1005

Submission by
the Discrimination Law Experts
to the Department of
Attorney-General and Justice, NT

Inquiry: Modernisation of the *Anti-Discrimination Act*

5 February 2018

Submitted to: Director, Legal Policy, Department of Attorney-General and Justice, Northern Territory
Policy.AGD@nt.gov.au

1006

Contents

1. Discrimination Law Experts 4
2. Recommendations 5
3. Introduction 8
4. Preliminary issues 9
Substantive Equality: 9
Attributes 10
Defining discrimination 11
A positive duty 12
Evidentiary burden 13
5. Responses to Discussion Paper Questions 15
Modernisation Reforms 15
1. Is updating the term sexuality to sexual orientation without labels appropriate? Are there any alternative suggestions? 15
2. Should the attribute of 'gender identity' be included in the Act? 16
3. Should intersex status be included as an attribute under the Act? 16
4. Should vilification provisions be included in the Act? Should vilification be prohibited for attributes other than on the basis of race, such as disability, sexual orientation, religious belief, gender identity or intersex status? 17
The preferred model 17
Free speech 18
Having regard to the RDA 19
Other attributes 19
5. Should the Act create rights for people experiencing domestic violence in relation to public areas of life such as employment, education and accommodation? 20
6. Should the Act protect people against discrimination on the basis of their accommodation status? 22
7. Should 'lawful sex work' be included as an attribute under the Act? 23
8. Should 'socioeconomic status' be included as a protected attribute? 24
Socio-economic status in Australia 24
Should socioeconomic status be included as a protected attribute under the Act? 25
Symmetrical or asymmetrical? 25
Conclusion 26
9. Should the Act be broadened to include specifically trained assistance animals such as therapeutic and psychiatric seizure alert animals? 27
Who trains the assistance animal? 27
Assistance animals in training 27
Species being used as therapeutic and psychiatric seizure alert animals 28
New Reforms 28
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? 28
11.Should the requirement for clubs to hold a liquor licence be removed? 29
12. Should the restriction of areas of activity on sexual harassment be removed? 30

1007

13. Should the definition of 'service' be amended to extend coverage to include the workers? 31
Removing Content that Enshrines Discrimination 32
14. Should any exemptions for religious or cultural bodies be removed? 32
15. Should the exclusion of assisted reproductive treatment from services be removed? 34
Clarifying and Miscellaneous Reforms 34
16. What are your views on expanding the definition of 'work'? 34
The limitations of the existing prohibitions against discrimination in work area 34
Why this limitation is problematic 35
Other jurisdictions 36
Other workplace protections 37
Recommendations for change 37
17. Should section 24 be amended to clarify that it imposes a positive obligation? 39
18. Is the name 'Equal Opportunity Commissioner' preferred to the name 'Anti-Discrimination Commissioner'? Would the benefits of a new name outweigh the financial cost that comes with re-naming an office? 40
19. Is increasing the term of appointment of the ACD to five years appropriate? Should the term of appointment be for another period, if so what? 41
Modernising Language 41
20. Should definitions of 'man' and 'woman' be repealed? 41
21. Should the term 'parenthood' be replaced with 'carer responsibilities'? 41
22. Should the term 'marital status' be replaced with 'relationship status'? 42

1008

1. Discrimination Law Experts

The Discrimination Law Experts (DLE) group is made up of researchers from universities across Australia with expertise in discrimination and equality law and policy. The group first met in Canberra in 2010 and annually thereafter. Its goal is to inform Australian discrimination and equality law and policy development by undertaking and disseminating research, and providing expert input to law reform processes. The members of the group who contributed to or supported this submission are listed below. This submission was coordinated by Professor Simon Rice and Associate Professor Belinda Smith.

1. Dr Dominique Allen, Department of Business Law and Taxation, Monash University
2. Associate Professor Anna Chapman, Melbourne Law School, University of Melbourne
3. Dr Colin Campbell, Faculty of Law, Monash University
4. Mr Liam Elphick, Law School, University of Western Australia
5. Professor Beth Gaze, Melbourne Law School, University of Melbourne
6. Associate Professor Beth Goldblatt, Faculty of Law, University of Technology Sydney
7. Dr Paul Harpur, TC Beirne School of Law, University of Queensland
8. Associate Professor Anne Hewitt, Adelaide Law School, University of Adelaide
9. Ms Rosemary Kayess, Faculty of Law, University of New South Wales
10. Associate Professor Therese MacDermott, Macquarie Law School, Macquarie University
11. Dr Karen O'Connell, Faculty of Law, University of Technology Sydney
12. Dr Alice Orchiston, Sydney Law School, University of Sydney
13. Professor Simon Rice OAM, Sydney Law School, University of Sydney
14. Associate Professor Belinda Smith, Sydney Law School, University of Sydney
15. Ms Alice Taylor, ANU College of Law, Australian National University
16. Professor Margaret Thornton, FASSA, FAAL, ANU College of Law, Australian National University

1009

2. Recommendations

1. **We recommend** that the Act's long title and objects (s 3(a)) be amended by substituting the words 'equality of opportunity' with 'substantive equality' and include in the object explanatory words setting out the four-dimensional meaning of substantive equality:

   > Substantive equality aims to redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance participation; and accommodate difference by way of structural change.

2. **We recommend** that the Act be amended by adding a new section 19(3) as follows:

   > A court may determine that discrimination has occurred on the ground of an attribute not listed in s 19(1) where such attribute is of a comparably harmful nature.

3. **We recommend** that the Act be amended by substituting for s 20(2) a provision that, without limiting the generality of subsection (1), defines both direct discrimination and indirect discrimination and expressly states that the concepts are not mutually exclusive.
4. **We recommend** that the Act be amended to prescribe a general positive duty to take reasonable and proportionate measures to eliminate discrimination, harassment, vilification and victimisation; to advance equality of opportunity for persons with protected attributes.
5. **We recommend** that the Act be amended to provide for the evidentiary burden of proof to shift to a respondent when a complainant establishes a *prima facie* breach of the Act.
6. **We recommend** that the Act be amended to replace the protected attribute of 'sexuality' with the term 'sexual orientation', and to define 'sexual orientation' as 'a person's sexual or emotional attraction, or lack of sexual or emotional attraction, towards other persons of the same sex, persons of a different sex, both persons of the same sex and persons of a different sex, or all persons regardless of their sex'.
7. **We recommend** that the Act be amended to add 'gender identity' as a new protected attribute, defined as meaning 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.'
8. **We recommend** that the Act be amended to add 'Intersex status' as a new protected attribute, defined as meaning 'the status of having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.'

9. **We recommend** that the Act be amended to prohibit conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of certain protected attributes, allowing an exception for public acts, done reasonably and in good faith, for purposes in the public interest including public discussion or debate.
10. **We recommend** that the Act be amended to provide protection for people who are subjected to domestic, family or sexual violence. This attribute should be defined consistently with Territory and National plans to address domestic, family and sexual violence.
11. **We recommend** that the Act be amended to add 'accommodation status' as a new protected attribute, defining it inclusively to mean being a tenant, licensee, boarder, lodger, itinerant, transient and homeless.
12. **We recommend** that the Act be amended to provide protection for people who engage in lawful sex work.
13. **We recommend** that the Act be amended to include an attribute of 'socioeconomic status'.
14. **We recommend** that the Act be expanded to cover assistance animals.
15. **We recommend** that the Act be amended to allow representative proceedings as a means of addressing some of the shortfalls of the individual complaints mechanisms, provided that the statutory criteria are not so onerous and/or complex so as to render the pursuit of such an action beyond the reach of complainants without legal representation.
16. **We recommend** that the Act be amended to cover all clubs and associations, with appropriate exceptions that allow discrimination in favour of groups of people with a shared attribute who have been historically disadvantaged.
17. **We recommend** that the Act be amended to remove restrictions of areas of activity on sexual harassment.
18. **We recommend** that Division 5 of the Act – pertaining to discrimination in the context of 'goods, services and facilities' – be amended, so as to render illegal not only discrimination engaged in by service providers against (would-be) service recipients, but also discrimination engaged in by those who use (or decline to use) the services of particular service providers.
19. **We recommend** that the Act be amended to:
    - repeal religious exemptions in sections 40(2A), 40(3) and 43;
    - amend the religious exemption in section 51(d) to read: 'an act or practice of a body established for religious purposes which conforms to the doctrines, tenets or beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion'; and

- amend the religious exemption in section 37A(b) to incorporate the same wording of the proposed new section 51(d).

20.We recommend that the Act be amended to remove the exclusion of assisted reproductive treatment from services.

21.We recommend that the Act be amended to change the definition of 'work' so as to extend the prohibition against discrimination in work beyond those working under contracts for and of services, and those undertaking a vocational education program, to unpaid workers, interns and volunteers in the workplace, regardless of whether or not those individuals are working under a common law employment contract.

- **We recommend** that the Act be amended to clarify that it imposes a positive obligation. That positive obligation should be framed as a duty to eliminate discrimination by requiring duty-holders to accommodate special needs arising from a person's attribute.
- **We recommend** that
  - the name 'Equal Opportunity Commissioner' not be preferred to the name 'Anti-Discrimination Commissioner', for that proposed title is inconsistent with both the name and principal purpose of the Act, and is unsupported by the work that is reported.
  - if the name 'Equal Opportunity Commissioner' is to be substituted for the name 'Anti-Discrimination Commissioner', the Act be amended to clearly give the Commissioner functions and powers to take active and enforceable steps to achieving substantive equality, consistently with the recommendation above to amend the Act's objects and title.

22.We recommend that the Act be amended to repeal the definitions of 'man' and 'woman'.

23.We recommend that the Act be amended to replace the definition of parenthood with 'carer responsibilities' and that this protected attributed be extended to include kinship responsibilities.

24.We recommend that the Act be amended to replace the term 'marital status' with 'relationship status'.

1012

3. Introduction

We are a group of legal academics with extensive expertise in the theory and practice of anti-discrimination and equality law. We make this submission in response to the Northern Territory Government's Discussion Paper of September 2017: *Modernisation of the Anti-Discrimination Act* ('the Act').

