North Australian Aboriginal Justice Agency

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Discussion Paper: Modernisation of the Anti-Discrimination Act

Submission of the North Australian Aboriginal Justice Agency

February 2018

Contents

Background to the submission

NAAJA welcomes the opportunity to contribute to the modernisation of the *Anti-Discrimination Act* (the **Act**).

Aboriginal and Torres Strait Islander (ATSI) people continue to experience discrimination at an unacceptable and disproportionate rate, which is a driving factor to poor outcomes across a range of areas such as justice, health and education. Accordingly, the topic of discrimination has particular and unfortunate resonance for ATSI people.

In providing this submission, our aim is to focus on a Northern Territory-specific context and to highlight issues and make recommendations based on our authority led by an Aboriginal board and consistent with our meaningful commitment to cultural competency (as set out in the Cultural Competency Framework 2017 – 2020).

We note the Discussion Paper states 'comments do not have to address all aspects of the Discussion Paper nor are confined to any of the proposed options as discussed in this paper'. Whilst we have sought to put a position in relation to matters canvassed in the Discussion Paper, we have also sought to provide a broader perspective reflective of NAAJA's interests.

Acknowledgements

NAAJA acknowledges the contributions by staff in the Law and Justice and Civil sections of both our Top End and Alice Springs offices, which informed and drove this submission. We also acknowledge the hard work of our Law and Justice interns on various sections of this submission. Aboriginal lawyers have also been involved in drafting parts of this submission.

About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to ATSI people in the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). In January 2018 NAAJA commenced services in the southern region of the Territory bringing together Alice Springs and Tennant Creek (Central Australian Aboriginal Legal Aid Services). NAAJA and its earlier bodies have been advocating for the rights of ATSI people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas impacting on ATSI peoples' legal rights and access to justice. NAAJA travels to remote communities across the Territory to provide legal advice, community legal education and consult with relevant groups to inform submissions.

Introduction

The Discussion Paper correctly states 'discrimination law is an evolving area of practice and the law needs to keep pace with contemporary standards and

expectations.'[1] Within a general context, discrimination law has undergone significant change in recent decades and has developed new and refined standards and expectations.

In considering NAAJA's clients and the authority of an Aboriginal-led board, what are the specific standards and expectations in the context of ATSI world-views? What are these specific standards and expectations in a Northern Territory context? How can these be understood and communicated effectively? How do these views accord with notions of institutionalised and systemic discrimination? How do institutions and legal frameworks respond to ATSI world-views of institutionalised and systemic discrimination? How can these interests be advanced?

In our submission, these questions are fundamental to modernising anti-discrimination responses and instruments in the Northern Territory. We can learn the lessons of elsewhere and modernise our approach based solely on external influences (which are important), or we can also incorporate ATSI views to develop and modernise a Northern Territory set of standards and expectations. This focus forms the core purpose of NAAJA's submission. We seek to provide guidance, clarity and direction as to how to incorporate ATSI views.

And whilst views differ amongst ATSI people as they do for any group of people, there are some common and consistent themes expressed by groups across the Northern Territory and based on our direct experiences:

Learnings from the 'Telling it Like it Is' project

The *Telling it Like it Is* Project explored differences between the ways in which Aboriginal people experience and perceive discrimination, compared to the experiences and perceptions of non-Indigenous people. The project was undertaken by the Australian Research Council in partnership with the *Larrakia Nation Aboriginal Research Corporation*. The study highlighted the different way in which Aboriginal and non-Aboriginal people experience physical and social worlds. Such is the chasm between these experiences that the worlds being faced are themselves different. The findings from the '*Telling it Like it Is'* project were then analysed in a further study,[2] in conjunction with in-depth interviews with Darwin's ATSI residents and visitors to discover how Aboriginal peoples view settler Australian politics, values, priorities and lifestyles. Whilst views differed among the respondents, various common and consistent themes emerged.

One sentiment that was expressed was that the rapid pace of change and development in Darwin is leaving fewer places for Aboriginal peoples.[3] Some participants expressed views that there is a need for more Aboriginal control and involvement in decisions about the city and its developments in order to attempt

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[1] *Discussion Paper on the Modernisation of the Anti-Discrimination Act*, Department of the Attorney General and Justice, September 2017, p5

[2] Habibis, D, Taylor, P, Walter, M & Elder, C 2016, 'Repositioning the Racial Gaze: Aboriginal Perspectives on Race, Race Relations and Governance', *Social Inclusion*, vol. 4, no. 1, pp. 57-67

[3] Above n 2, 61

structural inclusion rather than exclusion.[4] Most respondents expressed feeling uncomfortable in places like shopping centres, especially whilst alone,[5] and reported feeling more comfortable in places that are predominantly Aboriginal.[6]

The responses indicate that there is always a feeling of being on the outside as it is impossible to conform to white societal expectations. For example, one respondent commented that even when they speak the same language as the settler Australian, it is rejected as it is still not good enough.[7] The paper describes a "barrier to success or a sense of belonging," as to succeed or fit into settler culture would be forfeiting important things that define one as an Aboriginal person.[8] Success or a sense of belonging was viewed as requiring an Aboriginal person to conform to the demands of white culture and sacrifice many of the things that are cared about most – family, culture, language and law.[9] Many of the respondents expressed a view that money and consumption is at the heart of white settler culture,[10] which comes at the expense of connection to family and results in loneliness and high levels of stress[11]. Some respondents commented on how it is tiring being judged for not conforming to this 'consumer culture' lifestyle.[12] This is as a result of wanting to put family before work or saving money for instance.[13] Respondents reported feeling "stereotyped, judged, patronised" and that white people think that they are better than them.[14]

To the specific point of discrimination, the report states:

> Racism, discrimination and disrespect was a daily experience. Respondents felt stereotyped, judged, patronised and found wanting. White people think they are better than Aboriginal people and show this in their interactions with them. They are also ignorant of the depth and richness of Aboriginal culture and its strengths. There's no understanding of how well Aboriginal people are doing given what they've had to deal with. Respondents saw talking about the past as a first step for reconciliation but it's misinterpreted as an excuse for any difficulties they have. They said Aboriginal people get told they can't let go of the past, but it's white Australians who won't own it or let go of a false version of events.

