimination, the elimination of sexual harassment and the promotion and acceptance within the community of the principle of the right to equal opportunity. It is legislation that seeks to create a fair community in which all Territorians can equally participate in public society thereby building an inclusive community.

The Anti-Discrimination Commission (ADC) is a fundamental part of the framework established to achieve the objectives set out in the Act. The ADC is led by the Anti-Discrimination Commissioner who is tasked with achieving the objects of the Act. In practical terms the ADC provides:

- A formal complaints mechanism in which people who feel they have been discriminated against may make a complaint.
- A public training and education program to educate about rights and obligations and to better understand what discrimination is.
- A free confidential enquiry line for members of the public to get information on the Act.

¹ Human rights treaties to which Australia is a party: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination against Women (CEDAW). Parliamentary Joint Committee on Human Rights: Guide to Human Rights, June 2015.

- A professional business line for businesses to get information on their obligations.
- Contribution to public policy on issues relating to discrimination.
- Broader public education and advocacy on discrimination through participation in community forums, social media and events.

The Act also provides a framework that shapes both the rights of people who are sought to be protected by the Act and the obligations of those required to meet the standards of the Act. The Act is an important vehicle that:

- Informs organisational policies and procedures.
- Provides a framework for appropriate conduct in public places.
- Is an important advocacy tool for people or advocates to negotiate their or other's rights.
- Is an educational tool used to improve inclusive attitudes and practices.

Discrimination may be experienced by people every day in many ways and in many contexts. The Act does not seek to prescribe or prohibit discriminatory conduct in every setting, nor does it assume that all discrimination is undesirable. It seeks to draw a balance between rights and obligations and to identify types of discrimination that negatively impact on people in the Northern Territory (NT).

In our experience people who are not the subject of regular discrimination can be quick to minimise its impact and dismiss it as a character flaw or oversensitivity of the individual experiencing the discrimination. What we see at the ADC and what is supported by research, is that discrimination can have deep and serious impacts for people.² The impact is felt beyond the individual experience into much broader communities. For example, if a work place is sexually hostile this will not only impact on the people who the offensive behaviour is directed at, but is also likely to have impact on the overall workplace, including reduced productivity, increased staff absence, higher turnover and potential impacts on outcomes such as profits.

Discrimination can exclude people from society leaving them socially isolated and feeling less because of character traits that often are beyond their control. When this happens to groups of people based on a trait the consequences can be extreme. Groups experiencing discrimination are less likely to be in positions of power or influence within the community and may face access barriers, including levels of hostility from the broader community, in trying to assert or advocate for change by themselves. It results in silencing individuals and whole communities, inequality and a fundamental attack on individual's personal dignity.

² Ferdinand, A., Paradies, Y., & Kelaher, M. (2015). Mental health impacts of racial discrimination in Australian culturally and linguistically diverse communities: a cross-sectional survey. *BMC Public Health*, 15, 401. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4412110/>; Berger, M., & Sarnyai, Z., (2014). More than Skin Deep – stress neurobiology and mental health consequences of racial discrimination, 18(1). <http://www.tandfonline.com/doi/abs/10.3109/10253890.2014.989204>; Jules, et al., (2011). Multiple Pathways Linking Racism to Health Outcomes. *DuBois Review: Social Science Research on Race*, 8(1). <https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/issue/journal-dbr-volume-8-issue-1/8FE3880B9A76C3E535D65AA51A552700>; Matsuda, M. (1989) Public response to racist speech: Considering the victim's story. *Michigan Law Review* 87(8), 2320-23381. <https://www.jstor.org/stable/1289306>.

In the NT we see that the following groups of Territorians are more likely to experience discrimination and therefore less likely to experience equality of opportunity:

- People living with a disability.
- Aboriginal Territorians.
- Territorians from non-English speaking backgrounds or heritage.
- Women (especially Aboriginal Territorians and women living with a disability).
- Territorians from the LGBTIQ community.

The Act is critical in addressing these issues. We believe the reforms proposed will assist in redressing this disadvantage.

This submission will respond to each issue as raised in the Discussion Paper. This submission will include examples of vilification. These are included to illustrate the issues we raise. We ask that these examples be redacted in any public version of this submission to prevent the redistribution of these examples and thereby re-vilification of the individuals and groups to which the issues were targeted.

MODERNISATION REFORMS

The Act is almost 25 years old. It is likely that any future review of the Act will be another 25 years away. It is critical that this opportunity is used to re-draft the legislation to reflect not only what is required today but to contemplate future needs, so it remains relevant for as long as possible. Discrimination law is an ever evolving area of practice and needs to develop alongside changes in community views. It is inevitable that this type of legislation in application will result in changing views over time and is likely to expose other forms of discrimination not yet contemplated.

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

On the 1 August 2013 the *Sex Discrimination Act 1984 (Cth)* was amended to include “sexual orientation” as an attribute. The Act is required to be amended to come in line with these reforms. Sexual orientation is also the protected attribute in the Australian Capital Territory, Western Australia, Tasmania, Victoria and South Australia.

Changing the term “sexuality” to “sexual orientation” will provide a more inclusive attribute as it does not use labels like the current definition does which may lose relevance over time. It is also a term broadly accepted and is consistent with the Yogyakarta Principles plus 10.³

Australia is obliged to enact rights at international law in relation to non-discrimination and equality on the basis of sexual preference. This reform is in line with those obligations.⁴

³ The Yogyakarta Principles plus 10, adopted in Geneva on 10 November 2017 sets out principles and state obligations of the application of International Human Rights Law in relation to sexual orientation, gender identity, gender expression and the sex characteristics. Of note is Principal 2 – the right to equality and non-discrimination. <http://yogyakartaprinciples.org/>

⁴ Human rights treaties to which Australia is a party: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the

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

The 2013 amendments to the *Sex Discrimination Act 1984 (Cth)* also included the new attribute gender identity. The Act is required to be amended to come in line with this reform and to provide more inclusive protection for the trans and gender diverse community.⁵

The Act currently has “sex” as a protected attribute. Sex is the classification of all people on the basis of a binary concept of male and female and is based on medical models that assume particular sex characteristics attach to whether a person is male or female. Gender identity is not about sex but about what gender a person identifies as, which may be different. For example at birth a person may be classified as female but growing up may identify as male. This distinction is important as discrimination is often experienced because of this difference.

Types of discrimination experienced may include, but is not limited to:

- In the built environment. For example public toilets, school change rooms, sporting activities or prison. Buildings are often built on a narrow assumption that all people are male or female and that their physical sex characteristics reflect this. These assumptions can make these spaces and others, unsafe, humiliating and degrading for people who do not fit these assumptions.
- Discriminatory attitudes that may result in inequality, discrimination or vilification.

Meg identifies as trans and gender diverse, and refers to herself as she, biologically she was assigned as male at birth. She attends her local employment centre to register for work. She is advised that she must register as male or female. When she advises that she does not identify with either gender, she is told that this is not an option and that it would be better for her employment opportunities if she registers as male given that is the sex assigned to her at birth. She is advised that she is better not telling prospective employers about her gender identity as it is likely this will impact on her employability.

Meg feels humiliated by this advice and feels a sense of despair that she will never be able to gain employment. This resulted in Meg experiencing anxiety and depression which causes her to stop seeking employment, therefore leading to her Centrelink benefits being cancelled and Meg becoming homeless.

If gender identity was a protected attribute under the Act, Meg would be able to either self-advocate in this situation or do so through an independent advocate or bring a complaint to the ADC. This could result in education to the employment service about discrimination and the trans and gender diverse community, respect and dignity for Meg, and ultimately the support she really needed to assist her in gaining employment while retaining and feeling proud of her gender identity.

Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination against Women (CEDAW). Parliamentary Joint Committee on Human Rights: Guide to Human Rights, June 2015.

⁵ Terminology in relation to the trans and gender diverse community changes throughout this section due to differing terminology being used in data collected. Where terminology differs this is because we have adopted wording consistent with the data we have referred to.

Gender identity also includes a person who does not identify as male or female, but as a non-binary gender. It is critical that the Act reflects the expanding conceptualisation of gender to remain relevant and to provide appropriate protection. An example of how there is change in the broader community is with Facebook. Facebook developed 51 gender options for users in the United States and 71 in the United Kingdom, this design has recently been further modified to provide for individuals to enter their own gender description as Facebook found that the previous design was not sufficiently inclusive. Similar practices are being adopted elsewhere. The Act must reflect and embrace these contemporary changes and ensure it operates within an inclusive framework.

Human Rights Treaties provide that all people are treated equally, this includes people who have different gender identities. The *International Covenant on Civil and Political Rights*⁶ provides that a person be treated equally and not discriminated against on the basis of their status. This has been interpreted to include gender identities. Gender identity and discrimination are acknowledged as obligations under the Yogyakarta Principles.⁷

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

The UN Office of the High Commissioner for Human Rights says:

“Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions of male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.”⁸

At a conservative estimate 1.7%⁹ of the population may identify as having an intersex variation¹⁰. Intersex status is not about gender identity and is not intended to create a third sex option. Intersex status is a protected attribute under the *Sex Discrimination Act 1984 (Cth)*.

While the terminology “intersex status” is used in the *Sex Discrimination Act 1984 (Cth)* the ADC submits that consideration should be given to the use of the term “sex characteristics” in line with the updated Yogyakarta Principles 2017 and in line with the Darlington Statement 2017.

Society is built on an assumption that everyone is male or female. Societies’ attitudes are also pinned to this hard held belief, when the concept of male or female is a social construct, it is categorisation created for convenience and simplicity but it is not true. A person with intersex variations may experience discrimination in the built

⁶ Articles 2(1) and 26.

⁷ Gender identity was a focus of the revised 2016 Yogyakarta Principles and in response to acknowledged developments in jurisprudence with this particular issue in International Human Rights law. The Yogyakarta Principles plus 10, adopted in Geneva on 10 November. <http://yogyakartaprinciples.org/>

⁸ Office of the High Commissioner for Human Rights
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx>

⁹ Organisation Intersex International Australia Limited. <https://oii.org.au>

¹⁰ Reliable statistics are difficult to obtain as research is limited in this area and often seeks to capture groups based on LGBTI references that make disaggregation of data regarding intersex difficult to obtain. It is also difficult because people may discover their intersex status at different times of their development and therefore may not know their intersex status at the time asked. People may also feel uncomfortable sharing this information. 1.7% is accepted as the most reliable statistic currently available, but it is possible it is much higher.

environment (e.g. accessing toilet facilities, change rooms after sport) or attitudinal discrimination (e.g. harassment or vilification because of their physical difference).

Amir was born with female genitalia but predominantly male hormones and presents physically with masculine attributes including facial and body hair. He goes to see a GP at his local clinic to seek a pap smear amongst other regular health checks. The Doctor he sees refuses to treat Amir on the basis that they feel uncomfortable.

Inclusion of an attribute to protect intersex people in the Act would provide a framework for the education of health providers about intersex status and encourage more supportive environments. Amir would also be able to make a complaint to the ADC about the experience.

Intersex variation is not well understood by the broader community, levels of ignorance may compound the negative experiences a person with an intersex variation may experience. Statistical information is difficult to obtain given people may not be aware of their intersex variances until they get older (particularly if a decision has been made at birth to re-assign gender), and because it is each individual's right to choose how they identify and whether they want to disclose.

In creating legislation that is relevant for the next 25 years, it is critical that this attribute be protected under the Act. Dialogue around what terminology is used for intersex variation is occurring both internationally and nationally. There is an increasing awareness about intersex variation through public education and social media that needs to be reflected in the Act.

In addition to intersex status being a protected attributed under the *Sex Discrimination Act 1984 (Cth)* it is also protected in the Australian Capital Territory and Tasmania.