In drafting this submission, we focus on key elements of the anti-discrimination law framework. In particular, we draw on our shared understanding about the nature of discrimination, the harm it does and the role of law in addressing it. The following points outline the principles on which our recommendations are based:

- Discrimination harms society as a whole and every member, not merely the identified aggrieved persons. For this reason, an obligation to address discrimination should be shared widely across society, and the identified aggrieved person should not bear an onerous burden in driving change;
- Discrimination unfairly excludes women and members of particular social groups, and limits their capacity to fulfil their potential in our society. It manifests in a wide variety of ways, ranging from blatant and intentional prejudicial conduct to the unintentional imposition of apparently neutral barriers. To address discrimination fairly and effectively in its many manifestations, anti-discrimination law needs to be wide in its coverage but also sophisticated and nuanced so that it can apply to the great diversity of human experiences, goals and needs;
- Simplicity should be a goal of regulatory reform but only to the extent that it serves to enhance both compliance and efficiency; and
- In designing effective anti-discrimination laws it is important to appreciate and articulate connections between the definition of discrimination, the nature and scope of prohibitions and exceptions that justify or permit some forms of discrimination. A wide definition of discrimination provides a clear and simple message, but necessitates rules and mechanisms that enable fair and efficient identification of discrimination that is justifiable.

The submission comprises two parts:

- preliminary points dealing with issues indirectly raised by the Discussion Paper; and
- responses to the specific questions posed in the Discussion Paper.

4. Preliminary issues

Substantive Equality:

The Act as it currently stands aims to promote the right to equality of opportunity and protect people against discrimination and sexual harassment (s 3).

We propose a new statement of the objects of the legislation that refers to 'substantive equality' rather than equality of opportunity, with a brief definition of what this entails.

The definition and meaning of equality in international law, a key source of Australian anti-discrimination law, has developed a broader understanding of equality that encompasses more than equality of opportunity. In practice, equality of opportunity has quite often been used procedurally to remove barriers for example by creating special university places for indigenous students who did not score well enough to get in. But this has not necessarily ensured substantive removal of barriers which might require the provision of support such as additional study skills or language sessions to enable disadvantaged students to succeed in higher education.

The meaning of equality, which is contested and diverse, should be spelled out more explicitly. This will provide valuable guidance to interpretation of the legislation. The Committee on the Elimination of All Forms of Discrimination in its 2004 General Recommendation No. 25 used the term 'substantive equality' to get away from formal approaches to equality that were not adequately ensuring the types of changes needed to overcome discrimination. This definition has since been followed by a number of other treaty committees and has been used by constitutional courts in many different countries.

Sandra Fredman and Beth Goldblatt, leading scholars of discrimination law, have suggested that neither equality of opportunity, equality of results, nor equality of dignity manage to capture the multi-dimensional nature of equality. Instead they suggest that substantive equality should have the following four features:

> First, it should be asymmetric. That is, it should distinguish between different treatment that causes further detriment to a disadvantaged group and different treatment that aims to redress past disadvantage and therefore improve the position of a disadvantaged group. Second, it should move away from the assumption of conformity to a dominant norm. Instead, it should accommodate difference and change existing structures. Third, it should insist on levelling up rather than down. And fourth, it should entail a positive responsibility to bring about

1014

> change, regardless of whether individual culpability or violation has been established.[1]

We recommend that the Act's long title and objects (s 3(a)) be amended by substituting the words 'equality of opportunity' with 'substantive equality' and including in the objects clause explanatory words setting out the four-dimensional meaning of substantive equality:

> Substantive equality aims to redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance participation; and accommodate difference by way of structural change.

Attributes

We note the growing list of attributes of discrimination in the proposed reforms to the Act and in anti-discrimination legislation elsewhere in the country. This is understandable, as discrimination is deeply contextual and our awareness of prejudice evolves over time to reveal new forms of discrimination that were not as well understood or exposed in the past. While we do not oppose the continuing effort to add attributes to lists of discrimination, we suggest that, in addition, the reformed legislation allows for discrimination to be understood as capable of occurring on the basis of attributes that are unlisted – also referred to as 'unspecified' or 'analogous'. This occurs elsewhere in the world, for example, in the South African Constitution which states in Article 9(3):

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, **including** race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[2]

The word 'including' has been interpreted by the Constitutional Court to mean that other grounds/attributes that do not appear in the list of grounds can be found to exist by a Court. This is a comparative test that assesses whether the unlisted ground has similar characteristics to a listed ground in creating discrimination. The Court has explained that:

> an unspecified ground (is) ... based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.[3]

As a result of this interpretation the Constitutional Court has found there to be discrimination on the additional grounds of HIV-status, citizenship and geographical location.

---

[1] Fredman, S. & Goldblatt, B.A. United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) 2015, *Gender Equality and Human Rights*, For Progress of the World's Women 2015-2016, no. Discussion Paper No. 4, pp. 1-65, New York, at 8.

[2] *Constitution of the Republic of South Africa* Act 108 of 1996, emphasis added.

[3] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC), para. 46.

1015

We recommend that the Act be amended by adding a new section 19(3) as follows:

> A court may determine that discrimination has occurred on the ground of an attribute not listed in s 19(1) where such attribute is of a comparably harmful nature.

This will strengthen the legislation and make it more flexible and capable of meeting the needs of a diverse and changing community.

Defining discrimination

The current definition in the NT is unconventional. It is an amalgamation of the distinctive approach of s 9(1) of the *Racial Discrimination Act 1975* (Cth) (RDA), which appears in s 20(1), and the standard direct discrimination provision, which appears in s 20(2). In *Newchurch v Centreprise Resource Group Pty Ltd* the Hearing Commissioner analysed the differences between s 9(1) of the RDA and s 20(1) of the ADA NT:[4]

> [Section 20] of the Act is in terms similar to s 9 of the federal *Racial Discrimination Act*. Differences in the terms could be insignificant, or significant in some circumstances. For example, in this case, there is no effective difference in meaning and operation between 'any distinction ... made on the basis of an attribute' (NT Act) and 'any act involving a distinction ... based on race' (federal Act). However, there may be a difference in meaning and operation between 'that has the effect of nullifying or impairing' (NT Act) and 'which has the purpose or effect of nullifying or impairing:' (federal Act), as the former does not cover an act's purpose, only its effect.
>
> There is a clear difference between the two Acts as to what cannot be nullified or impaired: 'equality of opportunity' (NT Act), and 'the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life' (federal Act).

The NT Supreme Court in *Pinecot Pty Ltd v Anti-Discrimination Commissioner* emphasised the pre-eminence of s 20(1) when it omitted mention of sub-s (2) and said:

> Section 20 provides that discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity' in an area of activity referred to in Part 4.[5]

But in both *Anning v Batchelor Institute of Indigenous Tertiary Education*[6] and *Acklin v Anti-Discrimination Commissioner & Batchelor Institute of Indigenous Tertiary Education*[7] the Hearing Commissioner paid no regard to the provisions of s 20(1). In *Newchurch v*

[4] Northern Territory Anti-Discrimination Commission, 5 January 2016, [6.39]–[6.40].
[5] [2001] NTSC 107, [10]
[6] [2007] NTADComm 1
[7] [2008] NTMC 3.

1016

Centreprise,[8] however, the Hearing Commissioner not only considered but decided the complaint under s 20(1), and made findings in terms of s 20(1) that racial comments were discrimination because they impaired Ms Newchurch's 'equality of opportunity to enjoy just and favourable conditions in a comfortable, inclusive and supported work environment where she felt secure and valued'.

We support the NT's continued prohibition against discrimination in the terms of s 20(1). If a proviso such as s 20(2) is required – and in the absence of regular and consistent use of s 20(1) that may be so – then it should, 'without limiting the generality of subsection (1)', as is now the case, define not only direct discrimination but also indirect discrimination.

In principle, we prefer a unified definition that simply prohibits discrimination, without a statutorily defined distinction between direct and indirect discrimination. However, pragmatically, we recommend a definition of discrimination that retains the two terms, direct discrimination and indirect discrimination, as it uses established wording from existing legislation, and is familiar to the Australian public and legal profession.

The two categories should not be construed technically or as mutually exclusive concepts. This can be achieved by expressly stating that the concepts are not mutually exclusive. The report of the ACT Law Reform Advisory Council (LRAC)[9] discusses the issues relating to distinguishing between direct and indirect discrimination, and we recommend that discussion to this review. We agree with LRAC's view that 'the preferable means of reducing the confusion surrounding the concepts of 'direct' and 'indirect discrimination' is to adopt a definition of discrimination which makes it clear that these two ways of understanding discrimination are not mutually exclusive'. The ACT Act now defines discrimination as conduct that occurs directly, indirectly, or both directly and indirectly, and each of direct and indirect discrimination is defined.

We recommend that that the Act be amended by substituting for s 20(2) a provision that, without limiting the generality of subsection (1), defines both direct discrimination and indirect discrimination and expressly states that the concepts are not mutually exclusive.

A positive duty

A legally enforceable positive duty to eradicate discrimination and promote equal opportunity is the emerging 'next step' in regulating for non-discrimination. Some large businesses and public sector bodies in Australia are now taking active, voluntary steps to promote equal opportunity and eliminate discrimination within their own institutions in order to minimise the risk of being held liable for unlawful actions by their employees or agents and, in many instances, because it is simply good business or sound administration

[8] Northern Territory Anti-Discrimination Commission, 5 January 2016.
[9] *Review of the Discrimination Act 1991 (ACT) Final Report*, LRAC 3 FP, ACT Law Reform Advisory Council, 2015.

by a public body. Moving from these limited voluntary efforts to an enforceable obligation set out in an anti-discrimination law is consistent with statutory objectives that promote equality.

The *Equality Act 2010* (UK) has a positive duty for public authorities to promote equality on the basis of eight attributes – age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The general equality duty is supplemented by specific duties which detail how public authorities should perform their obligations. Public authorities are under a positive obligation to remove identified disadvantage, take steps to address the needs of those who share a protected characteristic, and encourage those people to participate.

The State of Victoria has a statutory duty to take positive steps to eliminate discrimination. The duty was introduced in 2010 following a comprehensive review of the *Equal Opportunity Act 1995* (Vic) which identified the limitations inherent in a negative duty not to discriminate, and recommended recasting this as a positive duty to eliminate discrimination as far as possible. The positive duty (s 15(2) *Equal Opportunity Act 2010* (Vic)) applies to all people who have obligations under the Act not to engage in unlawful discrimination, sexual harassment or victimisation, and is in addition to those other obligations not to engage in unlawful conduct. The duty is backed by a limited enforcement process: the Victorian Equal Opportunity and Human Rights Commission may conduct an investigation into the alleged contravention and, following investigation, the Commission may take any action it thinks fit including entering into an agreement with the person to require compliance which can be registered as an order of the tribunal and report the matter to the Attorney-General and Parliament.