And further:

> For things to improve white people need to make an effort to form a genuine relationship with Aboriginal people that is based on experience and participation in Aboriginal worlds. Rather than Aboriginal people

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[4] Above n2, 62
[5] *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations* (Early Findings) Report, published by Larrakia Nation & UTAS, August 2016, 6
[6] Above n 2, 62
[7] Above n 2, 63
[8] Ibid
[9] Above n 5, 5
[10] Ibid
[11] Above n 5, 4
[12] Ibid
[13] Ibid
[14] Above n 5, 9

always having to take responsibility for explaining the issues, many respondents believed more white people need to take responsibility to learn more about Aboriginal culture and make more efforts to understand the nature and extent of racism in Australia and their own role in it. They should also spend time with Aboriginal people and on country. Some respondents also said Aboriginal people need to spend time with white people so they learn to understand them better. There should also be more meaningful measures towards reconciliation than have occurred so far.

Respondents stated:

> "The level of racism and prejudice is horrific. Daily accounts of misunderstandings or ignorance. It's real ignorance and a lack of wanting to understand or accept difference."
>
> "I'm at a point now where I don't bother really I just shut off ...It's like explaining gravity or that the earth is round to a person that believes the earth is flat. You know I'm not going to waste my time with that... It's flipping it back on to me then, it's me that's not engaging nicely enough, it's me who's got the problem rather than the racist moron."

The *Telling it Like it Is* report is a rare example of research which comprehensively explored the views of Aboriginal people in Darwin in a culturally appropriate way and to aspects directly relating to discrimination. It is broadly consistent with a range of reports and inquiries referring to the need for ATSI voices to be heard and for systemic and institutionalised racism to be dealt with in a meaningful way.

If the report finds that there are widespread views of racism and discrimination, and if the mechanisms in place to deal with discrimination do not adequately respond to these findings, there is a need for substantial and systemic reform. For it to be modern it must adapt to the specific circumstances as expressed by ATSI people of the Northern Territory.

The political reality of this is reform will not take place when a significant section of the population does not recognise this form of discrimination and does not validate these ATSI views. A cursory glance of dominant media reports will reveal a significant push-back against any measures which may strengthen the legislative protections to address more effectively ATSI claims of widespread views of racism and discrimination.

Telling It Like It Is also refers to interpersonal racism and discrimination in its research and the connection with adverse mental health and general health outcomes. The Australian Government's *Aboriginal and Torres Strait Islander Health Performance Framework 2014* also makes this link. And whilst the specific incidences and nature of interpersonal racism and discrimination is identified by many ATSI people as common and widespread, this compounds the existing issues relating to systemic and institutionalised discrimination.

NAAJA's work in relation to the justice system puts the case for substantial reform as a response to systemic and institutionalised discrimination.

Indifference to the value of a culturally appropriate justice system

NAAJA's submission to the Australian Law Reform Commission (ALRC) Inquiry Into the Incarceration of Aboriginal and Torres Strait Islander Peoples (available at www.naaja.org.au) sets out how the Northern Territory has gone backwards in its approach to valuing and integrating culturally appropriate mechanisms into the justice system. The core argument is – if incarceration rates are amongst the highest for any group in the world, and if there is significant diversity in the context of language and culture and related factors – then it is imperative the justice system is able to reflect on itself in the context of how it is culturally appropriate. NAAJA's submission sets out clearly defined reform measures for how this can be achieved, and this work builds on previous reports and inquiries.

These points were raised in by a non-government organisation delegation[15] to the United Nation's Committee for the Elimination of Racial Discrimination (CERD) on 28th November 2017:

> We incarcerate Indigenous Australians at the highest rates[16] comparable to any group anywhere in the world. Multiple domestic reports including Royal Commissions, Coroner reports, Reviews, Inquiries, and other mechanisms over decades have made specific recommendations to avoid this predicament. These have largely been ignored.
>
> Two parts explain the egregious nature of this situation:
>
> a) Many policies, laws and approaches including mandatory sentencing, bail laws, racial profiling, the practices of Police and Prosecutions, lack of alternative community based sentencing options, lack of remand options, imprisonment for unpaid fines, and many other policies, laws and approaches disproportionately affect Indigenous Australians.
>
> b) The justice system, and its many parts, is not culturally competent and appears incapable of assessing itself in this context. Indifference to the underlying factors causing disadvantage, and indifference to the importance of culturally appropriate and trauma-informed approaches across the justice system, contributes to a broad Indigenous worldview of racial discrimination, and impedes the underlying principles of justice.
>
> If the people of Australia's dominant culture were treated similarly, this situation would not be accepted and simply would not exist.
>
> The combination of these two aspects - (a) a suite of policies, laws and approaches which disproportionately affect Indigenous Australians, and (b)

[15] To view the 'Australian NGO Coalition Submission to the UN Committee on the Elimination of Racial Discrimination', October 2017 visit www.hrlc.org.au

[16] See Australian Broadcasting Commission online media report '*FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?*' June 6, 2017 , accessed at http://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528

> indifference to the underlying factors causing disadvantage and to the importance of culturally appropriate and trauma-informed approaches across the justice system – defines the characteristic of institutional and systemic discrimination. The absence of attention across the dominant media, policy and political setting to this characteristic reaffirms the status quo.

