

The Commissioners  
Royal Commission into the Protection and  
Detention of Children in the Northern Territory  
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Dear Commissioners Gooda and White

## **SUBMISSION OF THE NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION**

I am pleased to provide a submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory as the Northern Territory Anti-Discrimination Commissioner.

The Anti-Discrimination Commissioner is appointed under the *Anti-Discrimination Act (Act)* and is responsible for the implementation of the Act.

The Act provides protections for young Indigenous people and their families relevant to the matters before the Royal Commission, including a requirement to promote recognition and acceptance of non-discriminatory practices and compliance with the Act, by individuals such as Correction's officers.

The submission seeks to provide information and an understanding of how discrimination underlies the issues being considered by the Royal Commission and some practical recommendations to redress them.

Further information to my submission can be provided as required by the Royal Commission.

Yours sincerely  
Privacy



Sally Sievers  
Anti-Discrimination Commissioner

28 October 2016

**PUBLIC SUBMISSION TO THE ROYAL COMMISSION INTO THE PROTECTION  
AND DETENTION OF CHILDREN IN THE NT**

**Executive Summary**

The Anti-Discrimination Commission (ADC) has expertise and knowledge relevant to the matters before the Royal Commission and has a part to play in the solutions to the issues before it. This position is based on the probability that the accounts of youth detainees before the Royal Commission may be about race and age discrimination.

The intent of this submission is to present options to the Royal Commission about how the ADC may play a role in addressing issues of underlying discrimination in Northern Territory youth detention facilities.

The submission will address:

- Review of the *Anti-Discrimination Act*;
- Examination of new laws;
- Education;
- Practical reform and
- Other matters.

While the content focusses strongly on Indigenous Youth in youth detention facilities it will also touch on the intersectionality with other vulnerabilities as well as potential other vulnerable groups in youth detention who should be encompassed by future recommendations.

**The Northern Territory Anti-Discrimination Commission**

The Northern Territory Anti-Discrimination Commission (ADC) is an independent office headed up by the Anti-Discrimination Commissioner (Commissioner). The Commissioner functions are set out in section 13 of the Act (Attachment "A").

The ADC is responsible for the implementation of the *Anti-Discrimination Act* (Act). The objects of the Act are set out in Attachment "B."

The functions and objects of the Act are met by a small but dedicated office, consisting of 6 staff including the Commissioner. The office is located in Darwin with limited travel to other regions dependent on funding and demand.

With the exception of our delivery of public education and training, all services of the ADC are free and confidential, to ensure accessibility to everyone. The ADC provides a free confidential enquiry line for members of the public, including adult prison detainees<sup>1</sup> to obtain information about their rights under the Act.

It is free to make a formal complaint to the ADC. The ADC seeks support where communication barriers exist in making a complaint, including language and Auslan interpreters. A lawyer is not required to make a complaint.

The Act makes unlawful discrimination against particular attributes (Attachment “C”) in particular areas (Attachment “C”). Age and race are protected attributes and ‘service’ is a protected area. The Youth Detention facilities can be a ‘service’ for the purposes of the Act.<sup>2</sup>

The Act describes the type of discriminatory conduct (Attachment “D”) that is unlawful. It is only unlawful conduct if a reason for the discriminatory conduct is because of an attribute and it the conduct occurs in an area under the Act (Attachment “D”). Motive for the conduct is not relevant; it is the impact or effect of the conduct that is the relevant measure.

Issues that have been raised by youth detainees at Don Dale Detention Facility and before the Royal Commission may have been breaches of the Act. However limitations exist in the Act, the processes and the ADC resource levels that will in many cases preclude youth detainees, historically and in the future, from using the ADC as an avenue of recourse for allegations of discriminatory conduct. This is not acceptable given the objects the Act seeks to achieve.

The Anti-Discrimination Commissioner is also the Principal Community Visitor with responsibility for the Community Visitor Program. A separate submission has been made in relation to this program. The Anti-Discrimination Commission and the Community Visitor Program are both human rights agencies and is the closest local model in the Northern Territory to a monitoring mechanism under the Optional Protocol to the Convention on Torture.

I will address each issue in turn.

## **Law Reform**

### *Review of the Anti-Discrimination Act*

The Royal Commission should support a review of the *Anti-Discrimination Act* and increased resourcing levels of the ADC to ensure a greater ability to respond to these types of issues.

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<sup>1</sup> Please note information under heading *Practical Reforms*.

<sup>2</sup> See further explanation of “service” under heading *Review of Anti-Discrimination Act*

Current limitations under that Act are:

- The scope of the area of “services”.
- Lack of vilification laws in the Northern Territory.
- Lack of a systemic complaint option.

I will address each separately.