We recommend that the Act be amended to prescribe a general positive duty to take reasonable and proportionate measures to eliminate discrimination, harassment, vilification and victimisation; to advance equality of opportunity for persons with protected attributes.

Evidentiary burden

Enforcement of anti-discrimination law rests entirely on the largely unaided actions of those who suffer disadvantage, with virtually no support from legal aid funding. Without individual complaints, the law will not be enforced, and human rights cannot be regarded as adequately protected. But individual direct discrimination claimants have the burden of proving 'the basis' for their disadvantaging or less favourable treatment by the duty holder. In the absence of any requirement for the respondent to produce evidence of the basis of their action, it is extremely difficult to prove what was in the mind of the respondent. As a result, many cases of direct discrimination fail, because although less favourable treatment is proved, the court cannot be satisfied that it was 'on the basis' or 'because' of the prohibited attribute.

In international practice, when a 'prima facie case' has been made out that any disadvantage appears to have been on the prohibited ground, a presumption will arise that action was taken for the reason alleged unless the respondent proves otherwise. This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues, and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory, and will lead to clearer case law which will provide better guidance on the law.

We recommend that a shifting burden of proof mechanism be introduced into the Act. There are two slightly different models. The *Fair Work Act 2009* (Cth) contains a rebuttable presumption for the general protections provisions that shifts the burden of proof once adverse action and the existence of an attribute are established.[10] The shifting burden of proof that we are proposing is more akin to the one used in the UK, requiring a *prima facie* case of discrimination to first be made out. Section 136 of the *Equality Act 2010 (UK)* provides:

> **136. Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if that person shows that they did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
>
> (5) This section does not apply to proceedings for an offence under this Act.

The report of the ACT Law Reform Advisory Council (LRAC)[11] discusses the issues relating to proof of direct discrimination, and particularly the requirement to demonstrate what was in

---

[10] Section 361 of the *Fair Work Act*:
Reason for action to be presumed unless proved otherwise
(1) If:
(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
(b) taking that action for that reason or with that intent would constitute a contravention of this Part;
it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.
(2) Subsection (1) does not apply in relation to orders for an interim injunction.

[11] *Review of the Discrimination Act 1991 (ACT) Final Report*, LRAC 3 FP, ACT Law Reform Advisory Council, 2015.

the mind of the discriminator at the time of the impugned conduct. We agree with LRAC's view that complainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. Expressed in terms of s 20(1) of the NT Act, complainants should be required to demonstrate that they were subject to a distinction, restriction, exclusion or preference that had the effect of nullifying or impairing equality of opportunity. Once a *prima facie* case has been made out, the burden of proof should then shift to the respondent to demonstrate that the person was not subjected to that distinction, restriction, exclusion or preference because of a protected attribute.

We recommend that the Act be amended to provide for the evidentiary burden of proof to shift to a respondent when a complainant establishes a *prima facie* breach of the Act.

5. Responses to Discussion Paper Questions

Modernisation Reforms

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

It is important that this phrasing encompasses 'a different' sex rather than 'the opposite' sex, in order to recognise non-binary identities.[12] This definition would also explicitly capture those individuals who are asexual (feel no sexual attraction regardless of sex) and pansexual (feel sexual attraction regardless of sex), which the Commonwealth legislation does not currently protect.[13] The Australian Human Rights Commission defines sexual orientation as including 'pansexual' and 'asexual'.[14] Furthermore, this broader definition would also likely capture those individuals who identify as 'queer'. It is important that such persons are captured, as they encompass a statistically significant proportion of society. A study of LGBT students at the University of Western Australia found that 7% of respondents identified as asexual, 8.5% identified as 'other' (with 'pansexual' included in this category), and 22.9% identified as 'queer' or 'questioning'.[15] A nation-wide survey in the United

---

[12] This was recognised in the Commonwealth 2013 reforms: Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) cl 14.

[13] See further Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 179-84; Samantha Hardy, Olivia Rundle and Damien W Riggs, *Sex, Gender, Sexuality and the Law* (Thomson Reuters, 2016) 113.

[14] Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights' (Consultation Report, 2015) 5 http://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf.

[15] Duc Dau and Penelope Strauss, 'The Experience of Lesbian, Gay, Bisexual, and Trans Students at The University of Western Australia' (Research Report, Equity and Diversity, University of Western Australia,

1072

Kingdom in 2015 found that 5% of respondents did not identify as either straight or 'LGB',[16] with a significant proportion of these likely to identify as asexual, pansexual, or queer. It is therefore important to avoid narrow labels, such as 'homosexuality' or 'lesbianism', in the new definition of sexual orientation.[17]

We recommend that the Act be amended to replace the protected attribute of 'sexuality' with the term 'sexual orientation',[18] and to define 'sexual orientation' as 'a person's sexual or emotional attraction, or lack of sexual or emotional attraction, towards other persons of the same sex, persons of a different sex, both persons of the same sex and persons of a different sex, or all persons regardless of their sex'.

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

There is no reason why transgender persons should not be protected as equally as those of diverse sexual orientations. The Commonwealth protection is well-constructed to encompass the breadth of gender identities, and the Northern Territory's previous use of 'transsexuality' must be removed as this language is out of date and, to many, offensive.

We recommend that the Act be amended to add 'gender identity' as a new protected attribute, defined as meaning 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.'

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

Similar to the recommendation for Question 2, above, there is no reason that intersex status should not also be protected. The entire LGBTIQA+ community should be afforded equal protection from discrimination under the law. Using this definition, replicating the one used in the *Sex Discrimination Act 1984* (Cth), would ensure consistency between Territory and national legislation.

We recommend that the Act be amended to add 'intersex status' as a new protected attribute, defined as meaning 'the status of having physical, hormonal or genetic features

---

2016) 12-13. Available at: http://www.hr.uwa.edu.au/__data/assets/pdf_file/0004/2948530/UWALGBT_Report-Final-for-Web.pdf.

[16] Office for National Statistics, 'Sexual Identity, UK: 2015' (Statistical Bulletin Report, United Kingdom, 2016). Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2015.

[17] For instance, this would capture men who have sex with men even when they do not identify as 'homosexual', which is a common occurrence: Theodore Bennett, 'Orientations and 'Deviations': Sexuality in Anti-Discrimination Law' (2016) 42 *Monash University Law Review* 15, 26.

[18] Submissions to a previous AHRC report confirm this is the preferred view due to its breadth and inclusivity: Australian Human Rights Commission, 'Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination' (Consultation Report, 2011) 22-23. Available at: https://www.humanrights.gov.au/sites/default/files/document/publication/SGI_2011.pdf.

1021

that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.'

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

As the Discussion Paper points out, the NT is the only jurisdiction not to have enacted a prohibition against vilification. Territorians have access to the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth), but have no protection against vilification on the basis of any other attribute. It is arguable that vilifying conduct on the basis of all protected attributes is covered by the potentially very broad reach of s 20(1) of the Act, but this has not been explored judicially, and in any event, is not a clear policy statement against vilifying conduct.

The preferred model

The Discussion Paper proposes making it unlawful for a person to do an act, other than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people. This is the 'causing offence' model of an anti-vilification law, used in Part IIA the *Racial Discrimination Act* (RDA). It can be contrasted with the 'incitement' model that is used in the States and the ACT.

A significant difference between the 'incitement' and 'causing offence' models is the effect of the conduct in question and the perspective from which the effect of that conduct is assessed. The 'causing offence' model targets conduct by a person that has or would have the effect of offending, insulting, humiliating or intimidating another person or group of persons. The 'incitement' model, however, targets conduct by one person that has or would have the effect of inciting in another person a feeling of hatred, or all or any of serious contempt, severe ridicule and revulsion, towards a third person or group of persons.

The 'incitement' model is, historically, a measure intended to addresses public demonstrations of hate. It does not address pervasive and insidious conduct, does not remedy harm caused, poses a difficult question of proving causation between the conduct and the effect on a third party, and this conduct can be sufficiently addressed, at the more serious level, through the existing criminal law.

The 'causing offence' model is preferable as a policy response to vilification. It directly addresses the harm that is done by vilifying conduct, while at the same time putting people who engage in such conduct on notice that it is unacceptable.

1022

Free speech

Recent discussion about the operation of the vilification provisions in Part IIA of the RDA has raised the question of limits on free speech. The Commonwealth Parliamentary Joint Committee on Human Rights, in its 2017 report on 'Freedom of speech in Australia',[19] said:

> 2.124. There is an important role for what might be termed civility, common human decency, social norms and education in preventing the use of racist language and recognising shared humanity. Providing due consideration and civility to others and engaging in respectful dialogue is an important task with which all members of Australian society can assist.
>
> 2.125. Unlike the United States of America, which has a tradition of unrestrained free speech protected by the First Amendment, the Anglo-Australian tradition has been that there can be reasonable fetters on free speech: the question for Parliaments has been to determine where the balance lies.
>
> 2.126. The committee acknowledges that Part IIA of the RDA is considered to be an important protection against forms of racially discriminatory speech and racism in Australia by many, including multicultural organisations and Aboriginal and Torres Strait Islander groups. It is also consistent with Australia's international human rights obligations.
>
> 2.127. The committee was deeply concerned to hear extensive evidence about the range and extent of daily experiences of racism in Australian society. This is a concern for individuals, for businesses and for society. The evidence illustrated the serious, profound and lasting impacts of racially discriminatory forms of speech, including on the mental and physical health of those affected.
>
> 2.128. At the same time, the right to freedom of expression is of fundamental importance. The committee considers there needs to be scope for dialogue on serious and difficult questions, including matters of race.

The committee did not recommend changes to Part IIA of the RDA.

Luke McNamara and Kath Gelber have investigated the effectiveness of anti-vilification laws.[20] On whether the laws have a 'chilling effect' on speech, they found (p 165) 'little evidence that public discourse has been diminished over the past 25 years. Robust debates have been had on a broad range of issues'. Overall, McNamara and Gelber conclude (p 167):

---

[19] Parliamentary Joint Committee on Human Rights, Freedom of speech in Australia: *Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Inquiry report, Commonwealth of Australia, February 2017.