The literature review of the Law Council of Australia's Justice Project refers to 'trust' and the justice system:

> Aboriginal and Torres Strait Islander communities have experienced a history of social exclusion and marginalisation from the legal system and government.[17] This has led to police, government and the law being viewed as a tool of oppression by many.[18] Systemic discrimination, in addition to the law in Australia contributing to the criminalisation of Aboriginal and Torres Strait Islander communities, deaths in custody and the denial of political rights, have created a profound and ongoing distrust in the Australian system.[19] Many Aboriginal and Torres Strait Islander people have experience of intergenerational trauma linked with the justice system, and many also have personal prior experience of it working 'against them' instead of 'for them.'[20] This distrust 'affects all aspects of the interaction between Indigenous Australians and access to justice'.[21]

More effective measures to address systemic and institutionalised discrimination are required to modernise anti-discrimination legislation. One way to work towards this is with the suggestion of a Co-Commissioner as an identified position and as set out in this submission.

Indifference to the attention of harm

Recent reports and publications attest to the significant impact that discrimination has upon Aboriginal people in Australia.

It is common knowledge that suicide rates for ATSI people are amongst the highest in the world for any group of people. These rates are of particular concern in the Northern Territory where it is estimated that there are 35.2 Aboriginal suicides per 100,000 people[22] which is three times the suicide rate of Aboriginal people in NSW, and twice the Queensland rate.

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[17] Coumarelos C, Pleasence P, et al, LAW Survey: Legal needs of Indigenous people in Australia, *Updating Justice* No 25 (Law and Justice Foundation of New South Wales, 2013), 31.
[18] Judicial Commission of New South Wales, Equality before the Law Bench Book (Emerald Press Pty Ltd, 2016) 2202, [2.2.2].
[19] Cunneen C, Allison F and Schwartz M, 'Access to justice for Aboriginal People in the Northern Territory' (2014) 49 *Australian Journal of Social Issues* 237.
[20] Pleasance P et al, Reshaping legal assistance services: building on the evidence base: A Discussion Paper (Law and Justice Foundation of New South Wales, 2014), 135.
[21] Productivity Commission, Access to Justice Arrangements, Inquiry Report No 72 (5 September 2014), volume 2, 763; ABS, Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 cat no 2071.0 June 2017.
[22] 'The extensiveness of Aboriginal & Torres Strait Islander suicides – 1 in 20', The Stringer 25/2/2015

Indigenous psychologist Ed Mosby recognises that the alarmingly high number of suicides cannot be reduced to one single cause or event.[23] However, one contributing factor has been recognised as stemming from a deep rooted societal and historical sense of disempowerment.[24]

Another matter of ongoing concerning is the severity of harm inflicted on Aboriginal women because of discrimination based on their race and gender. NAAJA expands on these shockingly disproportionate rates of domestic and family violence in ATSI communities in our response to Question 4 of this Discussion Paper, in which we advocate for the inclusion of domestic violence as a protected attribute under the Act.

Our clients and discrimination

It is NAAJA' experience that many of our clients face discrimination against them on the ground of their race. As such, we are primarily concerned with the way in which the *Act* provides effective recourse when our clients face this treatment. However, it is also our experience that our clients may face discrimination concurrently on multiple grounds, for example, discrimination against them on the grounds of race and impairment; and a failure to accommodate a special need associated with race or impairment.

In our experience, a large number of our clients face multiple disadvantages that are also the basis of discriminatory treatment they face. For example, many of our clients are experiencing homelessness or long-term housing insecurity and / or domestic violence.

This submission focuses on the areas of the Discussion Paper which, in NAAJA's experience, are most pertinent to the lived experiences of our clients.

Matters relating to discrimination in addition to the matters raised in the Discussion Paper

We note the Discussion Paper states 'comments do not have to address all aspects of the Discussion Paper nor are confined to any of the proposed options as discussed in this paper'. Whilst we have sought to put a position in relation to matters canvassed in the Discussion Paper, we have also sought to provide a broader perspective reflective of NAAJA's interests.

The following are matters and suggested reform measures which NAAJA views as important from an ATSI Territorian perspective:

A Co-Commissioner as an identified position

Part 2 of the *Act (NT)* sets the arrangements for the Anti-Discrimination Commissioner. In NAAJA's direct experience, the relevant Commissioners over time have been allies and have passionately and vigorously advocated interests consistent with how ATSI

[23] See http://www.abc.net.au/news/2016-10-13/indigenous-suicide-report-queensland/7930086
[24] See https://www.creativespirits.info/aboriginalculture/people/aboriginal-suicide-rates#toc3

people broadly view anti-discrimination. These Commissioners have also worked within the constraints of the Act and the relationships with the relevant NT Government Ministers. However, NAAJA submits that there would be significant value in amending the Act to require the appointment of an Indigenous Co-Commissioner to focus on ATSI issues.

As noted in this submission, the issue of systemic and institutionalised discrimination continues to be a significant factor impacting the exercise of Aboriginal peoples' rights to non-discrimination. Systemic and institutionalised discrimination from an ATSI perspective is ongoing and persistent despite decades of significant reform in Aboriginal affairs. In some areas, it has worsened.[25]

Some areas of government are beginning to put in place frameworks relating to cultural safety, security, appropriateness, awareness and competency. These frameworks often do not have an independent accountability mechanism to ensure a robust approach. This is one area where a Co-Commissioner can focus on and drawing on the cultural authority across the Northern Territory.

Recommendation

We recommend the establishment of a Co-Commissioner or similar arrangement as an identified position for an Aboriginal person with direct experience and understanding of the Northern Territory context.

We recommend further key areas of focus to complement the existing Anti-Discrimination Commission including matters relating to the accountability across government agencies and programs pertaining to the cultural appropriateness, security, safety and related matters.