Intersex status is referred to in International law as sexual characteristics and is explicitly recognised in the Yogyakarta Principles plus 10¹¹ as being protected by human rights. The principles were re-drafted in 2017 to capture sexual characteristics. Sex is also a protected attribute under International Human Rights Treaties.¹²

Consequence of Discrimination against the LGBTIQ¹³ Community

It is predicted that up to 11 in a 100 people are LGBTI.¹⁴ Data on the LGBTIQ community demonstrates compelling evidence of the extent of discrimination and the devastating consequences of it for people in this community.

The Australian Human Rights Commission¹⁵ has reported that 34% of people in the LGBTI community hide their sexuality or gender identity when accessing services,

¹¹ The Yogyakarta Principles plus 10, Adopted on 10 November 2017, Geneva. <http://yogyakartaprinciples.org/>

¹² Convention on the Elimination of Discrimination against Women (CEDAW).

¹³ The preferred acronym is LGBTIQ, most of the data however has only been done on the more limited community of LGBTI, which is why the referencing in this section is not consistent. LGBTIQ stands for Lesbian, Gay, Bi-sexual, Trans Gender, Intersex and Queer.

¹⁴ Department of Health, Australian Government, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012)

¹⁵ 2014 Face the Facts www.humanrights.gov.au/face-facts

42% at social and community events and 39% at work. Beyond Blue research demonstrated a correlation between high rates of depression in the LGBTI community and the experience of discrimination or fear of it.¹⁶ Members of the LGBTI community are three times more likely to experience depression.¹⁷ Young members of the LGBTI community are particularly vulnerable with 80% of homophobic bullying occurring at schools.¹⁸

Most compelling are suicide statistics that show LGBTI people aged 16 to 27 are five times more likely to attempt suicide,¹⁹ 44% of lesbian women in this age group reports thoughts of suicide with 20% having attempted suicide. 46%²⁰ of gay men in this age group report thoughts of suicide and 14% have attempted suicide. 29%²¹ of bisexual women in this age group have reported thoughts of suicide, with 10% having attempted suicide.

In regard to a person with an intersex variation aged 16 and over, 60% of people had thought about suicide because of a congenital sex variation.²²

The statistics are even higher for the transgender community with rates of suicide attempts being 11²³ times more likely than the general population²⁴. Beyond Blue²⁵ through their market research say that living in isolation, in remote or rural Australia was likely to heighten the risk of discrimination. It also found that transgender people were more likely to have negative experiences with health care providers, including mental health providers, due to ignorance and preferred to use service providers who had previous exposure to the transgender community.

In the NT we know there are members of the trans and gender diverse community, including indigenous members, who live remotely and who reported concerns that echo those raised by Beyond Blue. We also know that in the health sector the services that can be accessed for the LGBTIQ community, particularly in the mental health sector are very limited, making it difficult for people to get the help and support they need. There is currently no dedicated service in the NT for the LGBTIQ community. Likewise the services and supports in the NT for the intersex community is very low.

¹⁶ In My Shoes. www.beyondblue.org.au/glbti

¹⁷ 2014 Face the Facts. www.humanrights.gov.au/face-facts

¹⁸ 2014 Face the Facts. www.humanrights.gov.au/face-facts

¹⁹ 16% of LGBTI reported having attempted suicide. National LGBTI Health Alliance, Snapshot of Mental Health and Suicide prevention statistics for LGBTI people July 2016.

<https://lgbtihealth.org.au/?s=snapshot+of+mental+health+and+suicide+prevention>

²⁰ Supra.

²¹ Supra.

²² Supra.

²³ Supra p 8.

²⁴ A national online survey in 2016 by Trans Pathways found that 4 out of 5 (79.7%) of trans young people had self-harmed compared to 10.9% of the general population aged between 12-17 years; 1 in 2 had attempted suicide being 20 times higher than the general population between 12-17 years. The same survey also reported that 68.9% had experienced discrimination and 89% had experienced peer rejection and 74% experienced bullying. See Telethon Kids Institute. <https://www.telethonkids.org.au/our-research/brain-and-behaviour/mental-health-and-youth/youth-mental-health/trans-pathways/>

²⁵ Beyond Blue pages 2 & 4 *In My Shoes*. <http://resources.beyondblue.org.au/prism/file?token=BL/1013>

The National LGBTI Health Alliance state the reasons for these high statistics are “directly related to experiences of stigma, prejudice, discrimination and abuse on the basis of being LGBTI”.²⁶

Research by the National LGBTI Health Alliance also looked at intersectionality of the LGBTI community with other attributes that may experience discrimination. They found:

- Aboriginal and Torres Strait Islander people made up:
 - 4% of people with an intersex variation.
 - 1.5% of LGBTI young people 16 to 27 and 3% of LGBT young people 14 to 21.
 - 4% of trans and gender diverse young people aged 14 to 25, 2.3% of people aged 18 and over.
- People with a cultural and linguistic diversity:
 - 28.6% of LGBTI young people aged 16 to 27; and 18% of LGBT young people aged 14 to 25.
 - 16% trans and gender diverse.
- People living with a disability:
 - 27% of people with an intersex variation aged 16 and over.
 - 36% of transgender people aged 18 and over identified as having a mental health issue that was a disability or chronic health condition.
- Rural, regional and remote:
 - 5.9% trans and gender diverse people aged over 18 (1.7% trans men and 8.1% trans women).
 - 18% of LGBT young people aged 14 – 21, with 2 % in a remote area.
- Homelessness:
 - 6% of Intersex people precarious accommodation status.
 - 51% of LGB young people and 71% gender diverse young people aged 14 to 21 did not live at home with family.²⁷

Statistics and the anecdotal evidence that is shared with and heard by the ADC justify stronger protections in the Act for the LGBTIQ community.

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 identify or intersex status?

Yes, vilification laws should be introduced in the NT through the Act. Those laws should reflect current vilification laws in the *Racial Discrimination Act 1975 (Cth)*. The ADC would not support the introduction of vilification laws that require “inciting hatred”. Such laws are likely to be of limited value in the NT as this test would be too high and would not reflect the type of vilification reported to the ADC.

The ADC is also of the view that vilification should apply to all of the attributes set out in section 19 of the Act. Vilification is a missing piece of the discrimination puzzle in

²⁶ National LGBTI Health Alliance, Snapshot of Mental Health and Suicide prevention statistics for LGBTI people July 2016. <https://lgbtihealth.org.au/?s=snapshot+of+mental+health+and+suicide+prevention>

²⁷ National LGBTI Health Alliance, Snapshot of Mental Health and Suicide prevention statistics for LGBTI people July 2016, pp 11 & 12. <https://lgbtihealth.org.au/?s=snapshot+of+mental+health+and+suicide+prevention>

the current Act. To ensure reforms will cover future needs it should be extended to all of the attributes.

Vilification is a serious issue in the NT. Signage posted around the NT in response to the Same Sex Marriage plebiscite is a recent example of vilification – see Attachment A. Also attached (Attachment B) are examples of other incidents reported by the media in 2017 also likely to amount to vilification. Vilification laws have the potential to stop crimes occurring, and to discourage the expression of extreme, harmful views in the public space that can be damaging to particular groups and to the broader community.

The Act charges the Anti-Discrimination Commissioner to eliminate discrimination on the attributes covered by the legislation in the areas set out in the Act (see Attachment “C”). Eliminating discrimination in the Territory is very much hampered if this does not include the worse kind of discrimination, vilification. Vilification creates safety issues both physically and psychologically for groups or people at the receiving end of the behaviour. Vilifying behaviour is not people expressing views through well informed reasoned debate, it is not people expressing their views at home or at a barbecue. Vilification is comments or acts in a public setting that target groups or individuals based on attributes, often attributes beyond their control, in a way that all reasonable people would find offensive, insulting, humiliating or intimidating. It is conduct of a very serious nature not mere slights.

For members of the NT community who may experience vilification their only legal recourse is:

- *Racial Discrimination Act 1975 (Cth)*.
- Criminal law, if the Act amounts to a criminal act (e.g. assault).

The *Racial Discrimination Act 1975 (Cth)* only applies to race vilification, it does not cover other types of vilification that may be experienced in the NT. The *Racial Discrimination Act 1975 (Cth)* also requires an individual to make a complaint to the Australian Human Rights Commission which is based in Sydney and runs its complaint process for Territorians remotely²⁸. If the matter is not resolved at a conciliation, then complainants are required to go to the Federal Court for a hearing. Limitations of this model are that in practice it often requires either an individual who is legally represented or an articulate complainant. For complainants where English is an additional language, or not a language at all, or for complainants living with a disability, this maybe a barrier to them complaining. This is disempowering and inequitable and likely to impact on their dignity and feelings of self-efficacy.

In some limited cases a complainant may have the basis for a discrimination case. Restrictions here are that discrimination must take place in an area. Areas are:

- Work
- Goods, services and facilities
- Accommodation
- Education
- Clubs

²⁸ We note that in our experience the AHRC work very hard to overcome issues associated with remoteness. They have historically come to Darwin to run conciliations.

- Superannuation and Insurance.

Vilification law is not limited by one of the prescribed areas but by public place. In our experience vilification often occurs outside the areas prescribed for discrimination, but in general public places such as while walking down the street, in online environments, through public messages and signage.

In 2014 the ADC was the subject of criticism in the media because of the inability to take on a Territory vilification case. The reason we were unable to take this matter was because it did not happen in one of the prescribed areas listed above. The incident occurred on the street in front of a nightclub.

For people impacted by vilifying behaviour, the lack of vilification legislation in the NT means that they either have no recourse or recourse that they may not be able to access.

For the ADC the lack of vilification legislation means that we are required to refer matters of race vilification to the Australian Human Rights Commission if they are not able to be run as discrimination complaints. If the vilification is because of another attribute and it does not fit within discrimination requirements, we are required to advise people that they have no rights or protection under discrimination legislation. This is not a response that is generally well received.

The lack of vilification legislation also impacts on the ability of the ADC to proactively respond to offensive comments in public spaces or online. Vilification legislation would enable the ADC to request the removal of material to prevent or reduce greater harm to the community. At present we have to rely on good will or intervention from the Australian Human Rights Commission for this to occur. Vilification laws in the Act would provide local solutions for local problems.

What form should vilification laws take?

The ADC is of the view that vilification laws should reflect the current form of vilification in the *Racial Discrimination Act 1975 (Cth)* – see Attachment D. We form this view based on our expertise in discrimination law combined with our expertise in facilitating complaints in the discrimination area. Variations on the form of section 18C is likely to impact on the utility of the law.

There has been significant public debate federally²⁹ about the terminology in section 18C of the *Racial Discrimination Act 1975 (Cth)*, of which 2 inquiries have been held federally to examine in part the merit of this terminology. This was in response to concerns that the test in section 18C was too low. In both cases decisions were made to retain the wording. We believe that this is because closer examination revealed that the concerns held were unfounded and did not justify the change. As frequently happens with legislation once interpreted, the ordinary every day meaning of words such as “offence” and “insult” and the meaning attributed to it via decisions do not correlate with the everyday understanding of these words. It is very clear that jurisprudence in this area has demonstrated unequivocally that the test of 18C being “the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or

²⁹Attempts to amend section 18C *Racial Discrimination Act 1975 (Cth)* by the Abbott Government and Freedom of speech in Australia – Inquiry into the operation of Part11A of the *Racial Discrimination Act 1975 (Cth)* and related procedures under the *Australian Human Rights Commission Act 1986 (Cth)*.

intimidate another person or a group of people” is a high, not a low threshold. It requires “profound and serious effects not to be likened to mere slights.”³⁰

Also often absent in public debate regarding section 18C was the existence of section 18D which provides a free speech exemption, ensuring anything said or done reasonably and in good faith is not captured. This exemption is designed to cover artistic expression (for example Cartoonists), journalist comment, academic and scientific comment. The ADC would support a similar exemption for the NT,

Discrimination law and its practice is much specialised and there is limited experience both in the NT and Australia. Caution should be exercised in quickly adopting wording changes to section 18C from sources that may not understand what section 18C actually means. Such submissions should instead be considered from a viewpoint of what they think the legislation should say rather than assuming technical knowledge of how the wording in the legislation will achieve this.