[20] Luke McNamara and Katharine Gelber, 'The impact of section 18C and other civil anti-vilification laws in Australia' in Australian Human Rights Commission, *Racial Discrimination Act +40 Symposium: Perspectives on the Racial Discrimination Act: Papers from the 40 Years of the Racial Discrimination Act 1975 (Cth)*, Sydney, 2015, 156-167.

1023

> Anti-vilification laws … *do* provide targeted communities with the opportunity to lodge complaints with a human rights authority, in a process that reassures them that the law can assist them, and reminds them that the polity has enacted provisions that enable them to seek redress for hate speech. Further, the laws have educative functions – both direct and indirect – and symbolic importance. On the other hand, we found ongoing and significant levels of hate speech, a regulatory model that relies on individuals who are willing and able to bear the burden of enforcement, and an uneven distribution of benefits among targeted communities.
>
> Despite these mixed results, targeted communities expressed overwhelming support for the value and retention of the laws, as a symbol of their protection and the government's opposition to racist vilification and discrimination. Indeed, although they are often demonised by strident opponents, it would appear that hate speech laws have become an accepted part of the Australian landscape.

Clearly exceptions to a prohibition against vilification are essential to accommodating free speech. In *Deen v Lamb* [2001] QADT 20 the Queensland tribunal said at [5] that it was 'plain that [the vilification prohibition] would be invalid insofar as it infringed upon the freedom to communicate upon political matters', but that the provision was saved by the exception for public acts, done reasonably and in good faith, for purposes in the public interest including public discussion or debate.

Having regard to the RDA

Although Territorians have access to the racial vilification provisions of the *RDA*, the Australian Human Rights Commission is very far from the lives and minds of Territorians. Very little use of the RDA is made by Territorians. A local prohibition, overseen by a local agency, is likely to be of much greater relevance and effect.

Other attributes

There is precedent in Australia for extending vilification protection beyond the attribute of race to other attributes:

- the ACT, Victoria, Queensland and Tasmania prohibit religious vilification;
- in New South Wales, Queensland and the ACT is it unlawful to vilify people on the basis of gender identity;
- the ACT and Tasmania prohibit vilification on the basis of disability;
- in New South Wales it is unlawful to vilify a person or a group of persons 'on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected)', and in the ACT it is unlawful to vilify a person on the ground of their 'HIV/AIDS status';
- the NSW law also prohibits vilification on the ground of homosexuality; and
- the ACT prohibits vilification on the basis of intersex status.

In Tasmania, separately from vilification provisions that use the 'incitement' model, there is a broad protection against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of certain protected attributes: race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, and disability.

In our view, the Discussion Paper is correct to identify the 'causing offence' model of protection against vilifying conduct, and that this model should be adopted in the NT. A vilification prohibition must be accompanied by an exception for public acts, done reasonably and in good faith, for purposes in the public interest including public discussion or debate.

Attributes that warrant protection from discriminatory conduct are no less deserving of protection from vilifying conduct. Indeed, in the NT, it could be argued that vilifying conduct on the basis of all protected attributes is covered by the potentially very broad reach of s 20(1) of the Act but this could be made explicit.

We support the approach of the Tasmanian Act, which uses the 'causing offence' model to prohibit vilifying conduct on the basis of a wide range of specified attributes. We note that the Tasmanian provision does not extend the protection against offence to the attribute of religious belief. On this issue, the ACT Law Reform Advisory Council observed:

> Unlike other attributes, it can be argued that the attribute of religious belief carries with it the risk of causing offence on the basis of religion; for monotheistic religions, an adherent's exercise of free religious expression may necessarily cause offence to the adherent to another religion. More generally, it is likely that criticism of a religion will offend adherents to that religion. A prohibition against causing offence on the basis of religious belief does not, therefore, seem practical.

The Council did, however, recommend including a prohibition against vilification on the basis of religious belief using the 'incitement' approach, rather than 'causing offence'.

We recommend that the Act be amended to prohibit conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of certain protected attributes, allowing an exception for public acts, done reasonably and in good faith, for purposes in the public interest including public discussion or debate.

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

Existing attributes such as sex and disability are not broad enough to cover the types of discrimination that may be experienced by victims of domestic, family or sexual violence.[21]

---

[21] See further, Belinda Smith and Alice Orchiston, 'Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25(3) *Australian Journal of Labour Law* 209, 219-230.

Without specific coverage under anti-discrimination law, victims are vulnerable to prejudicial treatment and disadvantage. For example, research has found that victims can face difficulty in obtaining rental accommodation due to unfair stereotyping by landlords.[22] They may also face difficulties in the workplace, for instance victims have been fired or bullied out of their jobs due to negative assumptions and prejudice.[23] They may also suffer indirect discrimination, being disadvantaged because of this attribute by apparently neutral requirements or conditions of work that are not reasonable.[24]

The formulation 'subjection to domestic, family or sexual violence' is consistent with the Northern Territory *Domestic, Family & Sexual Violence Reduction Framework 2018–2028* ('The Framework').[25] It is preferable to use this formulation instead of 'people experiencing domestic violence' to cover people who experience sexual violence outside of an existing family or domestic relationship, such as where the perpetrator is a stranger or acquaintance. The amended anti-discrimination law should use the same definitions of domestic, family and sexual violence as The Framework.[26]

Protecting people who are subject to domestic, family or sexual violence from discrimination is consistent with the current Council of Australian Governments' *National Plan to Reduce Violence Against Women and Their Children* ('National Plan'). The National Plan seeks to enhance victims' social and economic participation.[27] Providing protection from discrimination supports this objective, and addresses the double-harm that arises when a person is subjected to domestic, family or sexual violence and is then discriminated against on the basis of that experience.

The Australian Capital Territory recently amended its anti-discrimination legislation to include the attribute 'subjection to domestic or family violence'.[28] This protection extends to all areas of public life. **We encourage** the Northern Territory to implement an equivalent

---

[22] Donna Chung, Rosemary Kennedy, Bev O'Brien and Sarah Wendt, *Home Safe Home: the Link Between Domestic and Family Violence and Women's Homelessness* (Partnerships Against Domestic Violence, Commonwealth of Australia, November 2000). Available at: https://wesnet.org.au/wp-content/uploads/2011/05/homesafehome.pdf.

[23] See examples discussed in Australian Domestic & Family Violence Clearinghouse, *Submission to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper: Improving Protection for Victims of Domestic Violence, Attorney-General's Department*, February 2012. Available at: http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Family%20Violence%20Clearinghouse%20-%2031%20Jan%202012.PDF.

[24] For more analysis and examples, see Smith and Orchiston, above n 21.

[25] (Northern Territory Government, 2018). Available at: https://territoryfamilies.nt.gov.au/__data/assets/pdf_file/0006/464775/Domestic,-Family-and-Sexual-Violence-Reduction-Framework.pdf.

[26] Ibid 11.

[27] *National Plan to Reduce Violence Against Women and Their Children 2010-2022* (Commonwealth of Australia, April 2011) 10. Available at: https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf.

[28] *Discrimination Act 1991* (ACT) s 7(1)(x). This provision commenced on 3 April 2017.

1026

protection extending to all areas of public life, recognising that people who experience domestic, family or sexual violence should be afforded the broadest possible protection from discrimination.

We recommend that the Act be amended to provide protection for people who are subjected to domestic, family or sexual violence. This attribute should be defined consistently with Territory and National plans to address domestic, family and sexual violence as set out above.

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

We agree with the Discussion Paper when it says that people risk being treated less favourably because of stereotyped perceptions of homeless people, but this understates both the extent and nature of discrimination. People with accommodation status other than being homeless are discriminated against, and discrimination occurs indirectly as well as directly.

More broadly than homelessness, people are discriminated against because they are, for example, tenants, licensees or lodgers. An inference is drawn against people who are not home owners, characterising them as, for example, without means or in some way unreliable. They may be treated less favourably in, for example, applying for employment, seeking credit, seeking more secure accommodation, and applying for club membership. But as well as being directly discriminated against because of accommodation status, people find themselves discriminated against indirectly because of a requirement or condition that can be met only with a particular accommodation status. Employment, and goods, services and facilities, might be conditional on a person's having been at the same address for at least 12 months, or having a utilities account in their own name, a condition which a tenant, licensees or lodgers is often not able to meet.

As with many discriminatory considerations, accommodation status is often used as a proxy for a real and legitimate issue, which may be, for example, ability to service a debt. Attention should be focussed on the real issue when people's accommodations status is not itself a relevant consideration.

Accommodation status is a protected attribute in s 7(1)(a) of *Discrimination Act 1991* (ACT). In that Act's Dictionary, 'accommodation status' is defined to include being:

(a) a tenant; and

(b) an occupant within the meaning of the *Residential Tenancies Act 1997* [ACT]; and

(c) in receipt of, or waiting to receive, housing assistance within the meaning of the *Housing Assistance Act 2007* [ACT]; and

(d) homeless.

1027

Recommending that provision, the ACT Law Reform Advisory Council (LRAC) said:

> People in the ACT … are discriminated against because they have no fixed address, or security of accommodation tenure. For example, discrimination occurs if a person tries to make an appointment with a local medical practitioner but is told that they cannot be put in the appointment system unless they have a fixed home address, and when an assumption is made about a person's financial means or lifestyle because they are [a] border or lodger. Research suggests that such discrimination can cause and further entrench homelessness, when it prevents a person from securing accommodation and accessing support services …

On homelessness in particular, the Victorian *Equal Opportunity Review Final Report* commented on the anticipated effect of protecting the attribute of homelessness:

> 5.103 Amending the Act to make it unlawful to discriminate on the basis of homelessness reinforces the dignity and worth of people who experience homelessness. It also sends an important signal to employers and providers of accommodation and other goods and services to recognise the person rather than their homelessness. Removing barriers to access to employment, housing and goods and services may assist the homeless to begin to overcome the multiple disadvantages they face.

We recommend that the Act be amended to add 'accommodation status' as a new protected attribute, defining it inclusively to mean being a tenant, licensee, boarder, lodger, itinerant, transient and homeless.

