

## CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

### Submission on behalf of Legal Aid NSW to the Commonwealth Attorney-General's Department

February 2012

#### About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

Legal Aid NSW has significant expertise in the area of discrimination law. Grants of legal aid are available for discrimination matters pursuant to Legal Aid NSW Policy Online 6.8 (Addendum A).<sup>1</sup> In addition to civil law litigation, discrimination law issues regularly arise in the provision of civil law advice and outreach services. Legal Aid NSW also provides a number of specialist programs addressing discrimination law.

#### Community Legal Education – *Discrimination Toolkit Workshops*

The Legal Aid NSW *Discrimination Toolkit Workshops* is a discrimination law community legal education (CLE) program.

The *Discrimination Toolkit Workshops* program was targeted at community workers rather than community members. This was in response to a need for community worker training in discrimination law being identified in the NSW Northern Rivers region by the Cooperative Legal Services Delivery (CLSD) program.<sup>2</sup> Services

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<sup>1</sup> Legal Aid NSW policy online is available at < <http://www.legalaid.nsw.gov.au/lawyers/policyonline/policies>>

<sup>2</sup> For further information on the Legal Aid NSW CLSD program see <http://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/cooperative-legal-services-delivery-clsd-program>. The Legal Aid NSW Law for Community Workers program strategy is also informed on research conducted by the Law & Justice Foundation of NSW which indicates that individuals experiencing a legal problem are unlikely to consult a lawyer at first instance. They are more likely, for example, to talk to a friend or family member, their GP or a trusted community worker. Community workers are therefore critical legal "problem spotters" and provide an important referral pathway to legal assistance, particularly for disadvantaged and vulnerable clients. See Law and Justice Foundation of New South Wales (2003) 'Access to justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 2: Quantitative Legal Needs Survey. Bega Valley (Pilot)' Sydney, Law and Justice Foundation of New South Wales at Chapter 5.

reported that their most marginalised clients were frequent victims of discrimination but rarely took any action to remedy it. Reasons included failure to identify unfair treatment as unlawful discrimination, lack of information about discrimination law remedies, difficulty obtaining legal advice and representation and prioritisation of other life issues above remedying discriminatory treatment.

The Lismore offices of Legal Aid NSW and the Aboriginal Legal Service (ALS) subsequently surveyed Aboriginal services about the incidence of discrimination in their community. Responses unanimously highlighted the prevalence of discrimination in the daily lives of Aboriginal clients and the need for community worker training to help identify discriminatory conduct and support individuals to make complaints.

Following this, the *Discrimination Toolkit* workshops were developed and piloted in the Northern Rivers and are now being offered to Aboriginal community workers in regional NSW through the CLSD program. They are co-facilitated by a specialist community legal educator and a Legal Aid NSW solicitor with a large discrimination law practice and are conducted in partnership with the ALS or other local Aboriginal services.

The workshops accompany the recently updated *Discrimination Toolkit: Your Guide to Making a Discrimination Complaint*.<sup>3</sup> The program provides a practical introduction to the basic principles and scope of discrimination law and complaint procedures. It assumes no prior knowledge of discrimination law. The goal of the workshop is to increase the capacity and confidence of Aboriginal community workers to support community members to use discrimination law as a tool for the promotion and enforcement of their human rights.

At the time of submission, seven workshops had taken place in the Northern Rivers and Hunter regions (Lismore x 3, Tweed Heads, Ballina and Newcastle x 2). Further workshops will be held in Wagga Wagga and Albury in early February 2012 and in the Far West (Broken Hill and Wilcannia) in March. To date, seventy-nine Aboriginal community workers have completed the training.

### Employment Law Project

In early 2010 Legal Aid NSW established an Employment Law Project to build and enhance the capacity of Legal Aid NSW to provide advice and assistance for disadvantaged clients with employment law problems, including discrimination. The service is targeted to vulnerable clients experiencing, or at risk of, social exclusion and long term unemployment. This project has enabled Legal Aid NSW to observe and develop opinion on the nature and extent of workplace discrimination and the operation of relevant laws including the *Fair Work Act 2009* (Cth) (FW Act).

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<sup>3</sup> Elizabeth Evatt Community Legal Centre, Kingsford Legal Centre, & Legal Aid NSW (October 2011) 'Discrimination Toolkit: Your guide to making a discrimination complaint' available at <http://www.legalaid.nsw.gov.au/publications>

Legal Aid NSW welcomes the opportunity to provide these comments. For further discussion of any of the issues raised in this paper, please contact Tristan Webb, Project and Policy Officer, Strategic Policy, Planning and Management Reporting Division, on 02 9219 5695 (or via email at [tristan.webb@legalaid.nsw.gov.au](mailto:tristan.webb@legalaid.nsw.gov.au)) or Annmarie Lumsden, Executive Director, Strategic Policy, Planning and Management Reporting Division, on 02 9219 6324 (or via email at [annmarie.lumsden@legalaid.nsw.gov.au](mailto:annmarie.lumsden@legalaid.nsw.gov.au))

## Background

Legal Aid NSW welcomes the Federal Government commitment to consolidating the current Commonwealth anti-discrimination framework<sup>4</sup> into a single, comprehensive law (the Consolidation Project). We recognise that the Consolidation Project is a significant step in Australia's Human Rights Action Plan.<sup>5</sup>

Legal Aid NSW considers the Consolidation Project as a significant opportunity for the Government to:

- clarify ambiguities in the current framework,
- promote consistency;
- enhance protections where needs are identified,
- address identified deficiencies with the current complaints-based model, and
- improve compliance with Australia's international human rights obligations.