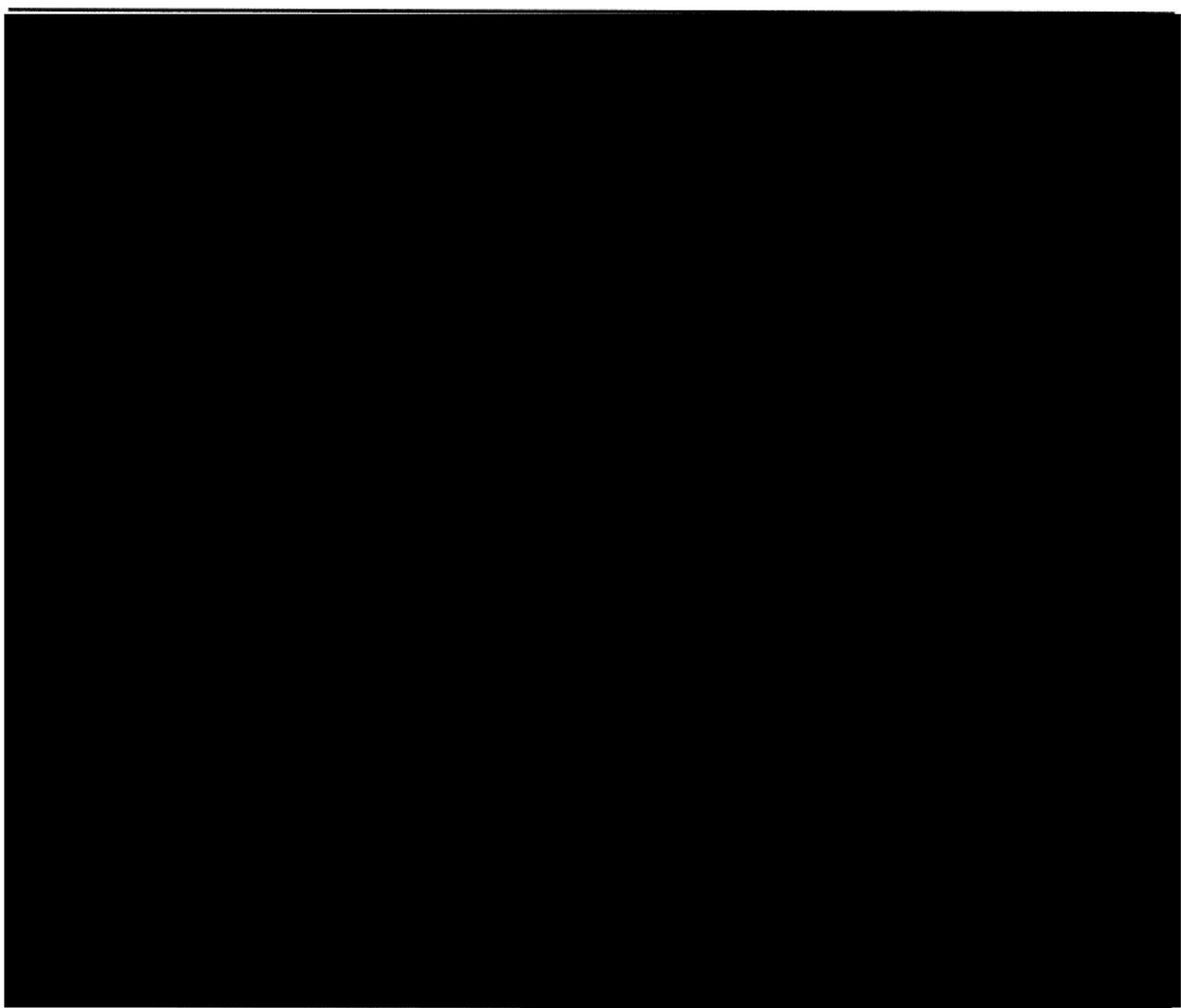
The ADC holds the following concerns about departure from the wording of section 18C *Racial Discrimination Act 1975 (Cth)*:

- Section 18C is well considered by the courts and provides some certainty regarding the scope of its application. Departure from this wording, even if only small, would result in increased litigation and legal argument which is contrary to the objects of the ADC process. It also favours the often more articulate and often legally represented respondent over the often unrepresented complainant who may already have barriers to engaging in the process.
- If the test is too high there will be no complaints, or complaints received will be declined upon reception, resulting in an ineffective law. In our experience, legal models that have an “incite hatred” component would be unlikely to cover many of the incidents of vilification we know happen in the NT. The test in section 18C is already very high, increasing this to include a “incite hatred” component would create in our view an impossible hurdle for complainants to prove.
- Interstate models that have departed from section 18C wording have largely according to our interstate colleagues been of limited or no value, as the tests are too high and do not reflect the type of vilification seen in Australia. The Australian Council of Human Rights Authorities in its submission to the Parliamentary Joint Committee on Human Rights regarding the Inquiry into Freedom of Speech in Australia, made the following observations:

“...ACHRA members are concerned that the case law has set a very high threshold for successful claims under vilification provisions in state and territory laws and so limited their effectiveness in deterring behaviours such as those currently caught by the racial hatred provisions in the RDA”.³¹

³⁰ *Creek v Cairns Post Pty Ltd* [2001] FCA 107 Kiefel J p16.

³¹ P19 Australian Council of Human Rights Authorities, Inquiry into Freedom of Speech in Australia. Submission to the Parliamentary Joint Committee on Human Rights by the Australian Council of Human Rights Authorities. December 2016.



Views expressed about the test being too low are in our view not reflective of the cases determined in this area and are often based on misinformation or misunderstandings about how the section works and what protections exist. The wording in section 18C reflects the type of vilification seen at the ADC. Many of the higher tests require a level of co-ordination and proof of intention to vilify. These tests are appropriate in a criminal setting but in our view not in a complaint, statutory rights setting. If a complaint is made about vilification, nobody gets sent to jail, they are required to attend a compulsory conciliation conference, and if the matter does not resolve they may be required to participate in a hearing, that is limited to civil type remedies.

Lastly, it is possible that this will not be a really high area of formal complaint as indicated by low complaint numbers received by the Australian Human Rights Commission³⁵. Low complaints received by the Australian Human Rights Commission however may be indicative of the access issues reported earlier;

³² [2012] FCA 307. The ADC usually refrains from reporting the facts of vilification cases to prevent the re-distribution and thereby re- vilification of parties or related groups. We request as stipulated at the opening of this submission that this shaded portion of the submission not be made public for these reasons.

³³ The comments set out are examples of comments that were found to be vilification.

³⁴ Incite hatred requires that comments or actions would incite the hatred of the reasonable person. This is a very difficult test to meet, in this case it is more likely that the reasonable person would be offended not incited towards hatred. The Federal court in this case found that the above comments would offend a reasonable person.

³⁵ The Australian Human Rights Commission report the following Northern Territory vilification complaints - 2010-11 (1); 2011-12 (4); 2012-13 (6).

provision of a local avenue of complaint may see these figures increase. However the greater reason for the reform is because of the message it sends to the community about acceptable conduct. It also enables the ADC to take proactive steps when issues do arise, including responding to calls from concerned bystanders, while also providing an avenue of redress for individuals impacted by the behaviour.

Vilification laws are an essential part of addressing discrimination and inequality in the NT. All Territorians should have the right to live a life of dignity and not feel unsafe while in public because of fear of attack because of their membership to a group protected by the Act. We want to see a NT that values civility and social cohesion.

Specific Vilification

Disability Vilification

People living with a disability have shared with the ADC experiences of vilification because of their disability. To protect the privacy of individuals we are unable to share these stories and will need to leave it to individuals to do this themselves. The ADC however knows that disability vilification does and is happening in the NT and often to quite vulnerable individuals who find it difficult to defend themselves. There is no data available about levels of disability vilification because people are often too frightened to speak up, are unable to speak up or believe nothing can be done if they do. At present, the latter is true in the NT if the person is seeking legal recourse and the issue is not covered by existing discrimination legislation.

Vilification legislation would provide a vehicle for people to bring these types of complaints. The complaints process would allow for these issues to be dealt with in a conciliation environment, where ADC staff could assist to safely navigate the issues. If the matter does not resolve then legal recourse could be sought or people could opt out at this stage.

Race Vilification

In the NT we have over 100 nationalities and some 50 social, cultural and religious organisations³⁶. Approximately 26% of the population is Aboriginal, which is proportionally higher than any other state or territory.³⁷ We are also aware of or have had stories shared with us about vilification experienced or feared by other racial and cultural groups in the NT including the Asian, African and Muslim communities.

Race vilification is a common issue that the ADC hears about, particularly in relation to Aboriginal Territorians. A recent example is the Alice Springs Open Forum in which comments made were likely to be acts of vilification against Aboriginal Territorian youths. Comments were made condoning the use of violence and acts of hate against Aboriginal Territorian youths in Alice Springs. During this period a number of Aboriginal youth were assaulted with a baseball bat, while it is not possible to directly attribute this assault to the comments on the Forum it is noted that the act was consistent with comments made on the Forum.

³⁶ NT Government, *Australia's Northern Territory – Multiculturalism* (2016)

³⁷ Australian Bureau of Statistics, 2016.

Comments were made by the Special Rapporteur on the rights of Aboriginal people, after a visit to Australia, including the NT, about the levels of racism against Aboriginal and Torres Strait Islanders as “deeply disturbing.”³⁸

In regard to race generally, the Committee on the Elimination of Racial Discrimination³⁹ also made note of statistics released by the Scanlon Foundation Survey 2016⁴⁰ which identified a significant increase in the reported level of race discrimination from 15% in 2015 to 20% in 2016⁴¹. They stated:

“The Committee also expresses concern that migrants, notably Arab and Muslims, asylum seekers and refugees, as well as Africans and people of African descent, South Asians, and Indigenous Peoples are particularly affected by racist hate speech and violence.”⁴²

The Australian Human Rights Commission, in reporting to the Committee on the Elimination of Racial Discrimination, advised that 34% of race based complaints received in 2016-17 related to racial hatred.

An overwhelming body of recent research has clearly linked experiences of racial discrimination and racism with physical and mental harm. In 2015, a national survey of culturally and linguistically diverse (CALD) groups in Australia found strong connections between racism and negative health outcomes. BMC Public Health found experiences of racial discrimination were common for many CALD communities, and is associated with increased psychological distress, risk of mental illness and long-term health problems. It causes higher incidences of a range of mental illnesses, including anxiety and depression.⁴³ Physically, there are connections to chronically elevated cortisol levels, high blood pressure and chronic stress.⁴⁴ It can further cause hypertension, nightmares, post-traumatic stress disorders, psychosis and even suicide.⁴⁵

The impacts of racial discrimination and racism are multi-faceted. Often, on a daily basis, members of CALD groups and Aboriginal communities are confronted with material which demonises, belittles and stigmatises them by perpetuating negative stereotypes. This functions to alienate them from society and inhibit their full participation. The flow-on effect for general society may contribute to disharmony and prejudice.