7. Should 'lawful sex work' be included as an attribute under the Act?

Sex workers are subject to a high degree of stigma and negative stereotyping, irrespective of the legality of their work. Advocacy organisations report wide-ranging examples of discrimination against sex workers, particularly in the areas of employment, accommodation, goods and services and insurance.[29]

Anti-discrimination law protection is an important mechanism for ensuring optimal public health outcomes. Australia's *National HIV Strategy* recognises 'stigma and discrimination' as barriers to sex workers accessing health services.[30] The United Nations Development Programme in conjunction with the United Nations Population Fund and UNAIDS, have

---

[29] Scarlet Alliance, *Principles for Model Sex Industry Regulation* (2014) ch 6. Available at: http://www.scarletalliance.org.au/library/principles_2014. See also, Linda Banach, *Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination* (Scarlet Alliance and Australian Federation of AIDS Organisations, 1999). Available at: http://www.scarletalliance.org.au/library/unjust-counterproductive.

[30] Department of Health, *Seventh National HIV Strategy 2014–2017* (Commonwealth of Australia, 2014) 15. Available at: http://www.health.gov.au/internet/main/publishing.nsf/content/8E87E65EEF535B02CA257BF0001A4EB6/$File/HIV-Strategy2014-v3.pdf.

urged governments to create a 'protective and empowering' legal framework to reduce stigma against sex workers and facilitate 'health promotion efforts'.[31] Safeguards against discrimination encourage sex workers to voluntarily engage with HIV prevention, testing and treatment services.[32]

Combating discrimination could also help to improve access to justice for sex workers. A recent study of the Australian legal sex industry found that stigma and the fear of prejudicial treatment prevents sex workers from reporting breaches of labour and workplace safety laws.[33] Extending anti-discrimination law coverage to sex workers may serve to empower them to enforce other legal rights.

The majority of Australian states and territories already provide some form of protection for sex workers under anti-discrimination law: the Australian Capital Territory has the ground of 'profession, trade, occupation or calling',[34] and Victoria,[35] Queensland[36] and Tasmania[37] each have the formulation 'lawful sexual activity'.

Identifying and protecting *lawful* sex work is consistent with the Northern Territory's policy of legalising only some forms of commercial sexual activity. However, we recommend that the proposed formulation 'lawful sex work' be changed to 'engaging in lawful sex work' to maintain consistency with the language used to describe other attributes protected by the Act.

We recommend that the Act be amended to provide protection for people who engage in lawful sex work.

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

Socio-economic status in Australia

Australian jurisdictions generally do not include socioeconomic status as a proscribed ground in anti-discrimination legislation. Australia has nevertheless ratified a number of UN treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, as well as ILO Convention 111, all of which include the cognate ground of social origin.

---

[31] John Godwin, *Sex Work and the Law in the Asia Pacific. Laws, HIV and Human Rights in the Context of Sex Work* (UNDP, 2012) 10. Available at: http://www.undp.org/content/dam/undp/library/hivaids/English/HIV-2012-SexWorkAndLaw.pdf.

[32] Ibid 11.

[33] Alice Orchiston, 'Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry' (2016) 21(4) *Sociological Research Online* 5.1-5.2. Available at: http://journals.sagepub.com/doi/abs/10.5153/sro.4136.

[34] *Discrimination Act 1991* (ACT) s 7(1)(q).

[35] *Equal Opportunity Act 2010* (Vic) s 6(g).

[36] *Anti-Discrimination Act 1991* (Qld) s 7(l).

[37] *Anti-Discrimination Act 1998* (Tas) s 16(d).

In accordance with its international obligations, Australia has implemented legislation, albeit of a modest nature. The *Australian Human Rights Commission Act 1986* includes social origin as a ground for the lodgement of complaints, although binding orders cannot be made. Complaints can be investigated and conciliated with the possibility of an inquiry and a report to the Attorney-General, although no inquiry has yet been conducted on this ground. The annual reports of the Commission reveal that very few complaints are in fact lodged in respect of social origin.

The Fair Work Commission may also hear complaints on this ground arising from 'adverse action' under the *Fair Work Act 2009* (Cth) (FWA) s 351 and termination under FWA s 773. There are a handful of unsuccessful reported decisions in which social origin appears to have been raised as a defence in conjunction with other grounds in response to a detriment, such as termination.[38]

Apart from the 2017 amendments to the *Discrimination Act 1991* (ACT) relating to accommodation status (defined to include homelessness) and employment status, no State or territory anti-discrimination legislation includes socioeconomic status as an operable ground.

Should socioeconomic status be included as a protected attribute under the Act?

There has been a growing concentration of wealth at the top of the economic scale since the global finance crisis, with the level of inequality in Australia now approximating that of the 1920s.[39] While it is recognised that distributive justice is more properly the prerogative of government, anti-discrimination legislation has an important role to play, as class discrimination is fostered by wealth, snobbery and prejudice arising from where people live, what employment they are engaged in – if employed – and the place and extent of their education. Working class and poor people may be looked down upon by those with wealth and social capital. Private schools are a notable means of transmitting social capital.

Symmetrical or asymmetrical?

We suggest that a symmetrical model in line with the general practice is preferable.

The key question is whether socio-economic status should apply to people who are advantaged by their socio-economic status, as well as those who are disadvantaged by it. The symmetrical approach is the norm in Australia in respect of race, sex, etc, that is, the legislation generally applies equally to Indigenous people as well as to Anglo-Australian and white people, and to men as well as women, even though, historically, one side of the dualism has been disproportionately disadvantaged by discrimination.

---

[38] *Moussalli v Western Power (No 3)* [2010] FMCA 389; *McDonald v Civic Disabilities Services Ltd* [2014] FCCA 1464; *Campbell v Aero & Military Products Pty Ltd* [2015] FCCA 2310.

[39] Andrew Leigh, *Battlers and Billionaires: Inequality in Australia* (Black Inc., Melbourne, 2013).

As poor people are disproportionately affected by socioeconomic discrimination, it has been suggested that the preferred model should be asymmetrical. That is, the right to complain should be limited to the less well off. This would prevent those who are better off from challenging programmes designed for the less well off.[40] Indeed, some Canadian courts have refused standing to professionals, such as accountants, in interpreting social condition.

However, we suggest that the asymmetrical model is too restrictive and could confuse distributive justice initiatives with the non-discrimination principle. (In this regard, we note and commend the suggested inclusion of 'accommodation status' as a discrete protected attribute, particularly as it is intended to include homelessness).

In particular, we note that the asymmetrical model could exclude employment complaints being lodged by a person on the basis of, say, their working class background, place of residence, education or accent and, having applied for a professional position, is then refused. The decision maker's assumption is that the working class person would not 'fit in' to the workplace, regardless of their qualifications. Capuano recounts how qualified law graduates were rejected by a Melbourne law firm because they had attended public rather than private schools.[41] It was apparently assumed that those who attended private schools would carry more economic and social capital with them, which would enable them to attract business to the firm. This is precisely the type of discrimination that should be challenged.

Access to goods and services may also involve discrimination on the basis of socioeconomic status, such as declining to carry out work on the assumption that the customer could not afford to pay, or refusing to perform work in a working class neighbourhood.

Conclusion

As Australia becomes less egalitarian, the gap between rich and poor increases and the proscription of discrimination on the ground of socioeconomic status becomes more pressing. The evidence reveals that poverty disproportionately affects Indigenous people, women, refugees, the elderly, and those on welfare. We submit that the inclusion of socioeconomic status as an operable ground would mean that its intersection with race, sex, age and disability would enhance the efficacy of the *Anti-Discrimination Act*. Including socioeconomic status as a protected attribute would be a progressive step for the Northern Territory.

We recommend that the Act be amended to include an attribute of 'socioeconomic status'.

---

[40] See, eg, Sandra Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda' (2010) 3 European Hum Rights L. Rev. 290, 291

[41] Angelo Capuano, 'Giving Meaning to 'Social Origin' in International Labour Organisation ('ILO') Conventions, the Fair Work Act 2009 (Cth) and the Australian Human Rights Commission Act 1986 (Cth): "Class" Discrimination and its Relevance to the Australian Context' (2016) 39 UNSWLJ 84.

1031

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

Who trains the assistance animal?

The Discussion Paper recognises that assistance animals are valuable and draws a distinction between animals which are trained for a person with a disability and those that are owner trained. If the Act is amended to limit animals to those trained for a person with a disability, it is critical to define who has the authority to do the training.

The issue of owner trained animals was an issue raised in the leading disability assistance animal cases in Australia:

1. *The State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96, where the 2 dogs were trained by the person with a disability (ie owner-trained); and
2. *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130, where the dog was trained by the Coffs Harbour Dog Training Club (which is a regional dog training school that has no disability expertise).

In contrast to owner -trained and animals trained by generalists, the established guide dog and assistance dog associations have international accreditation, have their training and outcomes annually assessed, employ trainers with post graduate qualifications, use a geneticist to maximise the breeding program, source and share breeding stock and animals with other associations and have intensive programs that last between 1.5 years and two years.[42]

Rather than opposing all owner-trained animals, another approach is to provide a scheme for accrediting them. For example, Western Australia has a scheme to test the training of owner-trained dogs seeking accreditation as disability assistance dogs. Western Australia has assessors who will work with people seeking their owner-trained dog to become accredited. These assessors will provide additional training and support until the dog reaches the appropriate standard and can be accredited. This service costs money and the individual seeking accreditation needs to pay for the service.

Assistance animals in training

Limiting protection to assistance animals that have already been trained ignores the fact that the animal needs to be trained; a person does not become a driver without being a learner driver. Similarly, an assistance animal does not develop the required level of training without going out into public spaces to learn their skills. Existing training associations take their animals into public spaces and it is vitally important that this process continues. The

[42] Paul Harpur, Martie-Louise Verreynne, Nancy Pachana, Peter Billings, Brent Ritchie, 'Disability assistance animals or not? Problems in policy and practice workshop: summary and scoping discussion paper' (2016): http://espace.library.uq.edu.au/view/UQ:409735.

training of a guide dog for example requires a year of puppy caring and around a year of intensive training. At a minimum, the Act must extend protection to assistance animals that are being trained by approved associations.

Species being used as therapeutic and psychiatric seizure alert animals

Within Australia there are birds and cats that have been recognised as assistance animals.[43] The Americans with Disabilities Act regulations extend protection to miniature horses and in the US there are ducks,[44] pigs and turkeys being used as assistance animals.[45]

The animals used for therapy extend to cats,[46] fish,[47] and specialist areas such as equine-assisted counselling and dolphin-assisted therapy.[48] Perhaps the Act could confine assistance animals to those species that are approved as assistance animals in supporting regulations.