The Legal Aid NSW submission proposes general legislative aims as informed by our experience of providing information, community legal education, advice, minor assistance and representation to disadvantaged people across New South Wales.

The Legal Aid NSW submission does not intend to duplicate detailed legal analysis provided by others. Where our experience suggests a position aligned with recommendations presented elsewhere we have endorsed that component of the other submission.

We understand that proposed legislation will be released by the Commonwealth Attorney General for comment at a future point. Legal Aid NSW would welcome the opportunity to comment on this draft legislation.

The Legal Aid NSW response is predicated on the following underlying principles:

- The consolidation bill should incorporate Australia's international human rights obligations into domestic law;
- The Government's stated commitment to no diminution of protections at the federal level should be observed;<sup>6</sup>
- The consolidation bill should ensure consistency of outcome with those best practice features identified in the current Acts, State and Territory anti-discrimination laws, and the *Fair Work Act 2009* (Cth);

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<sup>4</sup> *Racial Discrimination Act 1975* (Cth) (RDA), *Disability Discrimination Act 1992* (Cth) (DDA), *Sex Discrimination Act 1984* (Cth) (SDA), *Age Discrimination Act 2004* (Cth) (ADA), and *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

<sup>5</sup> See Attorney-General's Department <http://www.ag.gov.au/nhrap> accessed January 2012 (particularly item 18).

<sup>6</sup> Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

- The consolidated bill should reduce complexity of concepts and processes and improve accessibility of the law for people affected by discrimination.

### Meaning of Discrimination

**1. 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 test which defines discrimination should be clear, readily understood, and particularly accessible to self-represented applicants. Legal Aid NSW submits that a unified test would be the best way to achieve this outcome. Such an approach would make rights-education more straightforward, remove unnecessary technicality and assist individuals and their advocates to identify potential breaches. A unified test should be complemented by explanatory memoranda and/or a statutory definition which clarifies that a consolidated definition is intended to incorporate the concept of both direct and indirect discrimination.

#### Legal Aid NSW experience

'Discrimination Toolkit Workshops' for Aboriginal community workers in regional New South Wales.

Legal Aid NSW facilitators delivering the *Discrimination Toolkit* workshops report that participants consistently struggle with the current definitions of discrimination, particularly the comparator requirement and the distinction between direct and indirect discrimination:

*Indirect discrimination is a complex concept to teach and is frequently missed or incorrectly identified by participants in workshop activities. As a human rights educator, it is frustrating that a system intended to be accessible, user-friendly and cost effective is not as clear or easy to understand as it could be.*

It is of concern that many of the community workers and advocates who are best placed to refer individuals into the discrimination law system struggle with the meaning and application of the current indirect discrimination provisions. The definitional complexity may go some way to explaining why so few indirect discrimination complaints are made to AHRC.

In the event that a unified test is not adopted then Legal Aid NSW recommends that the consolidated bill should improve the two tests in a way that renders them clear and consistent.

### **Direct discrimination and removal of the comparator test**

The Legal Aid NSW experience of providing advice and community education suggests that the concept of a comparator is particularly difficult for applicants, and indeed community support workers, to understand. This lack of clarity is compounded by the 'unpredictable' application of the test by judicial officers as outlined in the Discussion Paper.

Legal Aid NSW submits that the comparator test could be replaced by the detriment test as formulated in the Discussion Paper. This has the advantage of being a test that is currently used in other jurisdictions such as the ACT<sup>7</sup> and Victoria<sup>8</sup>. Such an approach would be simpler to understand and this clarity likely to increase the consistency of its application, in marked contrast to the comparator test.

### **Indirect discrimination and the need to clarify what is meant by 'reasonable'**

Legal Aid NSW supports the proposal in the Discussion Paper to clarify the concept of 'reasonableness' by the addition of an indicative list of factors to be taken into account when determining reasonableness.

An indicative list would clearly make it easier for the concept of indirect discrimination to be understood by applicants. It would provide guidance to applicants and respondents alike through the court process and would assist in negotiations. Importantly it would also provide guidance to respondents when they are imposing requirements.