Strengthening independence of the Commissioner as part of Statehood

At various stages the idea of the Northern Territory transitioning to Australia's 7th State has been raised. In 1998 a referendum was held and was narrowly defeated by 51.9%. A major concern of the Aboriginal population in voting no to statehood was the ensuring the protection of Aboriginal land, culture and languages. Since then, various governments have raised the idea and taken steps towards another referendum. Whilst at the date of this submission there is no recent and clear steps set by government for the Statehood process it is highly likely the issue will re-emerge at some stage. A seventh State will require a new constitution.

In our view, a new constitution ought to embed the role of the Anti-Discrimination Commission and provide clear guidance and protection for its independence and operations. This includes consideration of a new constitution prescribing the term of appointment, how a Commissioner is appointed, restrictions in relation to how a Commissioner can be removed, the possibility of guaranteed resources and other aspects as proposed at a convention to draft a new constitution.

[25] Refer to NAAJA submission to the ALRC Inquiry Into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, October 2017

In our submission, it is imperative that governments establish a mechanism to allow Aboriginal input into the drafting of a new constitution and that the constitution is robust and modern in its approach. Many constitutions are outdated and were drafted during times when Aboriginal voices were actively excluded and ignored. Many constitutions internationally including for nation-States were drafted during times when direct and overt discrimination were active factors across government decision-making and governance structures. In recent decades there has been considerable development in the understanding and theory of good governance and effective and robust accountability mechanisms to ensure the decisions of government reflect the values of the people, and particularly as it relates to vulnerable minority groups within a democracy. Governance frameworks and processes must be robust if they are to properly reflect their stated values and objectives. Although a Commissioner structure retains a level of independence and autonomy, without a constitutional guarantee around key provisions there is no certainty that a Commissioner's role is performed free from any potential adverse influences of a government of the day. This includes any adverse influence as a result of pressure to withdraw funding to reduce the capacity and resources of a Commissioner role or pressure in relation to terms of appointment and the possibility of re-appointment. And whilst there is no specific information in the Northern Territory to prompt this recommendation, it is common knowledge across States and Territories that the potential for this pressure is real, and in some instances can have a determinative effect on the approach of a Commissioner role.

In our view, efforts to modernise legislation to protect against discrimination ought to include constitutional provisions to improve the independence and autonomy of a Commissioner role.

Recommendation

We recommend that the Statehood process, when it commences, actively considers mechanisms to ensure Aboriginal input into the drafting of a new constitution and that specific space and context is provided to ensure consideration of recognising a Commissioner for Anti-Discrimination in the constitution. This includes consideration of a new constitution prescribing the term of appointment, how a Commissioner is appointed, restrictions in relation to how a Commissioner can be removed, the possibility of guaranteed resources and other aspects.

A Human Rights Act for the NT

NAAJA submits that a Human Rights Act for the NT would complement a modernised *Anti-Discrimination Act*, and provide an additional buffer against discrimination while further promoting equality and human rights. All Territorians would benefit from having their human rights protected in law and a public expression of support by government for human rights in an Act of Parliament will help ensure that rights are upheld and respected in the broader community.

A Human Rights Act for the NT would be of particular benefit to ATSI people who continue to experience disproportionate levels of disadvantage and discrimination,

especially if the Human Rights Act included protection of, Aboriginal land, cultural rights, identity, and language.

NAAJA notes that the ACT and Victoria have both legislated charters of human rights, and that those Acts have been reviewed and found to value add to those jurisdictions.

Further, NAAJA considers it is important to utilise the suggestions in the 'strengthening independence of the Commissioner as part of Statehood' as part of the above suggested process and the development of a Human Rights Act. The above process may develop more robust measures for collaborating with civil society in relation to the appointment of a Commissioner role, how a Commissioner is appointed, restrictions in relation to how a Commissioner can be removed, the possibility of guaranteed resources and other aspects. Such measures can complement consideration of these steps as part of the Statehood process.

Recommendation

NAAJA recommends that the Attorney-General establish a working group, including community representatives, to develop a Human Rights Act for the Northern Territory, which includes protection of cultural rights, Aboriginal identity, and language. Removal of section 37 exemptions – irrelevant criminal record

NAAJA submits that this exemption under s 37 of the Act is unnecessary and creates confusion and uncertainty with regards to the legal obligations of employers. A significant portion of NAAJA' clients have criminal records, and go on to seek employment in the community. Discrimination based on irrelevant criminal records presents a very real threat to the ability of our clients to participate productively and fully in the community.

NAAJA submits that there are no circumstances in which an "irrelevant" criminal record would be "reasonably necessary to protect the physical, psychological or emotion well-being" of vulnerable people in the course of work that involves their care, instruction or supervision. In these circumstances, the criminal record would presumably be relevant, and thus able to be considered by an employer or prospective employer.

With regards to child-related employment, NAAJA supports many clients to obtain Ochre Cards and respond to any questions or concerns presented by the Screening Authority. We present that this is the appropriate forum for peoples' criminal records to be considered and their suitability to work with children, to be determined.

In matters where charges are not finalised, NAAJA notes that a criminal record can only become irrelevant once a charge has been withdrawn. NAAJA is concerned that clients who may have their employment terminated as a result of pending charges may be limited in terms of available actions due to pending charges not being treated as an irrelevant criminal record. NAAJA asserts that a client whose employment is terminated in such circumstances, only to have their charges withdrawn or be found not guilty, should have a clear cause of action available against the employer in relation to termination based on an irrelevant criminal record. As it stands, the current gap in this area leaves clients vulnerable to having their employment unjustly terminated.

Other laws which contradict the Act

In NAAJA's view, the issue of legislation that is contrary or inconsistent with the *Anti-Discrimination Act* must be considered. NAAJA proposes the inclusion of a provision similar to s 10 of the *Racial Discrimination Act* (Cth). That section states:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

The Territory's Act lacks any equivalent provision, which renders it toothless where public programs enacted under legislation may have discriminatory operation. NAAJA submits that a similar provision be included in the Act, for instance:

> If, by reason of, or of a provision of, a law of the Territory, persons who possess a protected attribute (the **first-mentioned persons**) do not enjoy a right that is enjoyed by persons who do not possess that attribute (the **second-mentioned persons**), or enjoy a right to a more limited extent than persons who do not possess that attribute (the **second-mentioned persons**), then, notwithstanding anything in that law, the first-mentioned persons shall, by force of this section, enjoy that right to the same extent as the second-mentioned persons.