We recommend that the Act be expanded to cover assistance animals.

New Reforms

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

Representative proceedings aim to provide a mechanism for dealing with claims affecting a group of people with a common issue in an efficient manner, and to facilitate access to justice by potentially diminishing the power imbalance between a respondent and individual claimants.[49] In the Australian anti-discrimination arena, representative complaints have been described as 'rarely used',[50] both because of their complexity, and because of the limited remedies they provide. As such, their potential impact is 'still largely unexplored'.[51]

---

[43] Ibid.

[44] Paul Harpur, 'Disability Assistance Animals on Public Transport: A Report on Policy and Practice in Australia' (National Accessible Public Transport Advisory Committee, 22 November 2016, Melbourne).

[45] Robert Adair, 'Monkeys and Horses and Ferrets...Oh My! Non-Traditional Service Animals under the ADA' (2010) 37 *Northern Kentucky Law Review*, 415; Rebecca J. Huss, 'Canines (and Cats!) in Correctional Institutions: Legal and Ethical Issues Relating to Companion Animal Programs' (2013) 14 *Nevada Law Journal*, 25; Laura Rothstein, 'Puppies, Ponies, Pigs, and Parrots Policies, Practices and Procedures in Pads, Professions, Pubs, and Planes: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation' (2018) 24 *Animal Law Review* 1 (*in press*).

[46] M Rijken and S van Beek, 'About Cats and Dogs ... Reconsidering the Relationship between Pet Ownership and Health Related Outcomes in Community-Dwelling Elderly' (2011) 102(3) *Social Indicators Research* 373.

[47] N Edwards and A Beck, 'The influence of aquariums on weight in individuals with dementia' (2013) 27 *Alzheimer Disease and Associated Disorders* 4, 379.

[48] Cynthia K Chandler, *Animal Assisted Therapy in Counseling, 2 Ed* (2012) Routledge, 205 and 231.

[49] Australian Law Reform Commission, *Grouped proceedings in the Federal Court*, (1988) [69].

[50] N Rees et al., *Australian Anti-Discrimination Law* (2014) 734.

[51] C Ronalds and E Raper, *Discrimination Law and Practice* (2012) 175.

A recent example of the successful use of representative proceedings under the *Racial Discrimination Act 1975* (Cth) is the case of *Wotton v State of Queensland (No 5)*.[52]

The risk of an adverse cost order that weighs against the pursuit of individually initiated discrimination claims applies equally to proceedings of a representative nature. Lack of awareness of how discriminatory conduct may be unlawful, and of the existence of potential group members, also diminishes the likelihood of representative proceedings being initiated. The complexity of drafting pleadings to satisfy the statutory requirements has also been seen as a drawback, exacerbated by lack of funding for legal representation for such actions. Furthermore, the low level of damages traditionally awarded in anti-discrimination proceedings means that the same incentives to settle that exist in other, more commercially-based, class actions do not necessarily exist in the context of representative proceedings under federal anti-discrimination legislation. Funding for such actions has also been problematic.

In terms of the process outlined in the discussion paper, the number of complainants required to initiate a representative complaint has not been specified. Nor is it clear what commonality of interest is required between the group members. It would also be useful to give NGOs and other public interest bodies standing in their own right to pursue these types of complaints that are systemic in nature. Finally, although the reporting process is a good initiative to raise public awareness and seek to leverage a change in practice or policy, it should not exclude the pursuit of an enforceable outcome through the tribunal/ court system.

We recommend that the Act should be amended to allow representative proceedings as a means of addressing some of the shortfalls of the individual complaints mechanisms, provided that the statutory criteria are not so onerous and/or complex so as to render the pursuit of such an action beyond the reach of complainants without legal representation.

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

Reference to clubs in an anti-discrimination Act can be for two very different purposes. One is to identify an area of activity in which discrimination is prohibited, and the other is to identify an area of activity for purposes of an exception, by which discrimination is permitted.

To achieve the policy goal of limiting the extent of discrimination, a broad definition is desirable for the former purpose, and a narrow one for the latter. The usual approach in Australia's laws is to prescribe clubs as an area of activity for purposes of prohibiting discrimination, and to prescribe clubs, or voluntary associations, that are exclusively for people with a particular attribute for purposes, as an area of activity for purposes of an

---

[52] [2016] FCA 1457.

exception, by which discrimination is permitted. When prescribing clubs as an area of activity for purposes of prohibiting discrimination, Australia's laws usually limit the prescription to licensed clubs; only the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth), and the laws in Queensland and South Australia do not limit coverage of clubs in this way.

The effect of prescribing only licensed clubs (as the NT Act does) as an area of activity for purposes of prohibiting discrimination is that discrimination is *not* directly prohibited by clubs that don't have a liquor licence. Clubs that don't have a liquor licence are prevented from discriminating by the usual provisions relating to the provision of goods, services or facilities, but may be free to discriminate in relation to, for example, admission to and exclusion from membership, and the provision of members' benefits; whether treatment of prospective or current members is caught by the provision of goods, services or facilities is an open question.

The effect of prescribing only licensed clubs that are exclusively for people with a particular attribute (as the NT Act does) as an area of activity for purposes of an exception, is that clubs that are *not* licensed cannot operate exclusively for people with a particular attribute.

Separately from coverage of and exceptions for licensed clubs, the NT Act allows not-for-profit 'special interest' associations (social, cultural sporting etc) to discriminate in the provision of goods, services or facilities. If treatment of prospective or current members were caught by the provision of goods, services or facilities, which is moot, this exception might be consistent with a 'special measures' policy that creates space for groups of people with a shared attribute who have been historically disadvantaged. But there is no justification consistent with anti-discrimination policy that gives unfettered permission to a not-for-profit 'special interest' association to discriminate in the provision of goods, services or facilities.

We agree with the Discussion Paper when it says that the reason for restricting the scope of clubs to those that hold a liquor licence was specific to a particular time, and that there is no reason to continue this narrow approach. Indeed, the contemporary need is to ensure that people are protected against discrimination in all areas of public life.

We recommend that the Act be amended to cover all clubs and associations, with appropriate exceptions that allow discrimination in favour of groups of people with a shared attribute who have been historically disadvantaged.

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

The Act currently prohibits sexual harassment of a person in any of the areas of activity in Part 4 of the Act: work, goods, services and facilities, accommodation, education, clubs, superannuation and insurance. These demarcated areas of public life are the conventional areas protected under other state and federal sexual harassment provisions. However, as

noted in the Discussion Paper, two other Australian jurisdictions prohibit sexual harassment without restricting areas of protection. In Queensland, s 118 of the *Anti-Discrimination Act* (1991) and in Tasmania, s 17 of the *Anti-Discrimination Act* (1998), prohibit sexual harassment without any restriction to specified areas.

The most recent comprehensive discrimination law reform reviews in other jurisdictions have recommended similar changes. In 2015, the Law Reform Advisory Council in the ACT recommended that the Discrimination Act should be amended to prohibit sexual harassment generally, in all areas of life (Recommendation 15.1).[53] In 2012, the federal consolidation of anti-discrimination law project made the same recommendation.[54]

We support the removal of an 'areas' restriction in the Act, for the following reasons:

- Sexual harassment is socially pervasive and takes place in areas of life not clearly covered by the Act, such as social media platforms. Unless there is a reason to restrict coverage, we consider that beneficial human rights legislation should provide as much protection as possible for discriminatory acts. Sexual harassment provisions should not be limited by placing unnecessary hurdles to bringing complaints. The expanded coverage in other Australian state jurisdictions demonstrates that removal of area restrictions is possible and practical.
- Where areas of sexual harassment are demarcated, the lines of demarcation can themselves become an unnecessary source of legal and regulatory attention. So, for example, as noted in the Discussion Paper, what constitutes 'work' changes over time, so that the boundaries are no longer clear. Removing area restrictions provides clarity and prevents resources being wasted on seeking legal determinations on the demarcations of areas of activity over time.
- The removal of areas restrictions in other jurisdictions, along with the equivalent recommendations for change in the other most recent law reform inquiries, demonstrates that this is the direction that sexual harassment law reform is taking. A change to the Act would be consistent with the overall direction of sexual harassment law reform.

We recommend that the Act be amended to remove restrictions of areas of activity on sexual harassment.

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

We urge that Division 5 of the Act – pertaining to discrimination in the context of 'goods, services and facilities' – be amended, so as to render illegal not only discrimination engaged

[53] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991(ACT) Final Report,* 2015.
[54] Attorney General's Department, *Exposure Draft* Human Rights and Anti-Discrimination Bill 2012, November 2012.

in by service providers against (would-be) service recipients, but also discrimination engaged in by those who use (or decline to use) the services of particular service providers. Typically, anti-discrimination law operates in a 'unidirectional' manner, with only the party to the relationship typically regarded as less powerful being able to sue in discrimination (so, for instance, employees can sue employers for discrimination, but not the other way around). However, it is much less clear that such a power imbalance will exist between service recipients and service providers, especially where a particular service provider is operating as a sole trader or small concern, and is operating in a competitive environment. We also recommend the Division be amended so as to permit employees of service providers to sue those who use (or decline to use) the relevant services. If service providers are often no more powerful (and in some cases may in fact be less powerful) than service recipients, employees of a service provider may be less powerful still.

At present, an allegation of breach of anti-discrimination obligations could possibly be pursued through the use of accessory liability provisions. However, such actions are a somewhat convoluted way to address this type of discrimination, and we argue that it would be better to make clear the obligation of non-discrimination on the part of all parties to a service transaction.

We recognise that there may be practical problems, in some cases, with a service-provider or its employee being able to bring an action in discrimination law against third parties; however, such problems will not arise in all cases. Furthermore, a legal prohibition on discrimination against service providers and their employees would serve as a declaration by the State against such discrimination, and may deter its occurrence in the first place.

We recommend that Division 5 of the Act – pertaining to discrimination in the context of 'goods, services and facilities' – be amended, so as to render illegal not only discrimination engaged in by service providers against (would-be) service recipients, but also discrimination engaged in by those who use (or decline to use) the services of particular service providers.