³⁸ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36 (8 August 2017) 6

³⁹ Committee on the Elimination of Racial Discrimination – Concluding observations on the eighteen to twentieth period reports of Australia – 8 December 2017 p 3.

⁴⁰ Mapping Social Cohesion 2016 National Report p 19.

⁴¹ The 2017 Scanlon Report noted that the 2017 survey reported the same reported levels of discrimination as 2016. Mapping Social Cohesion, The Scanlon Foundation surveys 2017.

⁴² *Supra* FN24 p3.

⁴³ Ferdinand, A, Paradies, Y and Kelaher, M, *Mental health impacts of racial discrimination in Australian culturally and linguistically diverse communities: a cross-sectional survey* (2015) BMC Public Health 2015: 15: 401.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4412110/>

⁴⁴ Berger, M and Sarnyai Z, *More than Skin Deep – stress neurobiology and mental health consequences of racial discrimination* (2014) The International Journal on the Biology of Stress Vol 18 2015 1.
<http://www.tandfonline.com/doi/abs/10.3109/10253890.2014.989204>

⁴⁵ Jules, P et al, *Multiple Pathways Linking Racism to Health Outcomes* (2011) DuBois Review: Social Science Research on Race vol 8 issue 1. <https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/issue/journal-dbr-volume-8-issue-1/8FE3880B9A76C3E535D65AA51A552700> and Matsuda, M, *Public response to racist speech: Considering the victim's story* (1989) Michigan Law Review 87 (8) 2320-23381.
<https://www.jstor.org/stable/1289306>.

Protection from race discrimination and vilification are obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

Vilification experienced by the LGBTIQ⁴⁶ community

Reported experiences of vilification by the LGBTI is high compared to the rest of the Australian population:

- 6 in 10 experience verbal homophobic abuse, 2 in 10 experience physical homophobic abuse, but the experience is even higher for transgender people for verbal abuse:
 - 26% gay men
 - 23% gay women
 - 47% trans men
 - 37% trans women⁴⁷.

There are no specific statistics for the NT but anecdotally we are aware of incidents of vilification, sexual orientation vilification (see Attachment A) and trans and gender diverse vilification. Most of these reported cases relate to verbal attacks or highly offensive portrayals of the LGBTIQ community that are likely to be overly sexualised or questioning the morality of the community.

The ADC saw a spike in vilifications issues against the LGBTIQ community during the same sex marriage plebiscite where nine signs have been reported.

Religious Vilification

Religious belief vilification can and is often entwined with racial vilification. The right to hold a religious belief is also one of the few absolute human rights at international law and thereby should be protected.

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

Domestic and family violence is a major issue in Australia⁴⁸, and the NT⁴⁹ that impacts especially on groups already protected under the Act, such as women⁵⁰, particularly Aboriginal women and women living with a disability⁵¹ and the LGBTIQ

⁴⁶ Please refer to footnote 13.

⁴⁷ Australian Human Rights Commission. Face the facts: Lesbian, gay, bisexual, trans and intersex people. https://www.humanrights.gov.au/sites/default/files/7_FTF_2014_LGBTI.pdf

⁴⁸ On average, one woman a week is murdered by her current or former partner, 1 in 3 women has experienced physical violence since the age of 15, 1 in 5 sexual violence, 1 in 4 physical or sexual violence by an intimate partner and 1 in 4 has experienced emotional abuse by a current or former partner. Our Watch. <https://www.ourwatch.org.au>

⁴⁹ In the NT there are 1,730 victims of domestic and family violence per 100,000 people. This is 3 times higher than any other State or Territory. There are 61 domestic violence incidents on a typical day. The NT's *Domestic, Family & Sexual Violence Reduction Framework 2018 – 2028*, pp13.

⁵⁰ 34% of women have experiences physical violence since the age of 15. Australian Human Rights Commission – Fact sheet: Domestic and family violence.

⁵¹ Women living with a disability are 37.3% more likely than women without a disability to report some form of domestic or intimate violence. The National Council to Reduce Violence Against Women 2009.

community.⁵² It is an issue that requires a multi-faceted approach. Including domestic and family violence in the Act, would provide another tool for survivors of domestic violence, advocates and relevant service providers to support a safer and fairer community. Discrimination is a factor in domestic violence that may prevent women⁵³ from being able to make safe choices and to recover from their experience.

Examples of discrimination include⁵⁴:

- Women⁵⁵ being dismissed from their employment⁵⁶ because they have had time off to respond to their domestic violence situation or because of the workplace's safety fears.
- Women not being permitted to take time off work to respond to their domestic violence situation.⁵⁷
- Children being excluded from educational or care institutions because of safety fears.
- Women being denied accommodation, evicted because of safety fears, or because of damage done to property by a violent spouse.

By including domestic violence as a protected attribute under the Act this would create rights for women experiencing violence. Discrimination is acknowledged in the Domestic, Family & Sexual Violence Reduction Framework 2018-2028 as a reinforcing factor⁵⁸ that may increase the frequency or severity of violence against women.

Including domestic and family violence as an attribute in the Act would provide another avenue for advocates and service providers and people to assist survivors of violence in their ability to participate in broader society. It would support the objectives of the Domestic, Family & Sexual Violence Reduction Framework 2018-2028.

Sarah is an accountant at a local firm. She has been in a relationship with John for two years. Last night John physically threatened her when she told him that she wanted to leave the relationship. This is not the first time and she no longer feels safe. Out of fear she slept in her car overnight, because John would not leave. They have been living in a rental apartment which is in Sarah's name.

⁵² 41% of female identifying respondents, and 28% of male identifying respondents had experienced physical violence within a same-sex intimate relationship and 25% of respondents had experienced sexual assault within a same-sex intimate relationship (with women identifying and trans-respondents more likely to experience sexual assault. Pitts, M., Smith, A., Mitchell, A., & Patel, S. (2006). Private lives: A report on the health and wellbeing of GLBTI Australians. *Gay and Lesbian Health Victoria, The Australian Research Centre in Sex, Health and Society*, 57.

⁵³ Please note that the term women is used throughout this section only because women are disproportionately represented in domestic and family violence. It is not proposed that an attribute of domestic violence be limited in any way by gender or sex.

⁵⁴ These examples are drawn from complaints and enquiries received as well as stories shared to us while engaging with the public or other service providers.

⁵⁵ The term women is being used only because women are disproportionately represented in the domestic violence incidents, and the stories shared with the ADC have only been about women.

⁵⁶ Submission to the Attorney-General indicating that 2/3rds of women experiencing domestic violence were employed currently in the workplace (800,000 women or around one in six female workers. Australian Human Rights Commission – Fact sheet: Domestic and family violence – a workplace issues, a discrimination issue.

⁵⁷ It is noted that domestic violence leave rights are increasingly available. This is a great development. Women however may at times not want or be able to take leave (may have none) but may just need flexibility about when they work. In cases where domestic leave is not available inclusion of domestic violence as an attribute may also enable women to use other leave for purposes relating to domestic violence.

⁵⁸ Domestic, Family & Sexual Violence Reduction Framework 2018-2028, p 13.

She has rung both the police and a locksmith and is required to be at the property at 10.00am to get the locks changed and have the police on stand-by so she can safely re-enter the property. She starts work at 9.00am.

Domestic violence as an attribute enables Sarah to confidently approach her employer and negotiate a changed hours for her work day.

If Sarah had no rights and was unable to attend at 10.00am to re-enter this may have several consequences including:

- She may be required to use a women's shelter.
- She may continue to sleep in her car, which is likely to start impacting on her health and wellbeing and her work performance. This may ultimately result in her losing her job.
- She may remain in the violent relationship because she does not want to become homeless.

Aside from supporting women escaping violence, including domestic violence as an attribute would support women experiencing stigma because of their relationships, past or present. Stereotypes that women often experience once their history or situation is disclosed include:

- Views that they may be weak or too nice and this is why they were in a violent relationship.
- They could leave the relationship if they really wanted to.⁵⁹
- Many women make false claims about domestic violence.⁶⁰
- Domestic violence only occurs in poor or problem families.⁶¹
- Domestic Violence is perpetrated by drunks and macho men.⁶²
- Women ask for it.⁶³
- Some women are addicted to violent men.⁶⁴

Inclusion of domestic violence as an attribute would assist in these situations as well as provide a vehicle to better educate the broader community about the facts behind domestic and family violence.

Domestic violence is currently an attribute in the Australian Capital Territory and soon to be included in South Australian legislation.

Inclusion of domestic violence as an attribute would meet international obligations to protect women and children from violence under the Convention of the Elimination of All Forms of Discrimination Against Women and the International Labour Organisation Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958 (ILO C11).

⁵⁹ In fact most violence occurs when a women tries to leave. Our Watch, Myths about Violence. <https://www.ourwatch.org.au/Understanding-Violence/Myths-about-violence>

⁶⁰ Supra.

⁶¹ http://staffordshirewomensaid.org/about_violence/myths.php

⁶² Supra.

⁶³ Supra.

⁶⁴ Supra.

The attribute should only be in relation to those experiencing domestic and family violence, not perpetrators.

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

Accommodation status is about a person's current housing situation, and is intended to include, if a person is homeless, couch surfing, residing in temporary accommodation such as a hotel or safety refuge. Homelessness is a significant issue in the NT with an estimate that 15,479 Territorians⁶⁵ are homeless.⁶⁶ A disproportionate number of people who find themselves homeless are of Aboriginal and Torres Strait Islander descent⁶⁷, escaping family or domestic violence, or other relationship issues or are female.⁶⁸ These are groups in the community who are already identified as being at high risk of experiencing discrimination and inequality, homelessness compounds this risk. Homelessness leaves people vulnerable. Having safe stable shelter is fundamental to achieving equality and dignity.

Homelessness in the Territory may include rough sleeping, staying in supported accommodation such as a women's shelter, overcrowded housing, couching surfing or other temporary accommodation.⁶⁹

Discrimination that may be faced by people experiencing housing issues include:

- Impact on engaging with processes that require residential contact information. These may be critical services that are required to survive or to assist in not being homeless.
- Impact on aspects of life covered by the Act such as work and education. Long periods of homelessness may impact on people's ability to function at work or school and may result in consequences such as job loss or dropping out of education.
- Managing stereotypes about homeless and the barriers this may create in changing homeless status. Examples of homelessness stereotypes may include:
 - Assumptions that you are a drinker
 - Assumptions about your level of education
 - Assumptions about your background or personal circumstances.

⁶⁵ Homelessness in the Northern Territory Fact sheet. Homelessness Australia. <https://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness%20in%20Australia2.pdf>

⁶⁶ The NT has 15 times the national average rate of homelessness. NT Shelter Homelessness Quick Facts. <https://ntshelter.org.au/housing-issues/>

⁶⁷ 1 in 4 Indigenous people in the NT were considered to be homeless with 92% classified as this as they were living in severely crowded dwellings. Australian Institute of Health and Welfare. Homelessness among Indigenous Australians, 2014, p. 11.

⁶⁸ Homelessness in the Northern Territory Fact sheet. Homelessness Australia. <https://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness%20in%20Australia2.pdf>

⁶⁹ The NT has 13 times the national rate of people sleeping rough. 10% of all people sleeping rough in the NT are under the age of 18. NT Shelter Homelessness Quick Facts. <https://ntshelter.org.au/housing-issues/>

Carla is currently living in a youth hostel because she had to leave her mother's home suddenly because of sexual advances by her mother's current partner. Carla is 17 and has never held a job. She is only able to stay in the hostel for another week, after this date she has nowhere to live.

She seeks to register with an employment agency to try and get work to support herself and get some share accommodation. When she seeks to register the organisation requires that she provide a current address and phone number so they can contact her. When she advises them of her situation she is advised to come back when she has contact details.