We also propose that the *Interpretation Act* include a provision that requires the interpretation of legislation to be consistent with the *Act*.

In relation to inconsistent legislation, we acknowledge the NT Government's recent amendment of the sessional orders of the Legislative Assembly to require Members, when presenting a bill, to table a statement on whether the bill is compatible with Human Rights as defined in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*.[26] NAAJA applauds this positive step however notes that a sessional order does not have the same status as legislation. Accordingly, we argue that a specific provision as to the status of inconsistent legislation should be included in the *Anti-Discrimination Act* and note that this would be consistent with, and complementary of, the step taken with regard to the statement of compatibility.

Recommendation

NAAJA recommends that the *Act* include a provision stating that legislation that contradicts provisions in the *Act* should be struck down.

NAAJA recommends that a provision be introduced to the *Interpretation Act* requiring other legislation to be interpreted in a manner that is consistent with the *Act*.

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[26] See sessional order 12.3 at https://parliament.nt.gov.au/__data/assets/pdf_file/0004/384205/Sessional-Orders-13th-Assembly.pdf

NAAJA Responses to questions set out in the Discussion Paper

NAAJA has not responded to every specific question in the Discussion Paper, and has prioritised those areas which align most closely to our experience and capacity.

Gender and Sexuality Protections

Questions 1 to 3

We note these questions have been responded to by a broad range of NGOs in the Territory, in particular Rainbow Territory NT. NAAJA defers to the expertise of Rainbow Territory on these topics and supports the underlying premise of these submissions calling for reform.

Vilification

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

All other states and territories (aside from WA) have anti-vilification provisions enacted in their anti-discrimination legislation. Research conducted by the Cultural and Indigenous Research Centre Australia (CIRCA) consisting of interviews of representatives of ethnic minorities revealed that:

> [V]ilification laws [are] a precious symbol: [participants in the study] said that simply 'knowing there is something there to protect you' made them feel less vulnerable, because the law 'curbs those urges', 'protects the people', and makes them feel 'safe and supported'. The laws were seen as the government setting a 'standard', making a statement about what is 'not right' in public behaviour, acting 'as a deterrent', and allowing 'us all to be treated with respect.'[27]

NAAJA's position is that vilification provisions should be included in the Act, extending to all attributes included in the Act. This should include vilification that occurs in any area of public life, including online and through social media even if engagement in those public online forums takes place from a private environment such as a home or workplace.

It is our experience that the majority of clients who present for legal assistance describe discrimination against them due to their race, or failure to accommodate a special need associated with their race. The prevalence of chronic illness and disability amongst ATSI people also makes vilification on these grounds of particular relevance to our clients.

Current protections against racial vilification in the NT are inadequate. Recent examples of this include unmoderated public commentary that until recently was

[27] Gelber K, and McNamara L 'Anti-Vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided', *UNSW Law Journal* Vol 39(2), p508

enabled through social media platforms such as the NT Police Facebook page, and which is still enabled by the Alice Springs Community Forum Facebook page, which is frequently racially abusive and offensive to Aboriginal people. Introducing more robust mechanisms to deal with vilification would provide greater protection against such online conduct.

In addition to the most common complaint areas observed by NAAJA, there is a real need for vilification provisions to be introduced which prohibit vilification against all attributes listed in the Act, to bring the Act into line with contemporary community experience, modern expectations and human rights standards. This includes (but should not be limited to), sexual orientation, religious belief, gender identity, intersex status and HIV/AIDS status. NAAJA shares the view of Rainbow Territory that "legislating to broaden vilification protections reflects social attitudes of respect and inclusion that are held by the majority."[28]

It is essential that clear mechanisms are set out to address vilification when it does occur, to provide appropriate recourse for the person who has been vilified and ensure accountability of those who engage in vilifying acts. This should include accountability through the criminal justice system. Relevant parallel provisions in criminal law which would enable prosecution of such conduct must be sufficiently broad to cover all attributes included in the Act.

NAAJA agrees with the definition of vilification as described in the Discussion Paper, which would cover acts that are "reasonably likely, in all the circumstances, to offend, humiliate or intimidate another person or a group of people."[29] In addition to this, NAAJA would support the inclusion of a prohibition against inciting hatred or serious contempt towards a person or group of people on the basis of protected attributes they may hold. NAAJA notes that the definition as included in the Discussion Paper includes the qualification "other than in private (for example at home)."[30] NAAJA cautions against a definition which would extend any ambiguity to activities such as posting on social media from the privacy of ones home, which is an activity that must be captured by these provisions.

The Discussion Paper also raises the issue of exemptions to vilification provisions. NAAJA acknowledges that there is a need to balance vilification provisions with freedom of expression, pursuant to Australia's obligations under Article 19 of the *International Covenant on Civil and Political Rights*. NAAJA would support the inclusion of exemptions consistent with those outlined at s 67A(2)(c) of the *Discrimination Act 1991* (ACT). This would capture acts which are performed "reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter."

NAAJA has concerns about the broader definition that is raised in the Discussion Paper, which would include comments on an "event or matter of public interest if it is

[28] Submission of Rainbow Territory to the Discussion Paper on Modernisation of the Anti-Discrimination Act, p10
[29] Above n28, p11
[30] Ibid

a genuine belief held by the person making the comment."[31] NAAJA shares the concern of Rainbow Territory that such a provision could provide a broad excuse that may be exploited by individuals expressing racist or bigoted views,[32] and those whose actions are undertaken with malice and not in good faith.