Removing Content that Enshrines Discrimination

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

Sections 40(2A) and 40(3) relate specifically to accommodation providers, and provide a far broader exemption that should not be separated from the general religious exemption offered in section 51(d). Most other jurisdictions do not have such a provision specific to accommodation providers. Similarly, section 43 provides a specific exemption to cultural or religious sites that is rare and unnecessary. Individuals should not be denied access to a religious site based on protected grounds of discrimination.

Section 51, in its current form, uses outdated and generalised language, such that an act by a body established for religious purposes is exempt from the Act if it is 'done as part of any

religious observance or practice'. This is arguably the broadest general religious exemption that operates in any Australian discrimination law. The standard test is the two-limbed test proposed in amending section 51(d), above: that an act or practice of a body established for religious purposes (a) conforms to the doctrines, tenets or beliefs of the religion, and/or; (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion. The Commonwealth, New South Wales, Western Australia and South Australia only require one of these two limbs to be met,[55] while the Australian Capital Territory, Queensland, and Tasmania require both limbs to be satisfied.[56] Victoria only requires one limb but adds a more stringent objective requirement to the second limb.[57] The Northern Territory is the only jurisdiction in Australia to apply a completely different, and far less rigorous, test for a general religious exemption. It is likely that almost any act that subjectively relies in some way on a religious practice will be exempted from the Northern Territory's discrimination law protections – unlike other jurisdictions where the act must be grounded in an objective religious doctrine that must rely on at least a moderate level of agreement from adherents of that religion.[58]

Similarly, section 37A is one of the broadest educational religious exemptions in Australia, requiring only that an act be done 'in good faith to avoid offending the religious sensitivities of people of the particular religion'. This should also be amended to incorporate the two-limb test above, which will have the added benefit of consistent tests across the general and educational religious exemptions in the Northern Territory. Disparate tests between the two can lead to confusion as to how such provisions are to be applied in difficult cases.

We recommend that the Act be amended to:

- repeal religious exemptions in sections 40(2A), 40(3) and 43;
- amend the religious exemption in section 51(d) to read: 'an act or practice of a body established for religious purposes which conforms to the doctrines, tenets or beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion'; and
- amend the religious exemption in section 37A(b) to incorporate the same wording of the proposed new section 51(d).

---

[55] *Anti-Discrimination Act 1984* (Cth) s 37(1)(d); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72(d).

[56] *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (ACT) s 32(d); *Anti-Discrimination Act 1991* (Qld) s 109(1).

[57] *Equal Opportunity Act 2010* (Vic) s 82(2)(b).

[58] See *Christian Youth Camps* (2014) 308 ALR 615; Elphick, above n 14, 161-64.

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

The exclusion of assisted reproductive services from discrimination protections is not justifiable. Wherever possible, laws that set out to protect against discriminatory acts should not permit them. The current exemption could permit otherwise discriminatory denial of services to people who are in same sex or de facto relationships, single and transgender people.

As the Discussion Paper points out, removing this exclusion would provide coverage that is consistent with the *Sex Discrimination Act 1984* (Cth) and the *Assisted Reproductive Treatment Act 1988* (SA), which currently operates with respect to some services offered in the Northern Territory.

The exemption in s 4(8) of the Act that the provision of a service does not include the carrying out of an artificial fertilisation procedure unnecessarily limits the coverage of the Act.

We recommend that the Act be amended to remove the exclusion of assisted reproductive treatment from services.

Clarifying and Miscellaneous Reforms

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

The limitations of the existing prohibitions against discrimination in work area[59]

An important area of activity to which the Act applies is work. Work is integral to an individual's economic position and social status. There is also increasing evidence that work is intimately linked to an individual's wellbeing and health outcomes.[60] Therefore, it is imperative that these prohibitions operate effectively.

Section 4 of the Anti-Discrimination Act defines work to include:

- those who would be understood as common law employees, working under an employment contact of 'contract of service',
- those who would be considered independent contractors working 'under a contract for services', and

[59] The research which informs this submission regarding the definition of work has been conducted with the support of Australian Research Council's Discovery Projects funding scheme ('Regulating Post-Secondary Work Experience: Labour Law at the Boundary of Work and Education', DP150104516). Some of the ideas in this submission are explored in greater detail in a forthcoming article: Anne Hewitt, Rosemary Owens and Andrew Stewart, 'Mind the gap: Is the regulation of work-integrated learning in higher education working?' (2018) *Monash University Law Review*.

[60] See for example Catherine E. Ross and John Mirowsky, (1995) 36(3) *Journal of Health and Social Behavior* 230.

1039

- individuals working under a guidance program, vocational training program or other occupational training or retraining program.

The meaning and extent of the first two of these categories are problematic when it comes to the status of what could be described as 'unpaid workers', that is, people in the workplace engaging in either productive work or observation of work, who are not receiving an hourly wage. Many individuals engaged in the workplace who are not receiving an hourly wage are excluded from the common law definition of employee, and would also therefore be excluded from the definition of work in s 4.

The terms 'guidance program', 'vocational training program' and 'other occupational training or retraining program' are not defined in the Act and their extent is not currently clear. Some guidance about the meaning of 'vocational training program' might be taken from s 351 of the *Fair Work Act 2009* (Cth) which prohibits employers from engaging in a range of discriminatory adverse action against employees and prospective employees. However, a person is not an employee if they are undertaking a 'vocational placement': an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, State or Territory law or administrative arrangement. This means that periods of unpaid work experience undertaken as part of a higher or vocational education course are not (for most purposes) covered by the *Fair Work Act*, even if they might otherwise be capable of characterisation as employment.[61]

The status of people on vocational training programs is unclear under the NT Act, because the definition in s 4 probably excludes many (or all) unpaid workers who are volunteering their time for altruistic reasons or who are undertaking unpaid work to gain experience or connections to further their own careers, but are not doing so through a formal program of study. It may also exclude students undertaking placements as a part of tertiary (as opposed to vocational) programs. These individuals are consequentially not extended protections against unlawful discrimination or harassment under the Act.

Why this limitation is problematic

The failure to extend protections against discrimination to unpaid workers, volunteers and student learners in the workplace increases the segmentation of the labour market, with some parts 'inside' the protective regulation of labour law while others are 'outside' it.[62] This in turn risks increasing the precarious position of those seeking to enter or re-enter the workforce, or to enter a new profession.[63] In addition, the failure to extend protections

---

[61] See, eg, *Upton v Geraldton Resource Centre* [2013] FWC 7827.

[62] As to 'segmentation', see, eg, the various articles in (Winter 2015) 36(2) *Comparative Labor Law and Policy Journal*.

[63] For recent attention to some of these issues, see Productivity Commission, *Workplace Relations Framework, Final Report* (2015), especially ch 5, 251ff–262 ff, and ch 25, 823ff. See also International Labour

1040

against discrimination to volunteers makes those making an altruistic contribution to society vulnerable to acts from which others may be protected.

Unpaid workers in whatever guise (student interns, those seeking experience to further their own careers, and volunteers) are all presumably making a valuable contribution to a workplace. Even if this is not the case (for example, if a student is merely observing in the workplace) a strong argument can be made that they deserve to be protected from discriminatory conduct and harassment which would be prohibited if they were an employee.

Failure to extend protections against discrimination to unpaid workers in each of these categories risks compounding existing vulnerabilities. For example, a student undertaking a work placement as a part of their degree is often poorly placed to evaluate the quality of the placement before commencing it, dependent upon it to complete their course requirements, and may be relying on the experience, contacts and references they obtain to improve their future employment prospects. It is also clear that unpaid workers are being subjected to problematic discrimination and harassment.[64]

Other jurisdictions

The extension of Australian legislation that offers other protection within the workplace to unpaid workers is patchy. In some instances, unpaid workers are deliberately excluded from the coverage of the protections; in others, the protections are simply not extended to individuals if they are unpaid, as they are not within the defined category of 'worker' to whom the legislation applies. In some other situations, they are protected. For example, the *Sex Discrimination Act 1984* (Cth) applies to a broad range of working relationships, including partnerships, commission agents, contract work and employment (including prospective employees),[65] and part-time and temporary employment, work under a contract for services, and work as a Commonwealth employee.[66] However, the Act does not extend coverage to unpaid workers who are not employees. The *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) similarly cover a range of workplace relationships but do not appear to extend to unpaid work.[67] To fall within these statutes, therefore, an unpaid worker would need to establish that they had been engaged to perform work pursuant to some form of contract.

Organisation, *Non-standard employment around the world: Understanding challenges, shaping prospects* (International Labour Office 2016).

[64] Australian Human Rights Commission, *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017, Australian Human Rights Commission), 11.

[65] *Sex Discrimination Act 1984* (Cth) ss 14-17.

[66] Ibid s 4.

[67] *Age Discrimination Act 2004* (Cth) ss 18–21 and s 4 (definition of 'employment'); *Disability Discrimination Act 1992* (Cth) ss15–18 and s 4 (definition of 'employment'). The *Racial Discrimination Act 1975* (Cth) ss9 and 15.

1041

Some state and territory anti-discrimination statutes extend protections from sexual harassment and discrimination to students engaged in work experience.[68] Several jurisdictions in the United States have also extended a range of protections against discrimination and harassment to unpaid workers and interns in the last few years.[69]

Other workplace protections

In other areas, important protections are more consistently extended to unpaid workers. For example, in all Australian jurisdictions unpaid workers receive protection under workplace health and safety laws, and most jurisdictions have harmonised their law in this area[70] to apply to 'workers', broadly defined and includes 'a student gaining work experience' as well as a 'volunteer'.[71] In the States which have not yet adopted the model legislation, host organisations still have some form of obligation towards unpaid workers even if those individuals do not fall within the legal definition of 'employees'. In Victoria, employers are required to 'ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer'.[72]

Part 6-4B of the *Fair Work Act 2009* (Cth), which allows workers to apply to the Fair Work Commission for protection against workplace bullying, extends to both volunteers and students undertaking work placements at least where they are working for a constitutional corporation or the Commonwealth or in a Territory. The term 'worker' in that Part is given the same meaning as under workplace health and safety laws,[73] which extend to anyone doing unpaid work experience, whether part of a course or not.