### *Scope of Services*

The ADC can as a general position take complaints about allegations of unlawful discrimination in the prison system. However case law<sup>3</sup> has raised doubt about what types of actions are protected. Consideration needs to be given to whether such limitations truly honour the protections envisaged by international law or whether they are driven by other considerations and whether these other considerations are valid.

In practice this creates uncertainty around what types of complaints can be pursued by the office. For people using the process this can be seen as arbitrary and frustrating, as the complainer will focus on the nature and impact of behaviour, not the setting or context in which it occurred. Likewise Correctional services need to have a clearer understanding about obligations that infuse their day to day decisions and actions, rather than find out complaint by complaint. In an environment in which safety is a compelling driver of policies, procedures and actions taken, it is critical that when safety and rights collide that informed decisions are made.

### *Complaints mechanisms*

Currently only an individual can make a complaint to the ADC about a breach of the Act. This is an effective option and model for many but does not always achieve systemic reform or meet the needs of all people experiencing unlawful discrimination.

A broad review of the Act should encompass consideration of additional complaint models that are targeted at:

- Systemic reforms; and
- Complainants who are experiencing unlawful discrimination but are unlikely or unable to make an individual complaint.

There are two models that can be considered:

1. The Commissioner having an own motion power;
2. A representative complaint model.

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<sup>3</sup> *Rainsford v Victoria* [2008] FCAFC 31.

### *Own Motion Power*

Section 13 of the Act provides that the Commissioner may examine practices, alleged practices or proposed practices on their own initiative. It is unclear however in the Act the extent to which compulsion powers can be used for this purpose. There are also insufficient resources within the ADC to undertake such an examination.

This function is an important one that if used effectively would assist in meeting the objects of the Act and provide quicker redress to issues.

### *Representative Complaint Model*

Currently complaints can only be brought by an individual who is aggrieved by prohibited conduct. A review of the Act would consider the value of a representative complaint model. This is where a group of people or an organisation representing a group of people can make a complaint to the ADC.

Such a model takes pressure off individuals to make a sole complaint and assists where a complainant may be limited in their ability to access the ADC or tell their story. This type of model could be a vehicle for youth detainees to complain about systemic or repeated allegations of race and age based discrimination through an organisation such as the North Australian Aboriginal Justice Agency. This would enable earlier intervention and a voice for a group of people.

### *Vilification laws*

A reform of the Act should consider the local introduction of vilification laws. In relation to youth detention this should particularly be in relation to age and race vilification. This should be accompanied by reforms to the *Youth Justice Act* in which courts are open in the absence of an order being made to close the court. This permits the release and subsequent publication of youths name in the media that encourages attitudes to youth crime that can contribute to acts of vilification within the community, including via social and conventional media.

Currently the only vilification law in the Northern Territory is race vilification via the Federal *Race Discrimination Act*. Vilification laws focus on words and conduct and do not have the limitations set by “areas” in general discrimination law.

### *Examination of New Laws*

Section 13(1)(b) requires the Commissioner to exercise the following function:

To examine Acts and regulations and proposed Acts and regulations of the Territory to determine whether they are, or would be, inconsistent with purposes of the Act, and to report the results of such examinations to the Minister;

In practice the ADC is only approached by exception to comment on Bills or regulations and when approached is often required to respond in unreasonable time frames. This function is an important screening process for new laws. While it is ultimately a decision for Parliament as to what Bills are introduced and passed, they should be informed about whether a new law is likely to impact on rights under the *Anti-Discrimination Act*.

In 2016 amendments were made to the *Youth Justices Act* to permit the Superintendent to approve the use of restraints against youths in an emergency. This Bill was not examined by the ADC in line with the requirements of section 13 of the Act. Most Bills before the Parliament are not examined by the ADC.

### **Practical Reforms**

To access rights, you need to be able to first access information about what they are. The Adult prisons in the Northern Territory provide a free phone access service for prisoners in which they can contact the ADC. We understand that a list is provided by the phone with infographics and a number to press which provides an automatic dial link to the ADC. We understand that there is no current equivalent in the youth facilities. This is a significant obstacle for access to information about rights and should be addressed as a priority.

### **Education**

The ADC provides staff training in relation to discrimination and unconscious bias. Training is a significant vehicle through which individuals can examine their conduct and its impact. It also helps staff become aware of obligations they have under the Act as individuals and as part of an organisation. It is a fundamental step for anyone working in an environment with vulnerable individuals.

Training of correctional officers in both discrimination and unconscious bias should happen on a regular basis, particularly in regard to the orientation of new staff and staff new to management or staff supervision. Correctional officers are required to exercise considerable responsibility and judgement in a challenging environment.