Recommendation

Vilification provisions that extend to all attributes should be included in the Act, and apply to conduct that occurs in all areas of public life including online forums.

That the definition of vilification as defined in the Discussion Paper be adopted, which would cover acts that are "reasonably likely, in all the circumstances, to offend, humiliate and intimidate another person or a group of people." NAAJA would also recommend the inclusion of a prohibition against inciting hatred or serious contempt towards a person or group of people on the basis of protected attributes.

NAAJA recommends that caution be exercised in relation to the wording of exemptions, and would support the inclusion of exemptions consistent with those outlined at s 67A(2)(c) of the *Discrimination Act 1991* (ACT).

Additional attributes

Domestic Violence

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

Domestic violence is pervasive across our entire community, and is of particular concern to NAAJA given the high rates of domestic and family violence experienced by our clients and within Aboriginal and Torres Strait Islander communities.

The Northern Territory has the highest rate of domestic and family violence out of every state and Territory in Australia. Compared to non-Aboriginal people, the victimisation rate of ATSI people in the NT is 18 times higher; and the victimisation rate is even higher for Aboriginal women.[33]

NAAJA supports express protections being introduced into the *Act*for people experiencing domestic violence, or have experienced domestic violence, in relation to public areas of life such as employment, education and accommodation. In NAAJA's observation, being a victim of domestic and family violence can be an enormous barrier for clients seeking accommodation or employment and we frequently assist clients in this position. We agree that the inclusion of this attribute would have the benefits outlined in the Discussion Paper and believe it is both necessary and appropriate for these protections to be incorporated in the Act. NAAJA would support a broad definition of domestic and family violence that is inclusive of different forms of

[31] Ibid
[32] Above n 28, p12
[33] Source: NT Police (2017); ABS (2017), 4510.0 Recorded Crime – Victims, 2014-16.

family and domestic relationships, including those that exist in accordance with contemporary ATSI customs, and which is non-binary.

Recommendation

NAAJA recommends domestic and family violence being included as a protected attribute in the *Act* to protect those who have or are experiencing domestic and family violence, from discrimination.

NAAJA would recommend a broad definition of domestic and family violence that is inclusive of different forms of family and domestic relationships, including those that exist in accordance with contemporary ATSI customs, and which is non-binary.

Accommodation status

Question 6 – should the Act protect people against discrimination on the basis of their accommodation status?

A large portion of NAAJA's civil clients are homeless, at risk of homelessness or experiencing long-term housing instability. Many of our clients have been on the public housing waiting list for a number of years and may be living in overcrowded conditions with extended family members, in Aboriginal hostels or other non-permanent structures.

We recognise that homelessness is often a causal factor in unemployment, lack of educational opportunities and socio-economic disadvantage. We also recognise that accommodation status can prevent a person from accessing various public services, where inquiries can only be made online or require a residential address. For these reasons, we support the inclusion of a specific protection in the *Act* against discrimination on the basis of accommodation status.

NAAJA would support a broad definition of homelessness as outlined in the Discussion Paper, to include individuals who do not have a home and are living rough, along with those who have no permanent address and are moving between other people's houses from place to place.

Recommendation

NAAJA recommends the inclusion of a specific protection in the Act against discrimination on the basis of accommodation status.

We recommend a broad definition of homelessness to include individuals who do not have a home and are living rough, along with those who have no permanent address and are moving between temporary residences.

Socioeconomic status

Question 8 – should "socio-economic status" be included as a protected attribute?

Almost all of NAAJA's clients experience socioeconomic disadvantage. Many experience severe socioeconomic disadvantage and struggle with day-to-day

expenses. This has a profound impact on their ability to participate in public life, and can result in their mistreatment due to stereotypes associated with poverty, crime and ATSI status.

We support the introduction of socioeconomic status as a protected attribute in the *Act.* We believe additionally to providing legal recourse to members of the community who may face discrimination on the basis of their socioeconomic status, the explicit protection of socioeconomic status may serve an additional educative benefit by increasing focus on socioeconomic disadvantage and the barriers people experiencing socioeconomic disadvantage may face.

Recommendation

NAAJA recommends the introduction of socioeconomic status as a protected attribute.

New Reforms

Representative Complaint Model

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

NAAJA strongly supports introducing a representative complaint model. NAAJA is in a unique position of providing legal services for ATSI people in the NT across a wide range of legal areas including employment, housing, compensation, police complaints, prison complaints, discrimination matters and many more. As such, from time to time we observe changes in reportage of particular forms of discrimination from our clients which can indicate systemic problems that cannot be addressed effectively on an individual client basis.

For example, we experience a high number of complaints about police treatment through the implementation of the Point of Sale Intervention, or Temporary Beat Location policy across Alice Springs. The number and nature of complaints fluctuates depending on number of police put on duty and other operational changes. There may be some utility in NAAJA being able to bring a complaint on behalf of numerous clients in situations like these.

Another example where a representative complaints model would be useful is when discriminatory conduct is directed at a broad range of people without a specific identified target to fit into the traditional client based complaint model. For example, it has been brought to NAAJA' attention by a number of clients that discriminatory commentary is regularly published on the Alice Springs Community Forum Facebook Page which discriminates against Aboriginal people on the basis of their race, and some which vilifies Aboriginal people on the basis of their race.

No individual client is named, yet a range of our clients have suffered pain and suffering and are the broad, intended target of the commentary. A representative complaints model may provide some recourse for our clients in situations like these.

While individual complaints provide an important way to assert rights following individual acts of personal discrimination, this model will not always address systemic disadvantage and discrimination. The inclusion of a representative complaints model in the modernisation of the Northern Territory's *Act* will provide a systemic approach to addressing concerns surrounding discrimination on behalf of a group of people that are identified as having a protected attribute under the Act.