If homelessness were an attribute she could either self-advocate or through an independent advocate assert her right to use the service despite her lack of contact details and negotiate how ongoing contact and communication might occur. This might result in her getting employment and being able to address her homeless issues.

If she has no right to advocate for this change she may be left accepting this practice making it difficult for her to gain employment and resulting in ongoing homelessness and the many issues that could associate with that.

Protection under the Act would enable people and advocates for people to better navigate obstacles contributing to homelessness.

Accommodation status is a protected attribute in the Australian Capital Territory which is the most recent substantive discrimination legislative reform in Australia.

7. Should “sex work” be included as an attribute under the Act?

The ADC is of the view that sex workers should be protected under the Act as a separate protected attribute. It should include people currently working as sex workers and people who have been sex workers. The ADC's preferred model would be the Australian Capital Territory's attribute of Profession, Trade, Occupation or Calling.

Sex workers face potential discrimination in 2 broad settings:

1. While working as a sex worker
2. Because historically they have been a sex worker.

Sex workers should have the same work and public life rights as other workers and Territorians. Protection is required due to stigma and stereotyping that persists about sex workers. Lawful sexual activity or an equivalent attribute exists in Queensland⁷⁰, Victoria,⁷¹ Australian Capital Territory⁷² and Tasmania.⁷³ Inclusion of sex workers as

⁷⁰ Anti-Discrimination Act 1991 (Queensland). Section 7(l).

⁷¹ Equal Opportunity Act 2010 (Victoria). Section 6(g).

⁷² Discrimination Act 1991 (Australian Capital Territory). Section 7(1) (q)

⁷³ *Anti-Discrimination Act 1998* (Tasmania). Section 16(d)

an attribute would create dedicated rights for workers in this industry to advocate for rights and a vehicle to potentially decriminalise and destigmatise the industry.

Protection of sex workers is an obligation at International Law.⁷⁴

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

Protection for socioeconomic status should only cover lower socioeconomic status which would include:

- Income (lower)
- Education – including literacy and numeracy
- Employment – including unemployment
- Social position or status.

People who experience a low socioeconomic status are at high risk of social exclusion. Lack of social and economic participation may have impacts on health (especially mental health), family harmony, poverty, suicide, access to basic rights such as housing and levels of social dysfunction.

This attribute would not be intended to cover issues such as:

- Bankruptcy.
- Credit card debt (unless linked to long term welfare issues).
- Whether or not a supplier offers the basics card (or an equivalent to this) – but would cover conduct relating to basic's card use – e.g. being treated less favourably because a person has a basic's card.
- Socio-economic advantage.

Discrimination experienced could include:

- Inability to start or continue education.
- Inability to access support and essential services due to inability to comply with procedural requirements that require reading and writing.
- Judgement passed by others about lower social status that impacts on selection for work, education or other opportunities.
- Judgement at work or in other settings that hamper a person's ability to thrive.

Michael has a job interview to be a receptionist. He is currently receiving welfare benefits and has no savings. He has been unemployed for 1 year, but has been training to work as a receptionist.

Following the interview Michael is told that they are impressed with the skills he has developed in his training and his interpersonal skills. He is advised that the reason he is unsuccessful for the role was because of his appearance. Michael due to being unemployed only had old clothes that he could wear to the interview.

⁷⁴ 2011 UN political Declaration on HIV and AIDS, Universal Declaration of Human Rights (UDHR), International Labour Organisations Employment Policy Convention 122, UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

If socioeconomic status was a protected attribute he could self-advocate or through an independent advocate argue that this was an unfair reason for not being selected and explain that if given a chance to do the role he would be able to purchase more suitable clothes.

If it is not a protected attribute he would have to rely on the good will of the organisation to accept this argument. If they don't he may experience ongoing unemployment despite his efforts to upskill. The business may also lose a potentially good employee.

Socioeconomic status or an equivalent is not currently a protected attribute in other discrimination legislation in Australia. Social origin is a protected attribute under the *Fair Work Act* and employment status is an attribute in the Australian Capital Territory.

Socioeconomic status discrimination is not specifically an obligation at International Law but it represents an intersection of many other attributes that are protected at international law that may relate to socioeconomic status discrimination.

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

The Act currently provides that less favourable treatment of a person because they have a guide dog⁷⁵ is discrimination on the basis of impairment.⁷⁶ The Act does not explicitly identify other forms of assistance animals. Protection does exist in the *Disability Discrimination Act 1992 (Cth)* for other forms of Assistance Animals.

Including a wider base of assistance animals would better reflect the current use of animals by people living with a disability and enable complaints to be made to the ADC if unfavourable treatment because of the use of the animal was experienced. The ADC does get complaints and inquiries on these issues, some of which need to be referred to the Australian Human Rights Commission who operate remotely from Sydney. For some people with disabilities having local access to a complaint body is likely to present an easier option.

Emilios has bi-polar. He has an assistance animal that helps him manage his moods and alert him if his behaviour is escalating. The animal has been trained to provide this support to him.

Emilios has booked a hotel in Darwin where he intends to catch up with his family for Christmas. Upon arrival at the hotel he is told that he is not permitted to have an animal in the hotel. Emilios explains to the hotel that he has rights under the Act and shows them the animal's accreditation. He advises them to ring the ADC to confirm. The hotel rings the ADC who provide information on the operation of the Act. The hotel are satisfied and agree to the animal staying.

Wider inclusion also assists in the broader education of the NT community about rights and understanding in this area. Animals are increasingly being used to assist in the area of disability, animals being used go beyond dogs and the use beyond

⁷⁵ Guide dog in relation to visual, hearing or mobility impairment.

⁷⁶ Section 21 *Anti-Discrimination Act*

sensory disability, including neurological conditions such as autism and Asperger's syndrome, and mental health.

A comparison of assistance animal legislation across Australian jurisdictions can be found at Attachment E.

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?

A representative complaint model would provide an avenue to redress systemic issues of discrimination, rather than the current reliance on individual complaints of discrimination.

The individual complaints model is a critical avenue for people to seek redress for discrimination they may experience. It is a vehicle that may have systemic reach, but this is dependent on the people involved in the complaint. Limitations of an individual complaints model in eliminating discrimination are:

- It requires a person to be able to engage in a complaint process.
- It assumes people can safely make a complaint without repercussion.
- Individual complaints may only deliver individual outcomes and maybe slow or have no impact on changing broader systemic issues.
- It requires an aggrieved complainant to come forward before an issue can be examined. Some discrimination issues may impact on many people, the people who raise the issues with the ADC however may not be the "aggrieved" people. An aggrieved person is someone who is impacted by the discriminatory behaviour rather than someone who has observed it happening to other people or groups.

The ADC has regular calls from members of the public who see discrimination being carried out against other people. Individual complaints are run based on individual stories and experiences of discrimination, resulting in findings based on that particular story, which may not reflect others experiences, or outcomes that are driven by the particular complainant, what they want may not be a solution for others experiencing the same discrimination.

For example a person may complain about disability access in a wheelchair to a particular service. The complaint would only be considered within the confines of this complaint. As a result there may be agreement to widen the door frame. The door frame may get widened to suit the needs of that particular person, but fail to take into account other wheel chair users. Wheelchairs are made in a range of sizes, if the complainant had a standard wheelchair, modification of the frame might suit their needs but not those in a wider wheelchair.

Representative complaints would address these short falls, enabling organisations to bring a complaint of discrimination in relation to a system, practice or policy that impacts on a group protected by the Act. This would not require an act of bravery from one person, it would not require any individual to be the generator of the

complaint. Organisations could bring complaints based on what they see and hear on the field. They would be required to argue why a particular issue should be considered by the Commission and provide evidence to support their claims or at least indicate that evidence is capable of being obtained.

The Commissioner would require broad discretion in regard to which complaints could be taken given the size of the ADC. It is anticipated there would be capacity to do one or two a year, depending on the complexity of the complaints accepted.

A disability organisation is hearing stories from their clients about a new employment agency in Alice Springs that requires all new clients to fill out a form to register with their organisation. Clients are advised that if they cannot fill out the form themselves then they are not likely to be employable. This disability organisation is aware that this requirement is preventing clients of theirs from using the service. It is a small town and none of the clients want to make their own individual complaint from fear of retribution.

The organisation has spoken with the agency to see if they are prepared to change their process and are advised that it is part of their self-reliance policy that clients as a prerequisite to using the service are able to complete the registration form.

The organisation, unable to negotiate a change directly, lodges a representative complaint with the ADC. As a result of this complaint the organisation and the agency are required to attend a conciliation. At this conciliation the disability organisation is able to explain to the agency the limits of this policy and how it is disadvantaging particular groups, especially people living with a disability. A new improved policy is developed and the disability organisation and employment agency agree to an ongoing work relationship in which the disability organisation is available to the Agency as a resource to better understand this client group. This results in the service being available to a greater section of the disability community and hopefully to improved job outcomes for this sector.

There is no equivalent to this complaint model interstate. The need for such a model is greater in the NT due to the size of the jurisdiction and the barrier this creates for individuals to raise their concerns. Often there is only one service provider or one employer making complaining too high risk for the person experiencing discrimination.

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

The Act currently provides that clubs are a place where discrimination based on the attributes set out in the Act. The area of clubs is about membership, including who can be a member and treatment of members within a club. A range of exemptions exist to protect clubs set up for particular sectors of the community such as sex and minority cultures. Clubs include unincorporated associations.

The ADC receives very few formal complaints about clubs because the Act only covers clubs who hold a liquor licence. This requirement may have been relevant when the Act was first drafted, but is no longer a relevant factor to determine which club members do and don't have rights. Of particular concern are the sporting clubs

who may not always be covered by the Act. Currently there are about 83⁷⁷ sports clubs that hold some form of liquor licence, the remaining sporting clubs would not be covered by the Act. There is no current day reasons why the existence of a liquor licence would justify this distinction.

If this change proceeds, sporting clubs would be one of the groups the ADC would seek to engage with to inform of changes in the law.

Specific coverage of clubs is also found in the *Sex Discrimination Act 1984 (Cth)*⁷⁸ and the *Disability Discrimination Act 1975 (Cth)*⁷⁹

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

Currently sexual harassment is only unlawful if it occurs in an area set out in the Act. In reality sexual harassment often occurs in a range of settings and is not confined to the public places identified in the Act. For example sexual harassment may start at the workplace but drift into more personal spaces. The sexual harassment may be connected to work relationships but it may not occur “at” work. This is what happened in the matter of *Smyth v Kerr & NT Treasury*, in which the complainant was able to successfully prove that she had been sexually harassed but was unable to establish the ongoing connection with work, even though the person harassing her was a work colleague.

Currently the Federal *Sex Discrimination Act 1984 (Cth)* and the Queensland *Anti-Discrimination Act* do not restrict sexual harassment by area.

The ADC would support removal of the requirement to establish that sexual harassment occurred in an area as set out in Attachment “A.”

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

Service is an area under the Act in which discrimination covered by the Act is prohibited. It only protects people receiving a service, not those giving the service.

Currently there are industries where this limitation particularly impacts on female workers, such as the hospitality sector. The ADC has received complaints from women in the hospitality sector who have been sexually harassed by patrons. Under the current Act we are unable to take these complaints. United Voice⁸⁰ in a recent survey they conducted found that 89% of 306 hospitality workers surveyed had experienced some form of sexual harassment, with 19% having been sexually assaulted. While some of these were by work colleagues, we understand that some were by patrons.

⁷⁷ Data supplied by the Licensing, Attorney-General's Department, 2017.

⁷⁸ Section 25 – it is limited to clubs that sell liquor.

