

1 February 2012

Assistant Secretary  
International Human Rights and Anti-Discrimination Branch  
Attorney-General's Department  
Robert Garren Offices  
3-5 National Circuit  
Barton ACT 2600

*By email: [antidiscrimination@ag.gov.au](mailto:antidiscrimination@ag.gov.au)*

Dear Colleague

**RE: Consolidation of Commonwealth Anti-Discrimination Laws**

Thank you for the opportunity to provide our feedback to your discussion paper.

The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service ("ATSIWLAS") is a community legal centre that provides free legal advice, information, assistance, referrals and support to Aboriginal and Torres Strait Islander women in Queensland.

Our women often feel discriminated against on the basis of race, gender, disability, as victims of domestic violence and because of their socio-economic status. Discrimination impacts upon the self esteem of our women, their ability to fully participate in the public sphere and their feelings about their place in the world.

We do not believe that law reform is the ultimate vehicle for change – nor do we consider legal remedies to be the appropriate remedy for the hurt that Aboriginal and Torres Strait Islander women experience. We are however optimistic that the reform of commonwealth anti-discrimination laws will play a part in promoting normative and behavioural change.

Our comments are based on the experiences of the women who have been assisted by ATSIWLAS and of the women who work with our organisation in the hope of achieving our vision:

*"...to combat racism, violence, poverty, sexism and discrimination of all kinds that affect the interests and aspiration of Aboriginal & Torres Strait Islander women."*

Our comments relate to the meaning of discrimination.

**What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?**

The division of the definition of discrimination into direct and indirect makes the concept of discrimination unnecessarily complex. ATSIWLAS hopes that the new bill will introduce a unified definition of discrimination that is consistent with international human rights law. ATSIWLAS hopes that discrimination will be understood as any

distinction, exclusion, restriction or preference which is based on any ground – including race – which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.<sup>1</sup> The definition of discrimination should be wide enough to incorporate concepts of direct, indirect and structural discrimination.

### **Structural discrimination**

When State programs are delivered so that they have an unjustifiable disproportionate adverse impact on a group of people who share an attribute, that program is discriminatory.

The delivery of the child protection system in Queensland has an adverse impact on Aboriginal and Torres Strait Islander people. This is demonstrated by the over-representation of Aboriginal and Torres Strait Islander children in the child protection system. In 2009 Aboriginal and Torres Strait Islander children accounted for 34.4% of children in care in Queensland, while making up 6.3% of the population.<sup>2</sup> Indigenous children experience longer stays in out-of-home care, receive less comprehensive services, have irregular contact with family while in out-of-home care, are less likely to be reunified with their families than other children and are less likely to receive voluntary interventions such as Intervention with Parental Agreement.<sup>3</sup>

The Australian Human Rights Commission has argued that high levels of discrimination experienced by Aboriginal and Torres Strait Islander children is a product of systemic and structural discrimination in Australia.<sup>4</sup>

When the State is seeking to justify discrimination they should be required to establish that the discriminatory measures that they have taken are reasonable and objective and that the aim is to achieve a purpose which is legitimate. If there is a way of achieving the aim without producing a discriminatory outcome, duty holders should be obligated to take that course of action.

### **How should the burden of proving discrimination be allocated?**

Our view is that the respondent rather than the claimant should bear the burden of proof. This is a common sense approach given that the respondent will usually have the control of the evidence that the complainant requires including witnesses (who will usually be employees of the respondent), statistics and documents that may be confidential.

### **Case study**

Rose's grandchildren were subject to child protection orders in Queensland. Rose became the kinship carer of the children and the children were placed in her care.

<sup>1</sup> Human Rights Committee General Comment General Comment No. 18 (1989) 'non-discrimination' 10/11/1989.

<sup>2</sup> QCOSS Policy Position on Child Protection November 2009  
[http://www.qcoss.org.au/sites/default/files/QCOSS%20Policy%20Position\\_Nov%202009\\_Child%20Protection\\_0.pdf](http://www.qcoss.org.au/sites/default/files/QCOSS%20Policy%20Position_Nov%202009_Child%20Protection_0.pdf) on 1 February 2012.

<sup>3</sup> Ibid.

<sup>4</sup> Human Rights Commission, 'Information concerning Australian and the Convention on the Rights of the Child, Submission to the Committee on the Rights of the Child' August 2011 at [http://www.hreoc.gov.au/legal/submissions/2011/201108\\_child\\_rights.html](http://www.hreoc.gov.au/legal/submissions/2011/201108_child_rights.html) on 1 February 2012.

Rose contacted our service because the Department of Communities (Child Safety Services) (“the Department”) had cancelled her kinship carer status and removed her grandchildren from her care. The reason for the cancellation of her kinship carer status was that she had allowed her husband into her house even though there had been historical domestic violence, the police were regularly attending her residence and people who had a criminal history had been attending her home.

The re-assessment of Rose’s kinship carer status had been completed by a non-Indigenous social worker who commented that Rose’s Aboriginal status had been used as an excuse to justify otherwise unacceptable child-rearing practises.