NAAJA represents many ATSI people throughout the Territory on a wide range of issues and have noticed a number of reoccurring systemic issues that could be more effectively addressed together than on an individual client basis. The ability to address systemic issues that affect the Aboriginal community as a whole would provide a more effective, fast-track approach to positive change.

In addition to a representative complaints model, NAAJA would also support the introduction of own-motion investigation powers for the Anti-Discrimination Commissioner, similar to the own-motion investigation powers of the NT Ombudsman. This would enable the Anti-Discrimination Commission to conduct investigations into possible systemic discrimination, where evidence may have been brought to the attention of the Commission anecdotally or informally without a formal complaint being lodged.

It is essential that the Anti-Discrimination Commission is resourced appropriately to conduct such investigations and respond to concerns that may be raised through formal and informal channels.

Additionally, a mechanism such as representative complaints provisions and own-motion investigation powers have potential resource benefits for the Anti-Discrimination Commission, legal aid providers and respondents to complaints, as there may be less duplication of individual complaints though the scope to look at issues collectively and from a systemic perspective.

Recommendation

NAAJA recommends the introduction of a representative complaint model.

NAAJA recommends the introduction of own-motion investigation powers for the Anti Discrimination Commissioner.

NAAJA recommends that the Anti Discrimination Commission be more appropriately resourced to conduct investigations and respond to complaints that may arise.

Broadening the Scope of Clubs

Question 11 – should the requirement for clubs to hold a liquor licence be removed?

Given the broad scale discrimination our clients face in a variety of forums, NAAJA in principle supports the expansion of the term 'clubs' under the *Act* to also extend to clubs or associations which do not hold liquor licenses.

Recommendation

NAAJA recommends that the term 'clubs' be expanded to include clubs or associations that do not hold liquor licenses.

The definition of "Services"

Question 13 – should the definition of service be amended to extend coverage to include the workers?

NAAJA supports amending the definition of services to protect employees of service providers as well as customers. While the majority of complaints NAAJA has been involved in on behalf of our clients involves discrimination against our clients as customers, we are aware of racial discrimination directed at ATSI employees of service providers, and support amending the definition of "services" to protect these clients.

We also support amending the definition of "services" to clarify that powers exercised and duties performed by by members of the Police Force and Correctional Services Officers are covered by the term.

In Alice Springs, NAAJA is aware of instances in Town Camps where police responses to requests for help in family violence situations have not been prompt, which has created concern amongst community members that calls for assistance are not being treated with adequate priority.

We note that, while the *Act* explicitly excludes places of detention from being considered 'accommodation' under s4, there is no clarity as to whether discrimination which takes place within places of detention may fall within the parameters of the provision of goods and services.

In NAAJA's view, women at the Alice Springs Correctional Centre are frequently disadvantaged due to gender, and it would be useful to view this through a discrimination lens. The classification of custodial settings as a service would improve accountability in this regard.

The case law on this issue is grey, adding to the confusion.[34] NAAJA would welcome affirmative clarification within the *Act* as to whether those who are being held in the

[34] In *Rainford v State of Victoria* [2008] FCAFC 31 it is stated at [9] that, "although the meaning of service is not simple to resolve, and the matter was not argued in depth, we see some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility".
In *Commissioner of Police (NSW) v Mohamed and Others* (2009) 262 ALR 519 the Court found that the fact that an authority is required to provide a public service implies that the service is to be provided without discrimination across all bases of a characteristic protected under human rights law. There is no reason why members who suffer individually as a result of such conduct should not have a basis for complaint under appropriate legislation.
In the British case of *Farah v Commissioner of Police of the Metropolis* [1997] 2 WLR 824; [1997] 1 All ER 289, it had been stated that "Those duties of a police officer that involve assistance to or protection of the public constitute services to the public for the purposes of the *Race Relations Act*". This was approved in the High Court matter of *IW v City of Perth* (1997) 191 CLR. Gummow J found that "There is no dichotomy between the discharge of statutory functions and the provision of services to those seeking the discharge of those functions. Services is a word of complete generality which should not be given a narrow construction unless that is clearly required by definition or context." Brennan CJ and McHugh J found that "The term services has a wide meaning... we accept English authority holding there has been a provision of services 'in carrying out a statutory duty to determine whether a taxpayer was entitled to a deduction for a dependent child and in disseminating and giving advice to taxpayers to enable them to claim that relief". Gummow J approved Otton LJ's finding at 304 of *Farah* that ""[P]olice officers perform duties in order to prevent and detect crime and to bring offenders to justice. They are also vested with

custody of the NT Police or NT correctional facilities and/or youth detention facilities are being afforded a service, and whether they have recourse under the *Act* in regards to discrimination which may take place in the delivery of such service.

In NAAJA's view, the first duty of any effective piece of anti-discrimination legislation is to ensure that public authorities are required to act in a non-discriminatory and fair manner. A law which clearly covers private-sector companies but may exempt government officials with special coercive and investigative powers is not consistent with the rule of law.

Recommendation

NAAJA recommends amending the definition of services to protect workers as well as customers.

NAAJA recommends the definition of "services" to make the inclusion of services provided by Police and Correctional Services Officers explicit.

Removing content that enshrines discrimination

Religious Exemptions

Question 14 – should any exemptions for religious or cultural bodies be removed?

NAAJA notes the proposal for an alternative approach to the restricted access to cultural or religious sites, which could include a removal of this provision from Anti-Discrimination legislation due to other protections contained in the *NT Aboriginal Sacred Sites Act*. Legal issues concerning sacred sites are not within the day to day purview of NAAJA. As an Aboriginal organisation NAAJA emphasizes the need for input from Aboriginal communities, especially Traditional Owners, and Land Councils to ascertain whether the protections in the Aboriginal Sacred Sites Act are in fact sufficient or whether there is merit to the protection of such sites through anti-discrimination legislation also.

Clarifying and miscellaneous reforms

Question 16 – what are your views on expanding the definition of work?