Recommendations for change

Important protections against discrimination within the Act could be simply extended to volunteers and unpaid workers by amending the definition of work so as to explicitly include these areas. This is consistent with the approach in other jurisdictions. Of the State and Territory anti-discrimination statutes Queensland's *Anti-Discrimination Act 1991* has especially broad coverage, and explicitly extends to work experience and work on a voluntary and unpaid

---

[68] *Equal Opportunity Act 1984* (SA) s 87; *Equal Opportunity Act 2010* (Vic) s 4(1).

[69] See for example, New York City and State: https://discriminationandsexualharassmentlawyers.com/protections-for-interns-facing-discrimination/. Similar laws have been passed in Maryland: https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/md-unpaid-interns-discrimination.aspx.

[70] See *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

[71] See, eg, *Work Health and Safety Act 2011* (Cth) s 7(1)(g) and (h) and the definition of volunteer in s4.

[72] *Occupational Health and Safety Act 2004* (Vic) s 23(1); and see *Occupational Safety and Health Act 1984* (WA) s 22(1).

[73] *Fair Work Act 2009* (Cth) s 789FC(2), adopting the definition in s 7 of the *Work Health and Safety Act 2011* (Cth).

1042

basis. It would be logical to extend the definition of work in the Act in a similar manner as appears in the Queensland legislation.

An example of how this could be done appears below.

> ***work*** *includes work:*
>
> *(a) in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment); and*
>
> *(b) under a contract for services; and*
>
> *(c) remunerated in whole or in part on a commission basis; and*
>
> *(d) under a statutory appointment; and*
>
> *(e) by a person with an impairment in a sheltered workshop; and*
>
> *(f) under a guidance program, ~~vocational training program,~~ an apprenticeship training program or other occupational training or retraining program; and*
>
> *(g) experience undertaken as part of an educational or vocational course, including a secondary school student undertaking work experience; and*
>
> *(h) on a voluntary or unpaid basis.*

These amendments would ensure that prohibitions against discrimination and harassment are extended to a variety of vulnerable groups engaged in the workplace, including:

- secondary students undertaking work experience,
- tertiary and vocational students undertaking a work placement which is a part of their course of study,
- volunteers undertaking unpaid work for altruistic reasons,[74]
- people engaged in a work experience program organised by a business rather than an educational institution, and
- unpaid workers seeking to gain experience and contacts in order to advance their career prospects.

These extensions are consistent with the broader definitions used in some other jurisdictions in Australia and overseas, some of which have been discussed above, and are consistent with the scope of workplace health and safety laws, which apply to individuals engaged in the workplace regardless of whether they are being paid.

We recommend that the Act be amended to change the definition of 'work' so as to extend the prohibition against discrimination in work beyond those working under contracts for

---

[74] Volunteering is defined by Stewart and Owens as 'unpaid work that is performed with the *primary purpose of benefiting someone else or furthering a particular belief*, rather than gaining experience or contacts that may enhance employability.' Andrew Stewart and Rosemary Owens, *Experience of Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*, Fair Work Ombudsman (2013) 5.

1043

and of services, and those undertaking a vocational education program, to unpaid workers, interns and volunteers in the workplace, regardless of whether or not those individuals are working under a common law employment contract.

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

A clear, positive duty to accommodate special needs is consistent with a commitment to substantive equality. A commitment to substantive equality is an acknowledgement that the same treatment of people without reference to their different needs and circumstances can embed and reinforce inequality rather than lessen it.[75] A clearer statement of a positive duty to accommodate special needs is also in keeping with Australia's international obligations.[76]

Most duties that are imposed by the current Act operate as a general proscription *not* to discriminate, but to operate effectively, discrimination law needs to require positive action by employers and service providers to take steps to manage and mitigate possibly discriminatory circumstances.[77] One way to do so is to require duty-bearers to accommodate the special needs that a person may have because of an attribute. Actions that could be taken include identifying potential or actual discrimination, educating employees and participants and taking positive steps to promote equality.[78] Framing the duty to accommodate a special need as a positive obligation has the potential to move discrimination law obligations away from a fault-based system to one which focuses on the ways in which workplaces and public spaces can and should be changed to allow for full and active participation by all members of society.[79]

A duty to accommodate a special need is particularly important with respect to protecting the rights of persons with disabilities because it gives effect to a social model of disability. A social model of disability understands that disability does not exist because of a medical diagnosis but because of societal barriers in a society which has not been designed to accommodate the access needs of people with impairments.[80]

A duty to accommodate a special need recognises that in most cases, employers and service providers are in a better position than the person with the attribute to take the action that can turn a potential situation of discrimination into non-discrimination. In addition, we

[75] Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 375.

[76] See for instance, Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 5(3).

[77] Fredman, above n 75, 373.

[78] Belinda Smith, 'It's about Time – For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 117, 131 – 132.

[79] Sandra Fredman and Sarah Spencer, 'Delivering Equality: Towards an Outcome- Focused Positive Duty', Submission to the Cabinet Office Equality Review and to the Discrimination Law Review (June 2006) 5.

[80] Michael Oliver, *The Politics of Disablement* (MacMillan, 1990).

consider that clarifying s 24 so that the duty to accommodate a special need is articulated in positive terms has the additional benefit of giving certainty and clarity to employers and other service providers with respect of the duties that they have towards those with protected attributes.

When clarifying that s 24 is a positive obligation, it is also necessary to clarify that it is a distinct obligation, separate from the duty not to directly discriminate against a person on the basis of an attribute. This clarification is important because a failure or refusal to accommodate a special need should be a breach of the Act regardless of whether the decision was because of the relevant attribute or not.

We recommend that the Act be amended to clarify that it imposes a positive obligation. That positive obligation should be framed as a duty to eliminate discrimination by requiring duty-holders to accommodate special needs arising from a person's attribute.

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

The Act is properly called an 'Anti-Discrimination' Act, not an 'Equal Opportunity' Act. Despite the object 'to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute', the provisions of the Act are not directed to that end. Rather, the provisions of the Act are principally directed towards achieving another of its objects: 'to eliminate discrimination against persons' on the basis of a range of attributes in a range of areas of activity'. This is so of any anti-discrimination law in Australia; those that are called 'Equal Opportunity Act' are, essentially anti-discrimination laws. A provision in the NT Act for representative complaints will not alter the essentially reactive, complaints-based nature of the Act.

The NT Act gives the Commissioner functions that are largely concerned with redressing discrimination: s 13(1)(a)-(f). The functions described in s 13(1)(g)-(m) allow the Commission scope to promote equality of opportunity. The Commission's Annual Reports suggest that the Commissioner's work is principally related to complaints, and to more general preventive education. It does not show significant work towards equality of opportunity, and that is understandable and appropriate in light of the statutory functions, the available resources, and the extent of discrimination requiring redress. Unless the Act's objects and title are amended to refer to achieving substantive equality, renaming the Anti-Discrimination Commissioner the Equal Opportunity Commissioner would create confusion and misplaced expectation, and would direct public attention away from the Commission's current principal purpose.

If an Act were more clearly directed towards achieving substantive equality, as we propose above, it would, for example, impose legally enforceable positive duties of non-

discrimination, promote affirmative action for people with protected attributes, and require reporting by public and private entities on progress made in pursuing equality of opportunity in areas such as employment, service provision and education.

We recommend that:

- the name 'Equal Opportunity Commissioner' not be preferred to the name 'Anti-Discrimination Commissioner', for the proposed new title is inconsistent with both the name and principal purpose of the Act, and is unsupported by the work that is reported; or
- if the name 'Equal Opportunity Commissioner' is to be substituted for the name 'Anti-Discrimination Commissioner', the Act be amended to clearly give the Commissioner functions and powers to take active and enforceable steps to achieving substantive equality, consistently with the recommendation above to amend the Act's objects and title.

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

We have no recommendation to make on this point.

Modernising Language

20. Should definitions of 'man' and 'woman' be repealed?

These definitions are outdated and exclude non-binary, gender non-conforming and/or transgender people from certain protection under the Act. Allowing these terms to take their ordinary meaning will ensure such definitions are flexibly and widely applied by courts, adhering to the preferred view at the respective point in time. Furthermore, repealing these definitions will ensure that protections in the Act apply irrespective of age.

We recommend that the Act be amended to repeal the definitions of 'man' and 'woman'.

21. Should the term 'parenthood' be replaced with 'carer responsibilities'?

The term 'parent' is a narrow one and preference should be given to terms that are more inclusive of the variety of family and caring relationships that exist in the community. In addition, the term 'parent' focuses attention on the status of the person rather than on the responsibilities that the person may have. Replacing 'parenthood' with 'carer responsibilities' would ensure that the focus is on the activities and responsibilities that a person has rather than their status. This would allow for protection of a person engaged in activities that arise from the role of a parent or carer but may not have the 'status' of a parent or carer.

In addition, we recommend also including kinship responsibilities in the definition of the protected attribute to appropriately provide acknowledgment and protection for kinship

1046

connections amongst Aboriginal and Torres Strait Islander communities.[81] The Australian Capital Territory made a similar amendment to the *Discrimination Act 1991* which provides protection from unlawful discrimination because of 'parent, family, carer or kinship responsibilities'.[82] In South Australia, the protected characteristic is phrased as 'caring responsibilities' and includes kinship responsibilities.[83] We consider a similar definition would also be appropriate in the Northern Territory.

We recommend that the Act be amended to replace the definition of parenthood with 'carer responsibilities' and that the protected attributed should be extended to include kinship responsibilities.

22. Should the term 'marital status' be replaced with 'relationship status'?

'Marital status' is a protected attribute under s 19(1)(e) of the Act, but has a broad meaning under s 4(1). 'Relationship status' is a more accurate descriptor of the scope of this attribute. Changing 'marital status' to 'relationship status' would prevent confusion and serve the beneficial purpose of communicating more accurately the breadth of the attribute.

We note that s 19A(1) of the *Interpretation Act* (NT) has the effect of expanding this attribute to cover an Aboriginal or Torres Strait Islander person 'to whom the person is married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies'. Any changing of terms in the Act should not have the effect of removing the inclusion of Aboriginal and Torres Strait Islander customary marriages.

We recommend that the Act be amended to replace the term 'marital status' with 'relationship status'.

---

[81] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT), Final Report, (2015) 72 – 73.
[82] *Discrimination Act 1991* (ACT) s 7(m).
[83] *Equal Opportunity Act 1984* (SA) ss 5(3)(a), 5(3)(b) and 85T(e).