### **Other matters**

While this submission has focussed on the rights of Indigenous youth we ask the Royal Commission to consider when developing recommendations for future youth detention in the Northern Territory other vulnerabilities in this setting. In particular:

- Disability, noting the very high rates of deafness for Indigenous communities and how this may impact on communication, behaviour and literacy. Provision should be made for assessment of hearing upon entry to identify needs, followed by access to Auslan interpreters for youth who require it.

These issues could be addressed more broadly by the Northern Territory Government developing a Disability Justice Plan in line with the Plan developed in South Australia but targeted to meet the needs and issues unique to the Northern Territory.

- The Lesbian, Gay, Bisexual, Transgender and Intersex youth and the associated mental health and personal dignity risks faced when in youth detention.

It is essential that education be provided to Correctional Officers about the needs and issues of these groups to avoid individual and systemic discrimination.

Lastly, reforms should be made to the *Youth Justice Act*<sup>4</sup> to reverse amendments made in 2014 to provide for greater periods<sup>5</sup> of temporary detention of youths in adult correctional facilities.

I would be happy to speak to the Commission about any of the issues raised in my submission.

Privacy



Sally Sievers  
Anti-Discrimination Commissioner

28 October 2016

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<sup>4</sup> Section 154.

<sup>5</sup> From 24 hours to 72 hours, with a magistrate able to extend for 10 days – amendment to *Youth Justices Act – Correctional Services (Related and Consequential Amendments) Act 2014*.



## ATTACHMENT "A"

### 13 Functions of Commissioner

- (1) The Commissioner has the following functions:
  - (a) to assess complaints, conduct conciliations in relation to complaints and evaluate and refer complaints for hearing by the Tribunal;
  - (b) to examine Acts and regulations and proposed Acts and regulations of the Territory to determine whether they are, or would be, inconsistent with the purposes of this Act, and to report the results of such examinations to the Minister;
  - (c) to institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination and the effects of discrimination;
  - (d) to consult with organisations, departments and local government councils to ascertain means of improving services and conditions affecting groups that are subjected to prohibited conduct;
  - (e) to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds in this Act;
  - (f) to examine practices, alleged practices or proposed practices of a person, at the Commissioner's own initiative or when required by the Minister, to determine whether they are, or would be, inconsistent with the purposes of this Act, and, when required by the Minister, to report the results of the examination to the Minister;
  - (g) to promote in the Territory an understanding and acceptance, and public discussion, of the purposes and principles of equal opportunity;
  - (h) to promote an understanding and acceptance of, and compliance with, this Act;
  - (j) to promote the recognition and acceptance of non-discriminatory attitudes, acts and practices;
  - (k) to promote within the public sector the development of equal opportunity management programs;
  - (m) to prepare and publish guidelines and codes of practice to assist persons to comply with this Act;
  - (n) to provide advice and assistance to persons relating to this Act as the Commissioner thinks fit;
  - (p) to advise the Minister generally on the operation of this Act;

- (q) if the Commissioner considers it appropriate to do so, to intervene in a proceeding that involves issues of equality of opportunity or discrimination with the leave of the court hearing the proceeding and subject to any conditions imposed by the court;
- (r) such functions as are conferred on the Commissioner by or under this or any other Act;
- (s) such other functions as the Minister determines.

## ATTACHMENT "B"

### 3 **Objects**

The objects of this Act are:

- (a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute; and
- (b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannuation; and
- (c) to eliminate sexual harassment.

## ATTACHMENT “C”

### ATTRIBUTES

- race;
- sex;
- sexuality;
- age;
- marital status;
- pregnancy;
- parenthood;
- breastfeeding;
- impairment;
- trade union or employer association activity;
- religious belief or activity;
- political opinion, affiliation or activity;
- irrelevant medical record;
- irrelevant criminal record;
- the person's details being published under section 66M of the *Fines and Penalties (Recovery) Act*;
- association with a person who has, or is believed to have, an attribute referred to in this section.

### AREAS

- education;
- work;
- accommodation;
- goods, services and facilities;
- clubs;
- insurance and superannuation.

## ATTACHMENT "D"

### 20 Discrimination

- (1) For the purposes of this Act, discrimination includes:
  - (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
  - (b) harassment on the basis of an attribute,  
in an area of activity referred to in Part 4.
- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had:
  - (a) an attribute; or
  - (b) a characteristic imputed to appertain to an attribute; or
  - (c) a characteristic imputed to appertain generally to persons with an attribute,  
less favourably than a person who has not, or is believed not to have, such an attribute.
- (3) For discrimination to take place, it is not necessary that:
  - (a) the attribute is the sole or dominant ground for the less favourable treatment; or
  - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant. (underlining added)