NAAJA strongly supports the amendment of the definition of "work" to clarify that it includes a "volunteer", shared workplaces or anything akin to a work relationship.
Many of our clients volunteer at services like the Red Cross, St Vincent de Paul or other charities or services providers in their spare time, or if they for some reason

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powers to enable them to perform those duties. While performing duties and exercising powers they also provide services in providing protection to the victims of crimes of violence."

In *Commissioner of Police, NSW Police Service v Estate of Russell* [2002] NSWCA 272, it was found at 43 that "The police service of NSW has the duties, functions and characteristics to establish it as a public authority. It seems to me that the services provided by such serving police officers are services provided by a public authority in the sense contemplated by the *Act*." The decision in *Russell* was confirmed in *MM & AM v State of NSW, Department of Community Services* [2002] NSWADT 256.

cannot secure employment. We believe it is important that their right to participate in these activities free from discrimination is protected under the *Act.* Further, many of our clients have participated, or are participating, in CDEP program under which they are not considered 'workers' currently for the purposes of workers compensation, for example. NAAJA therefore supports amending the definition of 'work' to ensure that our clients are protected against discrimination in these various forms of 'work.'

Recommendation

NAAJA recommends the amendment of the definition of "work" to clarify that it includes a "volunteer", work being undertaken through a CDEP program, shared workplaces or anything akin to a work relationship.

Failure to accommodate a special need

Question 17 – should section 24 be amended to clarify that it imposes a positive obligation?

NAAJA supports rewording section 24 to create a clear, positive duty of employers and service providers to proactively accommodate the special needs of people with protected attributes. We believe this would clarify expectations and obligations of employers as well as improving access to justice for our clients who can clearly identify the obligation that is owed to them.

In relation to service providers, NAAJA frequently receives feedback from community members that interpreters are not used as often as they should be. This is to the detriment of clients, who already face significant barriers to engaging with services. NAAJA is of the view that clearly expressing this positive obligation would improve practices and accountability of service providers, including Government departments such as Territory Families and the Department of Housing.

NAAJA's southern region recently represented a client who settled a claim against her former employer on the basis that she was discriminated against because of her race, and the employer failed to accommodate for her special need. The second component of this complaint was much more difficult to establish particularly considering the legislation's current wording of a "failure to accommodate" rather than creating a proactive obligation on the employer to demonstrate the ways in which they accommodated the special need. We support amending this section to make the obligations of the employer, and rights of the person, clear.

Recommendation

NAAJA recommends rewording section 24 to make the positive duty of the employer and service providers to proactively accommodate the special needs of people with protected attributes, explicitly clear.

Anti-Discrimination Commissioner Amendments

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

NAAJA supports increasing the term of appointment of the Anti-Discrimination Commissioner to five years and considers this period of appointment as the minimum in terms of the period a Commissioner should be appointed.

A five-year term will enable time for a Commissioner to properly plan and grow and develop in a position. Following appointment there is a period of learning and adapting to the demands of the position. There is also scope in terms of specific areas of interest and/or focus and there is significant, unmet need. A five-year timeframe will enable time for a Commissioner to cater to different areas of interest and/or focus and to develop and evaluate various approaches. A five-year period is also suitable considering the time leading up to the expiration and the various factors relating to possible re-appointment.

We are of the view that the process of appointments and possible re-appointments should not be overly susceptible to political interests. Whilst the government of the day makes such decisions, five years is beyond the four-year election cycle and so an appointment will likely extend beyond the next election. Whilst this may be seen as a trivial point, in our view and as a result of the significant systemic and institutional discrimination issues the authority of a term of appointment over a five year period may encourage stronger advocacy in relation to these points.

Modernising language

Question 20 – should definitions of man and woman be repealed

NAAJA supports the repeal of the definitions of man and woman in keeping with changing societal expectations, and because the terms 'man' and 'woman' have different cultural meanings to Aboriginal and Torres Strait Islander people than is currently encapsulated by the *Act.* We support a more flexible approach to allow the *Act* to accommodate a changing society and the diversity of people it applies to.

Recommendation

NAAJA recommends the repeal of definitions of man and woman in keeping with changing societal expectations and diversity within the community.

Question 21 – Should the term "parenthood" be replaced with "carer responsibilities"?

NAAJA strongly supports amendments that recognise the diversity of people who may be involved in the ongoing care of a child or person under the *Act.* Aboriginal and Torres Strait Islander peoples in particular often have many different family members involved in the ongoing care of family members, who should be recognised by and protected by the *Act.*

We prefer an amendment that recognises explicitly kinship relationships and the caring obligations that often accompany them. We submit that parenthood should be replaced with "person with family, carer or kinship responsibilities" or words to that effect.

Recommendation

NAAJA recommends that “parenthood” should amended to include “person with family, carer or kinship responsibilities” or words to that effect.

Question 22 – should the term “marital status” be replaced with “relationship status”

NAAJA supports this change. Many of our clients are traditionally married, have multiple partners or otherwise are engaged in relationships which do not fit the narrow definition of ‘marriage’ under the *Act.* We support amending the term ‘martial status’ to properly reflect the protection afforded by the *Act.*

NAAJA also proposes that consideration should be given to adding the attribute of ‘membership of a family group’ or its equivalent.

Former CAALAS staff have witnessed discrimination against community members in Alice Springs on the basis of the actions of family members, e.g., “You can’t stay here – your brother’s a troublemaker.” Membership of a family group can also lead to discrimination in relation to employment opportunities. We propose the consideration of the addition of this attribute separately, or a broadening of the proposed amendments to the definition of ‘relationship status’ to include the prohibition of discrimination against someone on the basis of their membership of their family group generally.

Recommendation

NAAJA recommends replacing the term “marital status” with “relationship status”.

NAAJA recommends that an additional attribute of “membership of a family group” also be considered.