

Director, Legal Policy
Department of the Attorney-General and Justice
By email: Policy.AGD@nt.gov.au

12 August 2022

Dear Director, Legal Policy, Department of the Attorney-General and Justice,

Re: Response to the Draft Anti-Discrimination Amendment Bill 2022 (Northern Territory)

Our Watch welcomes the opportunity to provide a brief response to the draft Anti-Discrimination Amendment Bill 2022 (NT) (the Exposure Draft Bill).

Our Watch welcomes the expressed purpose of proposed reforms to the *Anti-Discrimination Act 1992* (NT) which is to ensure the protections offered by the Act meet the contemporary needs of people living in the Northern Territory. As a national organisation and a leader in the primary prevention of violence against women in Australia, Our Watch is particularly pleased to see the inclusion of gender as a protected attribute and the introduction of a positive duty to eliminate discrimination, sexual harassment and victimisation. These proposed reforms are consistent with a preventative approach to sexual and sex-based harassment and discrimination.

In this document we provide brief advice in response to the consultation survey questions released by the NT Government as part of consultation in relation to the Exposure Draft Bill. We would be happy to provide further advice or support as needed, including on the design of measures to support the implementation of these reforms and to promote gender equality more broadly.

Additional protected attributes under the *Anti-Discrimination Act 1992* (NT)

Our Watch welcomes the proposed addition of gender as a protected attribute. Discrimination against women is one manifestation of gender inequality that adversely impacts women and can drive violence against women.

As articulated in [*Change the story: a shared framework for the primary prevention of violence against women in Australia*](#),¹ there is a strong and consistent association between gender inequality and levels of violence against women. Gender inequality is a social condition characterised by unequal value afforded to men and women and an unequal distribution of power, resources and opportunity between them. Gender equality exists in Australia, and it is this social context that creates the conditions for, and gives rise to, high levels of violence against women. For this reason, prevention approaches, which aim to stop violence against women from

¹ Our Watch. (2021). *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2nd ed.). Melbourne, Australia: Our Watch.

occurring, focus on changing these social conditions; reforming the institutions and systems that excuse, justify or even promote such violence; and shifting the gendered power imbalances and social norms, structures and practices that drive and normalise it. The inclusion of ‘gender’ as a specific protected attribute under the Act not only provides formal legal protection but will also help to drive normative changes needed to advance and normalise gender equality in workplaces and community settings.

Our Watch also welcomes the addition of other protected attributes such as ‘language, including non-verbal language’, ‘accommodation status’, ‘socio-economic disadvantage’, and ‘employment as to sex work, including past sex work’. *Change the story* identifies how “the intersections of a range of structural and systemic forms of oppression and discrimination produce particular forms and patterns of violence. These intersections can increase the prevalence or severity of violence against some women, and limit or undermine individual and systemic consequences for the use of violence.”² While describing the many ways in which violence against women is condoned in society, the framework also notes that violence against sex workers and trans women is even more likely to be denied or downplayed in both community attitudes and system responses. In these ways, *Change the story* provides strong support for the proposed changes (and further, for the inclusion of ‘gender identity’ recommended below)³. In our view, the inclusion of these additional attributes will contribute to the prevention of violence against women in the NT by providing a legislative mandate to address multiple forms of discrimination that intersect with gender inequality to drive violence against women.

To be most effective, Our Watch recommends some extensions to the proposed protected attributes, namely that:

- In addition to the proposed new attributes of ‘gender’, ‘sexual orientation’ and ‘sex characteristics’, ‘gender identity’ be included as a protected attribute, to provide protections for transgender, non-binary and gender diverse people. This would also bring the Northern Territory’s Act into alignment with the *Sex Discrimination Act 1984 (Cth) (SDA)* and anti-discrimination legislation across other states and territories, which recognise gender identity as a protected attribute.
- The attribute ‘subjected to domestic violence’ be broadened to ‘subjected to domestic, family or sexual violence’. The current framing of the attribute ‘subjected to domestic violence’ is too narrowly formulated in the Draft Bill and should be reworded to explicitly capture a broader spectrum of gendered violence in interpersonal relationships. ‘Domestic violence’ as defined in the Draft Bill (with reference to the *Domestic and Family Violence Act 2007*) may be sufficiently broad to capture gendered violence within a range

² Our Watch. (2021). *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2nd ed.). Page 17. Melbourne, Australia: Our Watch.