⁷⁹ Section 27, clubs are not limited by the requirement to hold a liquor licence. The *Disability Discrimination Act* also covers the area of sporting activity (s28).

⁸⁰ United Voice. Survey exposes sexual harassment crisis in hospitality industry.

http://www.unitedvoicevic.org.au/hospo_sexual_harassment_survey

The ADC is also aware of problems in the transport industry, particularly for taxi drivers who may experience discrimination while doing their job and not have protection under the Act.

We support the application of service to both customers and service providers.

REMOVING CONTENT THAT ENSHRINES DISCRIMINATION

14. Should any exemptions for religious or cultural bodies be removed?

The current Act protects religious beliefs and religious activity⁸¹, from discrimination in the public areas covered by the Act.

Whilst the phrase religious belief, religious activity is not defined interpretation at section 4(4) clearly states it is an inclusive definition which provides:

“(4) For the purpose of this Act, religious belief or activity shall be construed to include Aboriginal Spiritual belief or activity”.

In practice this means that discrimination in the areas such as education, employment, and goods and services on the basis of religious belief or religious activity is prohibited in the NT. In the NT unlike four other jurisdictions, the absence of religious belief or activity is not protected.

The NT also specifically protects the carrying out of religious practices at work (s31(3)). Only Australian Capital Territory and Western Australia offer a similar level of explicit protection.

As set out earlier in the submission it is also proposed that the protection for religious belief and activity should increase to include vilification protection. This would ensure that public areas such as social media, comments called out in the street or online that would not be associated with an area under the existing Act, are covered. This is important given the reported increase in vilification of multi-faith, multicultural community, particular islamophobia.⁸² This protection does not currently exist federally.

This protection is consistent with Australian international obligations under the *International Covenant on Civil and Political Rights* (1966) (“the ICCPR”) and *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) (“the Religion Declaration”).

Exemptions generally

An exemption is an exception that permits discriminatory behaviour that would otherwise be unlawful.

The objective of the Act is to eliminate the type of discrimination set out in the Act, as well as promote equality of opportunity and to eliminate sexual harassment.

⁸¹ Section 19. It should be noted that not all jurisdictions include such extensive religious protection.

⁸² Mapping Social Cohesion, The Scanlon Foundation surveys 2017.

The Act is rights based legislation, and any exception or exemption must be justified against this objective.

Exemptions should not be included lightly, but should be weighed up against the equality the Act seeks to promote. Because discrimination law protects fundamental human rights, the prohibitions should only be sparingly displaced. There must be good justification for any genuine exceptions.

In deciding on the policy justification for an exemption, an approach similar to how one is factually established under the Act needs to be taken, that those proposing to retain the exemptions should be able to justify why the balance should be in their favour. They should be able to demonstrate through real examples how these exemptions currently permit them to enjoy their religious freedom and why continuation of this enjoyment should be at the cost of another individual enjoying their rights.

All State, Territory and Commonwealth anti-discrimination legislation contain exemptions, there is no overarching commonality, and they vary considerably.

While the law varies there are some consistencies, including an exemption for inherent requirements⁸³ of a role at work where it can be shown that the particular “attribute” even with accommodations would mean an individual would be unable to perform the critical components of the role⁸⁴. Most states and territories also have exemptions that relate to the training and ordination of religious positions such as Ministers and priests. It is not proposed that these exemptions be removed in this review.

Increasingly in Australia Discrimination law is being interpreted based on the approach taken in Canada and South Africa, and as articulated in the decision of Cobaw:

“...Amongst those persons whom the EO Act protects from discrimination are those who have the attribute of same sex orientation. The aims of COBAW, realised through its WayOut programme, are to raise awareness of homophobia in rural areas, and create connections with isolated, at risk young people. These are critically important objectives which advance recognition of the right of the individual not to be discriminated against on the grounds of his or her sexual orientation. The intrinsic value of these objectives includes recognition that such discrimination has the effect of diminishing the self-worth and personal dignity of those with such an attribute, and that adverse psychological effects and social and economic disadvantage are an inevitable consequence of such discrimination”.⁸⁵

At international law when balancing human rights the simplistic test in the area of justifiable discrimination is that of is it reasonable and proportionate. The question with the Act is whether the balance is right with current religious exemptions or does

⁸³ Note terminology differs in some jurisdictions. This is not specifically a religious exemption, it applies to all workplaces including religious organisations.

⁸⁴ It maybe that a critical component of a work role is the religious values/background of the person.

⁸⁵ Note Justice Redlich was not in the majority for the final decision, but the majority supported this aspect of his decision. *CYCL & Ors v CCHSL* [2014] VSCA 75 at pp.97-98.

the current regime permit forms of systemic discrimination and generally restrain society's pursuit of equality?

If needed the second question is then the scope and breadth of the exemption and what attributes and riders on reasonableness and the process are required before it is applied. The scope needs be considered in the context of each piece of legislation and the jurisdiction within which it is required to operate.

Exemptions should be as narrow as possible to achieve the objective and precisely or specifically defined or stated as possible. The Final Report of the Victorian Scrutiny of Acts and Regulations Committee in regard to *Exceptions and Exemptions to the Equal Opportunity Act 1995* stated⁸⁶:

“The Committee considers that where an exception is clearly justified, or can be expressed to identify the specific relevant factors that need to be considered for justification, the most specific statement of the exception is the preferred approach.”

It should be clear how an exemption is to likely be used. Exemptions should provide for the transparent accountable use of them by service providers and employers. For example information should be clearly available through school information that the school is limited to a particular religious belief or activity and that this practice seeks to rely on an exemption under the Act.

Further in weighing up the value of having an exemption it should be noted that the existence of exemptions may deter people from exercising their rights. For example the religious exemptions being considered for reform are likely to be much narrower in their application than is commonly understood. This misunderstanding may mean individuals may not exercise rights believing the exemptions are wider than they in fact are. Exemptions are themselves a perceived barrier for people wanting to exercise their rights and therefore should only be included in the Act where there is a clear evidence based reasons for their existence.

The ADC say these factors need to be taken into account when looking at the correct balance in the Act and to decide if exemptions should be removed.

Broad considerations for the NT regarding continued application of Religious exemptions

In looking forward to a modern Act, consideration needs to be given to if the five exemptions currently under the Act, which exclude various religious organisations, education and accommodation providers from the operation of the anti-discrimination legislation are the right balance of competing human rights moving forward into the future for the NT.

Two religious exemptions are not being re-considered as part of this review. In particular section 51 is aimed at religious belief rather than practice.

⁸⁶ Scrutiny of Acts and Regulations Committee *Exceptions and Exemptions to the Equal Opportunity Act 1995* November 2009, p5.

S51 Specific exemption

The Act does not apply to:

- Ordination of priests, ministers of religion or members of a religious order.
- Training or education of any of the above.
- Selection or appointment of people to perform functions in relation to any religious observance or practice.
- An act or body established for religious purposes if the act is done as part of any religious observance or practice.

This exemption or a variation of it exists in *Sex Discrimination Act 1984 (Cth)* and other State and Territory Acts, it fits squarely in the area of religious belief.

S52 Charitable benefits

Permits a person to provide for a charity in a will, deed or other instrument for discriminatory purposes and the charity is permitted to carry out the discriminatory purpose.

This is a general exemption, which does not just apply to religious educational providers or organisations etc., but exempts charitable gift from all areas of discrimination. It deals with the personal disposition of property. It exists in other legislation throughout Australia, has been scrutinised and found to be justified, it fits into the personal side of public personal divide.

Exemptions that are being reconsidered are set out below.

S30 Religious Educational Authority

Section 30 of the Act permits religious schools to exclude prospective students who are not of that religion. As set out above it is for the religious educational authorities to justify that this level of discrimination is still required by demonstrating through evidence and examples that it is something that is still necessary and will be necessary in the future in the NT.

Public consultations and religious specific consults revealed that numerous religious schools across the NT take all students who apply for admission. We also have been advised that this is the practice of Islamic schools interstate. The NT as yet does not have an Islamic school.

In some regions of the Northern Territory educational options for students are also very limited. If exclusion from a school based on religious belief were to occur it could discourage or prevent school attendance or create significant barriers for Territorians living remotely to get to school if the only permitted school is some distance away.

Education and access to education are key human rights⁸⁷. This particular exemption needs to be considered in light of the rights it denies. Should the right to exclude based on religious belief prevail over the right to an education or the rights of other

⁸⁷ International Covenant on Economic, Social and Cultural Rights.

individuals with protected attributes under the Act. For example students of a different religious belief.

Furthermore should the exemption remain if in practice exclusion rarely occurs? Does keeping the exemption there just create barriers for people who want to complain or exercise rights? Is it appropriate to keep an exemption in place in case it is needed one day?

Recent consideration of similar provisions of legislation in the Victorian case of *Arora v Melton Christian College*⁸⁸ (Human Rights Division) demonstrates that the exemption may be very limited in its true application but its existence may prevent complaints being made.

In this case a child was denied enrolment at Melton Christian College because their dress code provided that boys must have short hair and did not permit head coverings related to non-Christian faiths. The child had uncut hair and wore a patka because he was Sikh.

The school attempted to rely on section 39 of the *Equal Opportunity Act 2010* which allows an educational authority that operates a school for students of a particular religious belief to exclude students who are not of that particular religious belief.

The decision involved extensive discussion of the interpretation of the exemption under Victorian law and the evidence that would need to be led to substantiate the exemption. In particular that a school that primarily provided education to a particular religious group was not able to then pick and choose from which individual students from the other religions or group than their own they denied admission to.

The decision discussed other recent decisions, and looked at the evidence required to rely on the exemption. The Court also commented that, whilst the exemption exists and is on the books it deters people from complaining, where in practise to rely on the exemption the religious educational institution would need to largely exclude all other children than those of their religion to then rely on the exemption to exclude a particular child.

The Anti-Discrimination Commission's view is the balance is not right and the exemption should be removed in the modernisation of the Act.

S37A Religious Educational Authority as an employer

Section 37A permits religious schools to discriminate against employees on the grounds of religious belief or activity, or sexuality, if done in good faith to avoid offending the religious sensitivities of people of the particular religion. For example a religious school could rely on this exemption to justify not employing a prospective employee on the basis that they identify as gay or lesbian if their religious doctrine does not support gay or lesbian relationships.

This exemption was considered in amendments to the legislation in 2004 under the Law Reform (Gender, Sexuality and De Facto Relations) Act 2004, the amendments narrowed the exemptions available in regard to religious bodies described in the

⁸⁸ [\[2017\] VCAT 1507 \(Human Rights Division\)](#)

second reading speech as “...unnecessarily wide exemptions currently give to religious bodies”.⁸⁹

Like the current proposals those changes were “...not intended to impact on any church’s ‘freedom of religion: they are about balancing this freedom against the right of Territorians to protection from discrimination”.⁹⁰

The question is now a further 13 years on whether the exemptions which remained or where enacted at this time in regard to religious educational authorities remain justified, in light of the extensive social change over this time period.

When section 37A was discussed in 2004 it was made clear that the discrimination must be in good faith but with the following caveat “Before leaving this area, I would like to stress that these exemptions do not stop any religious school from employing teachers of a different religion, or homosexual teachers. Schools have the freedom to set their own policies in that regard.”⁹¹

The amendments made in 2004 were a suite of amendments to recognise distinction on the basis of “a person’s gender, sexuality or de facto relationship with another person.” The bulk of the discriminatory provisions were removed and it was stated in the second reading speech:

“Equality of treatment of gay and lesbian Territorians under the law provides self-respect, reduces stigmatisation, and promotes full participation in our community. We want to send a strong message that it is not acceptable to discriminate against anyone on the basis of their sexuality; our statute books will not legitimise such discrimination. Our aim in government is to create a more tolerant and understanding society, and our role as government is to take that lead. The reforms that I have presented today reflect this government’s committed approach to promoting and ensuring a Territory that is free of discrimination and protects its citizens to the fullest extent. I am proud to be introducing two bills that give gay and lesbian people rights and protection denied to them for so long.”⁹²

Current use

There has not been a high reliance on this exemption in the complaints received by the ADC. Information on the use and remaining relevance of the exemption will need to be provided by Religious Educational Authorities to justify its continuance.