While seeking our assistance to review the Department’s decision to cancel her kinship carer certificate of approval, Rose was also interested to know how she could pursue the Department in relation to the discrimination that she felt she had experienced.

Rose said that she knew lots of other women in the community who had had the same experience with the kinship carer assessment process.

The requirement that is contained in the *Child Protection Act 1999* to place Indigenous children, where possible, with kin was introduced to help to ensure that “the atrocities detailed in the Bringing them Home Report would never occur again”<sup>5</sup> Despite these intentions, the Department has not developed a distinct process for assessing whether Aboriginal or Torres Strait Islander people are suitable people to care for their kin. Accordingly, all people are assessed by non-Indigenous people according to the same assessment process and within the same cultural framework.

ATSIWLAS sought the following information from the Department of Communities pursuant to the *Right to Information Act 2009 (Qld)*:

1. The number of kinship carer certificates that had been issued;
2. The number of kinship carer certificates that had been issued to Indigenous people;
3. The number of kinship carer certificates that had been cancelled;
4. The number of kinship carer certificates that had been issued to Indigenous people that had been cancelled.

ATSIWLAS was refused access to this information on the basis that it was not readily available.

As the Discussion Paper notes, in other jurisdictions the burden of proof is not borne by the respondent. In the United Kingdom, the *Race Relations Act 1976* allows individuals to collect information from potential respondents. In addition to this, once the complainant is able to prove the facts from which it could be inferred that racial discrimination has occurred, the onus is on the respondent to prove that the action was not discrimination.

Our position is that anti-discrimination legislation should be amended so that when proving the type of discrimination that is currently classified as indirect discrimination, the claimant needs only to prove the imposition of an apparently neutral condition and the difficulty that they have experienced complying with the condition because of their attribute. The respondent should then be required to produce evidence to show that the same condition has been imposed on a pool of people who have the

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<sup>5</sup> Minster Bligh, Queensland, Second Reading Speech, Hansard, 10 November 1998.

complainant's attribute and that a significant proportion of those people were able to comply with the condition.

**Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?**

The consolidation bill should include a single special measures provision covering all protected attributes that can only be used to benefit the group that is affected by the measures. There should be no ability for the special measures provision to be used to allow a violation of that group's human rights. Special measures should always be developed in close consultation with the people that will be affected by them.

**Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?**

**Case study**

Kyle was employed by an organisation in an "identified position" – it was an occupational requirement that the job be filled by an Aboriginal person or a Torres Strait Islander person.

Kyle was a professional person with university qualifications. She had successfully performed a number of similar roles in her career.

Kyle's mother became terminally ill and Kyle took on carer responsibilities – she asked her employer to reduce her hours to accommodate her new responsibilities and she took leave without pay when her mother became very ill. When her mother died Kyle needed time off work for sorry business.

Kyle was dismissed from her employment 2 days after returning from work because of her lack of commitment to her role and her general attitude to work. No consideration was given to the special responsibilities Kyle had according to her Aboriginal culture.

Aboriginal and Torres Strait Islander employees add distinct value to workplaces and regularly perform work that cannot be undertaken by non-Indigenous staff. When employing Aboriginal and Torres Strait Islander people, organisations should be required to make reasonable adjustments to employment conditions to recognise the significance of their employee's culture. The introduction of this requirement would foster the development of a greater understanding of Aboriginal and Torres Strait Islander culture. This would in turn result in a workplace culture that values diversity and is less likely to be discriminatory.

**Should public sector organisations have a positive duty to eliminate discrimination and harassment?**

ATSILWLAS would like the Bill introduce an obligation that is the same as the positive obligation that is contained in the *Race Relations (Amendment) Act 2000* in the UK. This amendment acknowledges the need for positive systemic measures to eliminate racial discrimination and has introduced a positive duty on the public sector to

promote racial equality and to consider the racial impact of their actions and policies before acting.<sup>6</sup>

The introduction of a positive duty is a preventative measure. ATSIWLAS believes that any cost implications of imposing this duty are outweighed by the economic and social benefits of the elimination of discrimination.

### **Conclusion**

The late Sergio Vieira de Mello, former UN High Commissioner for Human Rights, stated that while the responsibility for the protection of human rights lies with States, 'the understanding, respect and expectation of human rights by each individual person is what gives human rights its daily texture, its day-to-day resilience'.<sup>7</sup> ATSIWLAS welcomes the consolidation of the Commonwealth anti-discrimination legislation as part of the Australian Human Rights Framework and hopes that this focus on human rights will result in the cultural change that is required to eliminate the discrimination that our women are continuing to experience.

Once more, thank you for providing us with the opportunity to give feedback on your discussion paper.

Yours faithfully

Aimee McVeigh  
Principal Solicitor

Colleen Wall  
Executive Officer

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<sup>6</sup> Dominique A 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

<sup>7</sup> S Vieira de Mello, *Statement to the Opening of the 59th Session of the Commission on Human Rights*, Geneva, 17 March 2003.