³ Our Watch. (2021). *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2nd ed.). Page 38. Melbourne, Australia: Our Watch.

of interpersonal relationships beyond intimate partner relationships. However, it would be preferable to use clear and accurate terminology to explicitly reflect this intent, otherwise there is a risk that discrimination on this ground will not be identified, claimed, or responded to. The broader wording we suggest would also clearly include protection against discrimination on the grounds of being subjected to sexual violence – a form of violence that is experienced both within and outside domestic and family relationships, and that, like domestic and family violence, disproportionately impacts women. As it is currently formulated, the proposed section 19(5)(a) may in practice protect only a small subset of women experiencing men’s violence.

To support the implementation of these proposed revisions to the Act, Our Watch further recommends:

- The introduction of ‘gender’ and ‘victims of domestic violence’ as protected attributes be supported by robust, state-wide primary prevention strategies to build awareness, knowledge, and skills in relation to these new provisions, and to develop complementary policies and practices to promote gender equality and prevent violence against women.
- The addition of new protected attributes is supported by a public education program to raise community awareness about the existence of new rights and obligations under the legislation, accompanied by support for the Northern Territory Anti-Discrimination Commission to lead work with stakeholders to ensure they meet their obligations.

The introduction of a positive duty to eliminate discrimination, sexual harassment and victimisation

Our Watch welcomes the introduction of a positive duty to eliminate discrimination, sexual harassment and victimization in the Exposure Draft Bill. This would place an important onus on employers to take preventative actions to address the factors that lead to sexual and sex-based harassment, rather than only responding to the problem. The introduction of a positive duty is likely to assist in driving systemic and normative change, both within organisations that have specific legal obligations under the Act, and at the community level more broadly. A positive duty to prevent sexual and sex-based harassment would reflect a positive shift to a preventative rather than response-based approach to sexual and sex-based harassment.

For the introduction of a positive duty to be most effective, Our Watch recommends that:

- The positive duty encompasses sexual and sex-based harassment, in order to capture the full range of systemic problems and behaviours that are negative or hostile and directed at a person because of their sex or gender, not all of which may be overtly sexual in nature.
- The Act allow both for individuals to lodge a complaint, and for the Anti-Discrimination Commission to initiate an investigation where the Commission has identified a serious or systemic failure to comply with the duty. This will help to empower individuals while also

shifting the onus to employers, businesses, organisations and institutions to take actions to prevent sexual and sex-based harassment. Enabling the Commission to investigate systemic failures without a formal complaint would be beneficial for promoting cultural and systemic change across organisations to address the systemic and cultural factors that enable and maintain gender inequality and drive sex discrimination and sexual harassment, in order to prevent them from occurring.

- The implementation process include education, awareness raising, training and support for employers, employees and others to understand new obligations under a positive duty and to access tools and support from trained facilitators to support the implementation of best-practice, whole-of-organisation strategies to address the drivers of sexual and sex-based harassment.

The extension of the prohibition of sexual harassment to all areas of public life

Our Watch supports expanding the prohibition of sexual harassment to incorporate all areas of public life. *Change the story* identifies the condoning of violence against women as one of the drivers of violence.⁴ Taking a legislative approach that places a clear prohibition on sexual harassment sends an important message and sets a cultural tone for what is considered acceptable behaviour in the Northern Territory.

To support the implementation of this addition, and to further prevent all forms of sexual harassment, Our Watch recommends that:

- The definition of sexual harassment be expanded to also include sex-based harassment (i.e., harassment because of, or in response to sex characteristics, which may not necessarily be sexual in nature).
- These changes be accompanied by increased support for the Northern Territory Anti-Discrimination Commission to receive and process additional complaints of this nature.
- Simultaneous and complementary prevention work be undertaken with communities, and particularly with men and boys, to shift attitudes, norms, policies and structures that condone, normalise or enable sexual and sex-based harassment in public settings.