Religious schools provide substantial employment in the Northern Territory. Employment opportunities for teachers, particularly in remote NT are limited. Further limiting employment options based on religious belief or activity is potentially problematic, particularly for those residing in remote NT.

The issue is however not limited to teachers as the current exemption goes beyond teachers and extends to the gardener, the receptionist, the cleaner and other non-teaching related staff.

⁸⁹ [\[2017\] VCAT 1507 \(Human Rights Division\)](#)

⁹⁰ 25/11/2003 Second Reading Speech – Law Reform (Gender, Sexuality and De facto Relationships) Bill 2003.

⁹¹ 25/11/2003 Second Reading Speech – Law Reform (Gender, Sexuality and De facto Relationships) Bill 2003.

⁹² 25/11/2003 Second Reading Speech – Law Reform (Gender, Sexuality and De facto Relationships) Bill 2003.

The first issue is can the exemption be justified in 2018 and for the future and secondly if yes, can the breadth of the exemption be justified.

A recent media story about a Western Australian teacher told of a casual teacher who was taken off the relief roster when his sexuality became known. His sexuality became known because of social media posts. The school relied on a similar exemption to the one being re-considered under the Act. We know nationally that many people hide their sexual orientation at work⁹³, presumably because they fear being in a similar situation to the teacher in Western Australia. The ADC is aware that people working in religious education institutions in the NT are hiding their sexual orientation out of fear of repercussions if they disclose. This is not a situation consistent with equality but one that prevents people from living a life of dignity and self-efficacy. People should not feel they have to hide who they are.

The question is, is it still ok in 2018 and moving forward for people to be discriminated against in their employment by a religious educational institution because of their sexual orientation? The NT and Australian society has moved forward since this was last before Parliament in 2004, there being broader acceptance. The exemption authorises discrimination and unequal treatment that is no longer acceptable in the broader Australian society.

The exemption however is not just relevant in its specific application but because of the wider message that retaining it provides. It sends a message to the community at large and to the LGBTIQ community, particularly young people that the NT government sanctions discrimination against LGBTIQ in employment and that they are in fact not equal.

There is real concern in 2018 and moving forward that the NT has an exemption which names and specifies that the Act justifies discrimination against a particularly vulnerable group of people on the basis of sexuality. In 2018 this enshrined discrimination cannot be justified in legislation whose objective is to promote equality of opportunity and the elimination of discrimination, and in light of the impact and disadvantage experienced by the LGBTIQ community as set out in this submission.

The ADC's primary submission is that the exemption in its entirety should be removed. Religious education institutions could still rely on the inherent requirement at work exemption to restrict employment based on religious belief or activity. It would however require that they be able to demonstrate that a person's religious belief or activity is critical to performing the particular role. This would require that religious educational institutions provide clear, unequivocal information to prospective employees about the use of the inherent requirement exemption and set out why a particular religious belief is critical to the role.

At minimum the ADC believes that the word 'sexuality' should be removed from the exemption or any reference to another specific attribute on which religious educational authorities can lawfully discriminate.

Lastly the ADC does not support the view that individual organisations should seek individual exemption from the ADC. Reliance should be on existing exemptions in

⁹³ Australian Human Rights Commission. Face the facts: Lesbian, gay, bisexual, trans and intersex people. https://www.humanrights.gov.au/sites/default/files/7_FTF_2014_LGBTI.pdf

the Act, whereupon if a complaint is made the organisation is required to demonstrate its applicability.

S40 (2A) Religious Educational Authority – as an accommodation provider

Section 40(2A) permits restricted use of accommodation operated by educational authority in accordance with the doctrine of a particular religion to students of that religion.

Following the framework set out above, in deciding if the exemption to allow or make legal discrimination against students of a particular faith remains, it needs to be justified by those who seek to utilise it. Consideration also needs to be given to determine the scope as narrow and limited as possible to achieve the aim and also accountability in how it is applied.

Complaints and enquiries have not been received by the ADC about religious educational institutions refusing school accommodation to students based on religious belief or activity.

The existence of the exemption is likely to be a barrier to people making such a complaint. It is also likely though that the exemption if relied upon would be difficult to prove, as discussed above with other religious exemptions.

It is for the educational institutions associated with religion who provide accommodation to students to provide data and material to justify its ongoing existence, as balancing competing rights of manifestation of a one religion over equality of opportunity or access by students of another.

ADC's view is that this exemption can no longer be justified and should be removed.

S40 (3) Religious Accommodation providers

Section 40(3) permits accommodation providers under the direction or control of a religious body to discriminate in accordance with religious doctrine or religious sensitivities of people of the religion.

This is the broadest of the exemptions as it applies to all attributes and prohibited conduct under the Act. The discrimination or unequal treatment it justifies could be on any of the 16 attributes including sex, age or disability if in accordance with the religious doctrine and if necessary to avoid offending the religious sensitivities of the religion. This is a very broad exemption.

There will need to be ongoing justification for the exemption, including the scope of the exemption and how it is used.

It is for the accommodation providers who would seek to rely on this exemption to discriminate or not provide equal access to their accommodation services to justify (that it is reasonable & proportionate) for the ongoing existence and necessity of this exemption.

Relevant to the consideration of this exemption is the increasing role of body's established for religious purpose in providing accommodation and housing

particularly for youth, homelessness, domestic and family violence, alcohol and drug residential services.

In the public sphere when religious organisations are providing housing or accommodation options, it is important to ensure discrimination against vulnerable groups covered by discrimination law is not made lawful. This exemption potentially impinges on many other people's human rights of non-discrimination. The exemption is a long way from people in private being free to practise their religion and religious beliefs.

The ADC has not dealt with complaints or enquiries that relate to this exemption, but this is not a reason to continue the exemption. As stated by Bobbi Murphy though:

"It is no answer that the exemptions should be very broad because they are rarely relied upon. One supposed proof of this fact is that relatively few cases have invoked the exceptions. However, it is misleading to take this as evidence of the fact that religious-based discrimination itself is rare. Many people, on becoming aware of the exemptions, would be quickly discouraged from pursuing any claims."⁹⁴

Further as long as such broad exemptions are allowed by legislation, even if not relied on in practice, they will sustain, rather than challenge, the prejudices that people already hold.

If the exemption can be justified then the breadth of this exemption is very concerning as it currently enables a body established for a religious purpose who provides accommodation the lawful ability to discriminate against all vulnerable groups covered by the Act, if it is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitives of people of the religion.

ADC's position is the exemption is too broad. If it needs to exist at all, the specific purpose to be achieved by the exemption needs to be more clearly defined. Questions such as should religious accommodation providers be permitted to discriminate against LGBT youth in providing relief accommodation, women who do not have children in providing domestic violence services, older men in homeless shelters etc.

The leading case in this area and which has resulted in discussion and academic writing on the meaning of various phrases in similar exemptions, and the evidence required to prove the exemption is the Victorian case of *Christian Youth Camps Ltd (CAN 095 681 342)* and *Mark Rowe v Cobaw Community Health Service Ltd (CAN 136 366722)* and *Victorian Equal Opportunity and Human Rights Commission (2014) 308 ALR 615*.

The summary of the case before the Supreme Court of Victoria - Court of Appeal states:

"At issue is the refusal by the applicants, Christian Youth Camps Ltd and Mark Rowe (to be referred to as 'CYC' and 'Mr Rowe' respectively), to allow the first

⁹⁴ Murphy, Bobbi *Balancing Religious Freedom and Anti-Discrimination: Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2017] MelbULawRw 5, p17.

respondent ('Cobaw') to hire a camping resort owned and operated by CYC, for the purposes of a weekend camp to be attended by same sex attracted young people ('SSAYP')."

The case shows just how difficult the exemption is to establish, however as set out above this must be contrasted with the lay persons reluctance to take on a religious accommodation providers for discriminatory conduct when such a broad ranging exemption remains in the legislation, and appear on ordinary reading to have greater applicability than may in fact exist.

Legal concepts discussed in this decision included the distinction between an organisation's religious functions and other services it provides on behalf of the government. It also considered what is meant by religious doctrine and also necessity. "The Court found that CYC was not a body established for religious purposes, and therefore s 75 of the *EOA 1995* was unavailable.

The ADC position is the exemption can no longer be justified and should be removed. In the alternative if it is to remain in some form the scope needs to be much narrower and accountability provisions need to be included.

S43 Cultural or religious sites

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 in line with the religious doctrine or necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

As set out in the discussion paper the protection of Aboriginal sacred sites is available through existing provisions in the *Northern Territory Aboriginal Sacred Sites Act*. It is ADC's view that this right need not be duplicated in the Act.

This is an exemption which only exists in the NT and Queensland, and the justification for it is very difficult to understand as, it is a further step removed from places of religious observance, than setting such as accommodation provision, or religious schools. The justification in the competing rights space is harder to establish the further the exemption moves away from religious belief.

The exemption is distant from exercising religious belief in a private context, and potentially impacts on a much wider group than other exemptions considered above. The exemption as currently worded is very broad and vague. It is very difficult to ascertain the scope of the exemption, as the phrases used in the section are very wide and would be difficult to define.

The current exemption is broader than the school based employment exemption, and narrower than the accommodation, as it specifies four attributes where discrimination is permitted. Further it contains no accountability provisions, as to who should be aware of the religious or cultural restriction and how they are applied.

A process is provided in *Northern Territory Aboriginal Sacred Sites Act*, below is the reference from the *Aboriginal Areas Protection Authority Website*:

“Aboriginal sacred sites are recognized and protected as an integral part of the Northern Territory’s and Australia’s cultural heritage, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) and the *Northern Territory Aboriginal Sacred Sites Act (Sacred Sites Act) 1989*”.

There is a clear process and procedure for establishing the sites to be protected, cultural significance and the type of protection.

The ADC does not support the ongoing existence of this exemption as its objectives are better achieved under specific legislation, setting in place a process for ascertaining cultural significance and process for advice and notification of the restriction on access.

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

Yes, this is in line with changing service provision in this area and changing community views. Assisted reproductive treatment services are no longer exclusively for heterosexual couples.

CLARIFYING AND MISCELLANEOUS REFORMS

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

Workplaces over time have changed. People no longer always operate in one workplace with one employer. In particular industries people may be employed by one organisation but work in collaboration and alongside others who work for other organisations, such as a construction site. It is currently unclear in the Act the extent to which a worker is protected from discrimination when a fellow worker (from another organisation) discriminates against them. It is the view of the ADC that such workers should also get the protection of the Act.

For example if a female is sexually harassed on a work site by a fellow worker who is employed by another organisation, she may not currently have rights under the Act. What would be relevant is who they each worked for and not what happened. It would also mean that workers from other organisations on site would be legally permitted to sexually harass her because the law would probably not cover them. This is not acceptable and is not in line with the objects of the Act.

Work should also be expanded to include volunteer workers. Individuals who volunteer their time to provide work should have the full protection of the Act, there should not be a lesser standard for them than paid workers.

Prita is recently arrived in Alice Springs with her husband who is working on a 457 visa. She is keen to become part of the Alice Springs community and make it her home. To increase her employability she approaches a local business to do some voluntary hours to increase her skills and get known.

One day at work the manager in the section she is volunteering for gives her a look that makes her feel uncomfortable. She does not say anything because she wants to stay working with the business. Three days later the manager comments on her

appearance and starts asking her questions about her sexual relationship with her husband. She is embarrassed by these questions and chooses not to answer. He keeps pressing her for an answer and then laughs at her when she starts to blush.

The following day while in the photocopy room with him he places his hands on her hips and makes suggestive comments. She feels really uncomfortable. She chooses not to go back.

Clear inclusion of volunteers in the Act would place an obligation on the organisation to have taken reasonable steps to ensure staff were aware of their obligations under the Act when taking on volunteers. For Prita it would give her the basis to complain to someone higher about her experiences with an expectation that they would do something about her concerns. It would also enable Prita to bring a complaint to the ADC.

17. Failure to Accommodate a Special Need

Section 24 of the Act currently provides an obligation to reasonably accommodate special needs a person may have. This section applies to all areas under the Act and all protected attributes. The current drafting of this section makes it a positive obligation. This is however a reading that the ADC applies and we appreciate that it may not be apparent to those who are required to apply it. The ADC would like to see more precise wording in the section to make this clear.

Such a reform would support the ADC in educating providers of this obligation. This is currently the highest ground of complaint at the ADC. It is an important protection that addresses access issues for groups protected by the Act, in particular people living with a disability.

Adrian has three children and is a single parent. He lives in Parap and works in town. His work starts at 8.00am. He is not permitted to drop his children to school until 8.00am. Under this protection he is able to negotiate with his employer to start work at 8.30 am, and work a further 30 minutes at the end of the day. This enables Adrian to stay at work and to get this children to school on time.

If this protection were not in place Adrian may need to choose between leaving his children at the school earlier, against school policy and potentially unsafe if he could not find another option to transport them to school each day. Or alternatively may need to resign his role and face potential unemployment with three children.

Services and Administration of Laws and Programs

Further to the issues raised in this section ADC is of the view that reforms should clarify the applicability of the area of “services” under the Act in the context of administration of laws and programs. This would include the scope and application of “services” in the context of the NT Police and Corrections and other law enforcement agencies.

The first issue is clarifying that the Act does apply to these service providers. Consideration should then be given to whether more specific articulation is required

about when it would apply. For example in relation to police officers should it apply to an officer's decision to make an arrest? For example a decision might be made to arrest only Indigenous Territorians at a public fight, when in fact there was a range of offending occurring from individuals who were not Indigenous. It could be that there was no issue with the fact of the arrest but the way it was conducted might be discriminatory.

Removal of uncertainty in this area would improve knowledge of rights and obligations in relation to these types of service providers. Currently uncertainty in this space when a complaint is made provides a landscape for legal argument rather than resolution and may discourage some complainants or their advocates from filing complaints with the ADC. Uncertainty also means that training and education about equality of opportunity and obligations under the Act on non-discrimination may not be given the same prominence as they should be by law enforcement and corrections agencies.

MODERNISING LANGUAGE

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

Yes. These terms are defined in the *Interpretation Act* and the Act should also not remain to assume that gender is binary. This approval is consistent with modern statutory drafting.

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

Changing the term parenthood to carer responsibility would expand the application of this attribute, but appropriately so, as it reflects the real world situation in which individuals may have a range of caring responsibilities beyond being a parent, that impact on equality of opportunity. Caring work is valued work in the community and individuals who undertake caring work should be protected under the Act from discrimination.

Changing the term will also better reflect the nature of the attribute, which is currently not limited to parenthood but does not encompass all caring relationships, as is required.

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

Yes, marital status infers that the scope of this protection only relates to whether you are married or not, when in fact it covers your relationship status and who you maybe in a relationship with. Changing this terminology will assist people in understanding the true scope of this attribute.

CONCLUDING COMMENTS

The ADC trusts that the contribution in this submission will assist in progressing the important and long needed reform to the Act. We are available for clarification or further information about any of the issues we raise.

We look forward to making further contributions in the developing a law that will provide a more inclusive, equitable and dignified place for all Territorians.

Yours sincerely

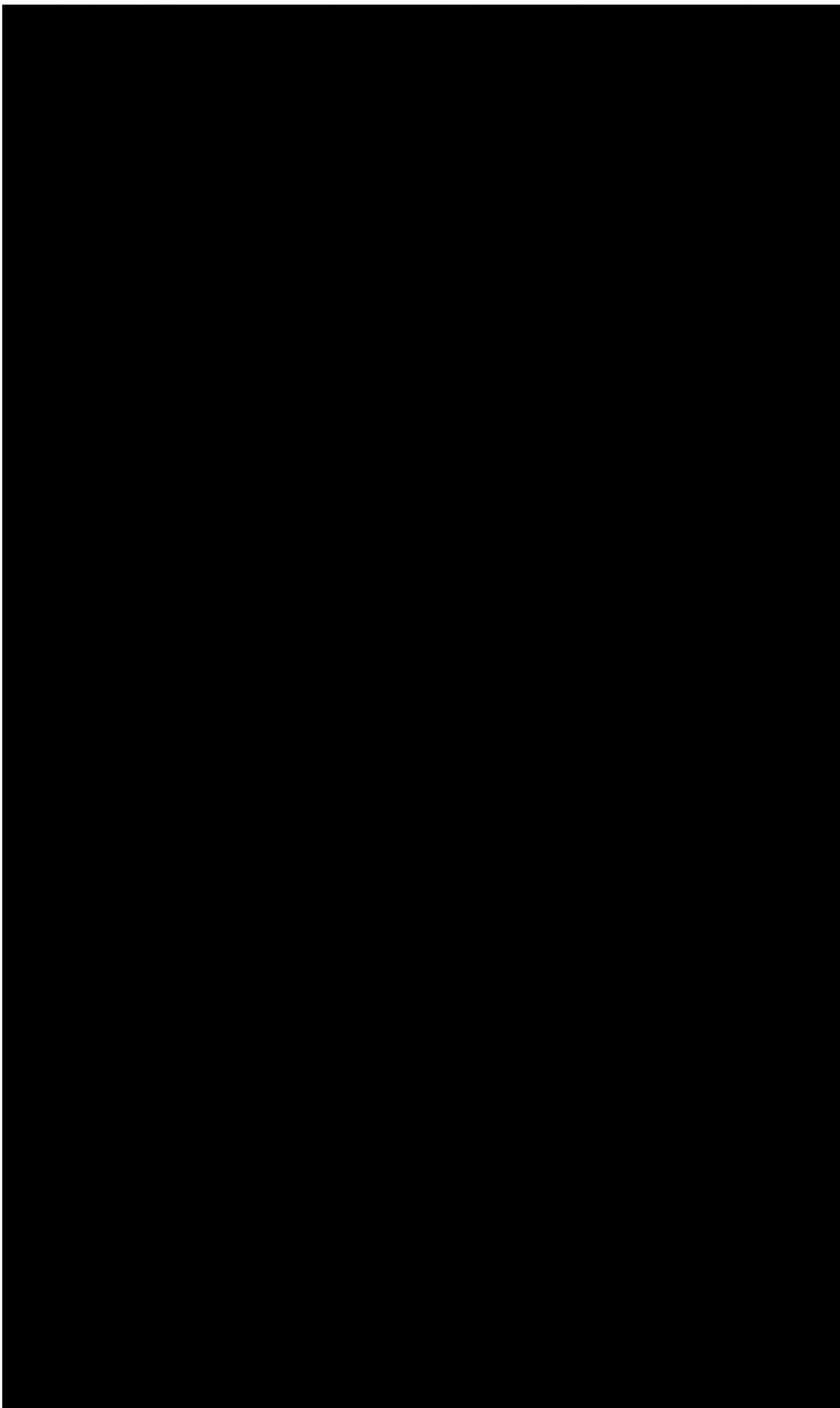


Sally Sievers

Anti-Discrimination Commissioner
Northern Territory Anti-Discrimination Commission

ATTACHMENT A

Some of the vilification images received by the ADC during the same-sex plebiscite



Attachment B

ABC News – “Sam Dastyari warns white nationalism on the rise after pub ambush by far-right group.” <http://www.abc.net.au/news/2017-11-09/sam-dastyari-ambushed-in-pub/9132642>

Central Australian Aboriginal Media Association – “Alice Springs Vigilant Group” <http://caama.com.au/news/2017/vigilante-attacks-in-alice-springs>

NT News – “NT Police warn against civilian vigilante groups as residents begin suburban patrols” <http://www.abc.net.au/news/2016-02-09/nt-police-warn-against-civilian-vigilante-groups/7153534>

Attachment C

Areas, or public places where discrimination is not permitted
[section 28 *Anti-Discrimination Act*]:

- Work
- Education
- Accommodation
- Goods, services and facilities
- Clubs
- Insurance and Superannuation

Attachment D

Racial Discrimination Act 1975 (Cth)

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Attachment E

Legislation	Wording
<p><i>Discrimination Act 1991 (ACT)</i> Current as of 3 April 2017</p>	<ul style="list-style-type: none"> • Listed as Assistance animal. Doesn't limit to just dogs. • Damage by animals not included. • Assistance animal not listed as an attribute but falls under disability. • Assistance animal definition – an assistance animal trained to assist a person with disability to alleviate the effect of the disability that satisfies any requirements prescribed by regulation.
<p><i>Anti-Discrimination Act 1998 (TAS)</i></p>	<ul style="list-style-type: none"> • Guide Dog is mentioned under Disability but not listed as an individual attribute. • Guide dog is not defined in this Act.
<p><i>Anti-Discrimination Act 1991 (QLD)</i> Current as of 22 March 2016</p>	<ul style="list-style-type: none"> • Guide, Hearing or Assistance Dog only mentioned in area of accommodation. • Linked to attribute Impairment and falls under that heading. • Defined by definition <i>Guide, Hearing and Assistance Dogs Act 2009</i>.
<p><i>Equal Opportunity Act 2010 (VIC)</i> Current as of 1 September 2015</p>	<ul style="list-style-type: none"> • S7(4)(c) – an assistance dog (covered under assistance aid). • Not listed as an attribute. • Limited to assistance dog not animals. • Damage by dog not included. • Assistance dog Definition – a dog that is trained to perform tasks or functions that assist a person with a disability to alleviate the effects of his or her disability.
<p><i>Equal Opportunity Act 1984 (SA)</i> Current as of 5 December 2016</p>	<ul style="list-style-type: none"> • Assistance animal is covered under disability. • Includes a fine for separation from animal. • Section for therapeutic animals which is a certified therapeutic animal certified by a medical practitioner. Does not include dangerous breeds. • Assistance Animal means: <ul style="list-style-type: none"> (a) a dog that is an accredited guide dog, an accredited hearing dog or an accredited disability dog under the <i>Dog and Cat Management Act 1995</i>; or (b) an animal of a class prescribed by regulation.
<p><i>Equal Opportunity Act 1984 (WA)</i> Current as of 5 August 2016</p>	<ul style="list-style-type: none"> • Listed under impairment but specifies guide or hearing dog only for people who are blind, deaf or hearing impaired only. • Does not take liability for damage a dog might cause.

<p><i>Anti-Discrimination Act 1977 (NSW)</i> Current as of: 8 December 2016</p>	<ul style="list-style-type: none"> • Listed under disability but specifies accompaniment people who are vision, hearing or mobility impaired. • Does not take liability for damage a dog might cause. • Limits animal to being just a dog.
<p><i>Disability Discrimination Act</i></p>	<ul style="list-style-type: none"> • Not limited to just dogs but any animals. • Animal must be accredited under State or Territory Law. • Animal must meet hygiene and behaviour standards applicable to animals in a public place. • Assistance animal is defined under s9(2).