The removal of the exemption in section 37A to allow discrimination on the basis of an individual's sexuality

Our Watch supports the removal of the exemption in section 37A, which currently allows discrimination on the basis of an individual's sexuality. This change would be in line with the

⁴ Our Watch. (2021). *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2nd ed.). Melbourne, Australia: Our Watch.

evidence base on the drivers of violence against women, and the intersecting drivers of violence against LGBTIQ+ people.

Change the story identifies the four underlying gendered drivers that lead to high rates of violence against women. This includes rigid gender stereotyping and dominant forms of masculinity.⁵ In or view, removing exemptions that allow organisations to discriminate against or terminate employment on the grounds of an individual’s sexuality is likely to contribute to changing the social conditions that enable violence in the NT to occur, including because it will directly address this driver, and is likely to reduce the impacts of rigid gender norms and harmful gender stereotyping.

Addressing sexuality discrimination and gender discrimination are intertwined objectives. Gender inequality is underpinned by heteronormativity and cisnormativity – attitudes, norms, and behaviours that value heterosexuality as the normal or preferred sexual orientation, and cisgender as the normal and preferred gender identity. There is significant overlap between the drivers of violence against LGBTIQ+ people and the drivers of violence against women. In 2017 an Our Watch literature review on primary prevention of violence against LGBTI people found that the social context of discrimination, violence and abuse against LGBTI people contributes significantly to family violence against them. The review highlighted the need for “ongoing legislative reform to remove lawful grounds for discrimination against LGBTI people, and to remove all barriers that prevent or hinder people from LGBTI communities from accessing publicly-funded services, including family violence services.”⁶ In line with this, Our Watch welcomes the proposed removal of the current exemption in the Act, as an important reform that will help achieve gender equality and address the multiple, intersecting drivers of violence against women and LGBTIQ+ people.

Should the Act provide equal protection for people who supply and receive goods, services and facilities?

Our Watch supports the amendment to extend equal discrimination protection to those providing and those receiving goods, services and facilities. As noted by the Northern Territory Anti-Discrimination Commission, the current legislation does not protect women workers, such as hospitality workers, who are subject to sexual harassment from patrons and are unable to make a complaint under the current Act.⁷

⁵ Our Watch. (2021). *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2nd ed.). Page 36. Melbourne, Australia: Our Watch.

⁶ GLHV and Our Watch, on behalf of Victoria State Government. 2017. *An analysis of existing research: Primary prevention of family violence against people from LGBTI communities*. Melbourne, Australia: Our Watch.

⁷ Northern Territory Anti-Discrimination Commission, 2018, *‘Modernisation of the Anti-Discrimination Act’* (Submission 145 in response to the Discussion Paper: Modernisation of the Anti-Discrimination Act (2017)). Available at https://justice.nt.gov.au/_data/assets/pdf_file/0005/1082516/submission-145-northern-territory-anti-discrimination-commission.PDF (accessed 4 August 2022).

The inclusion of a separate complaint process to target systemic discrimination

Our Watch supports the inclusion of ‘systemic discrimination’ complaints. Change the story indicates that collective action, for example through seeking to change discriminatory policies and structures, is an important part of work to prevent violence against women. Representative complaints provide an opportunity for reform in circumstances where there may not be an individual who feels safe enough or has the capacity to engage in a complaint process. This inclusion also supports the proposed expanded powers for the Anti-Discrimination Commissioner to investigate failures to eliminate discrimination in the protected areas under Part 2A.

To further strengthen the proposed new process and fully realise the preventative potential and intent of these amendments, Our Watch recommends:

- That s62A(3) be amended to require permission from affected parties who will be identified in a representative complaint. This will ensure the safety of those individuals and prevent further disempowerment.
- That the Northern Territory Anti-Discrimination Commission be supported and resourced to enable it to undertake meaningful investigations; adequately support complainants; and work with organisations or industries where systemic discrimination has been identified, to improve policies, processes and systems to address gender inequality and other forms of discrimination and prevent violence against women.

Thank you for the opportunity to provide this submission and please do not hesitate to contact our Director Government Relations, Policy and Evidence, Amanda Alford (amanda.alford@ourwatch.org.au) for further information or to discuss this submission.

Yours sincerely

Patty Kinnersly

CEO