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

The Legal Aid NSW experience accords with the assertion that the current burden of proof is too onerous on the complainant to try and establish that a respondent has treated them unfairly on the basis of a protected attribute. In this regard Legal Aid NSW notes and agrees with Associate Professor Simon Rice's comment:

*A complainant must... prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as a fact, on the balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for*

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<sup>7</sup> ss 8(1) *Discrimination Act 1991* (ACT).

<sup>8</sup> ss 8(1) *Equal Opportunity Act 2010* (Vic).

*their discriminatory conduct, simply because they are not called on to explain it.*<sup>9</sup>

In Legal Aid NSW experience this unreasonable evidentiary requirement acts as a significant barrier and disincentive to people wishing to pursue a remedy for unlawful discrimination. A lack of available evidence to prove the reason for the unfair treatment on a prohibited ground, more often than not, results in a complainant not pursuing any remedy at all.

The experience of Legal Aid NSW in providing civil law advice suggests countless examples where a person is complaining of unfair treatment on the basis of a protected attribute but has no evidence, other than a belief or a feeling, that the attribute was the reason for the treatment. In those circumstances, although solicitors can advise the person that it is their right to lodge a complaint and see if any supporting evidence arises during the complaints or court process, more often than not such evidence will not arise because it is in the mind, or occasionally in documentation, of the respondent only. The Legal Aid NSW experience is that, in the majority of instances, the result of the advice to the person is that they choose not to pursue a complaint because they have no evidence of the unlawful reason for the unfavourable treatment.

Further, Legal Aid NSW notes that issues relating to lack of available evidence, and the consequent assessment of reduced prospects of success in making a claim, can also result in fewer legal practitioners being willing to act in discrimination matters. This includes potential representation by Legal Aid NSW where a grant of legal aid for discrimination matters requires satisfaction of a merits test.<sup>10</sup> Accordingly, in most cases, Legal Aid NSW would not act in a matter in circumstances where an assessment is made that the applicant does not have reasonable prospects of success because they are unable to satisfy the evidentiary burden.

Legal Aid NSW therefore endorses the recommendation made by the 'Discrimination Law Experts' Group that:

*... the legislation should provide that once the claimant has made out a prima facie case that allows the possibility of inferring that unlawful discrimination occurred, that is, that the respondent's action could have been motivated by an unlawful attribute, a rebuttable presumption would arise that the basis for the action was unlawful.*<sup>11</sup>

We note that similar recommendations have been made by:

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<sup>9</sup> Senate Standing Committee on Legal and Constitutional Affairs (2008) *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (SDA Report), paragraph 6.47.

<sup>10</sup> The Legal Aid NSW merit test is applied amongst other tests. For further details see Addendum A. or Legal Aid NSW policy online at < <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies>>

<sup>11</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at p. 14.

- Law Council of Australia;<sup>12</sup>
- National Association of Community Legal Centres.<sup>13</sup>

### Legal Aid NSW experience

'Discrimination Toolkit Workshops' for Aboriginal community workers in regional New South Wales.

In these workshops, a common and recurring issue raised by participants is the discriminatory refusal of housing to Aboriginal people.

For this, and other issues, comments are often received from workshop participants to the effect of:

*"You can see it, you can feel it, you can smell it [the unfavourable treatment based on race], but there is just no way we can prove it. What's the point then in trying to do anything about it?"*

A significant portion of workshop time is spent on the importance of evidentiary requirements with facilitators providing participants practical tips on how they might be able to obtain proof of being refused housing. For example, where a person has been advised that a rental house has already been rented, and that person subsequently sees a 'for rent' sign relating to that house, the facilitator may discuss simple steps such as taking a photograph or a photocopy of the advertisement.

Workshop discussions will typically then turn to how, even with such evidence to demonstrate the refusal of a housing service, the person would then still have to try and prove that the reason for the refusal was their race. The facilitator will explain that unless the real estate agent has explicitly made a comment about race to the person seeking the rental house, it is exceptionally difficult for the complainant to prove that the reason was race.

It is the experience of the workshop facilitators that, at this point particularly, participants will often consider the evidentiary requirements insurmountable and, consequently, can become despondent with the process.

Legal Aid NSW highlights that our endorsed approach is consistent with the onus provisions of the FW Act. As noted in the Discussion Paper, according to the FW Act, once the claimant satisfies the threshold tests, the onus is then reversed and placed upon the respondent(s). Pursuant to s361 of the FW Act the prohibited reason is presumed unless proven otherwise. For example, in a disability discrimination claim, once the claimant has established that "*adverse action*"<sup>14</sup> occurred and that the

<sup>12</sup> Law Council of Australia (March 2011) 'Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws' at 17.

<sup>13</sup> National Association of Community Legal Centres (March 2011) 'NACLC Submission to the Commonwealth Attorney General. Access to Justice and Systemic Issues: Consolidation of Federal Anti-Discrimination Legislation' at F.

<sup>14</sup> *Fair Work Act 2009* (Cth) s 342.

claimant has a 'disability' (within the meaning of s351) the respondent(s) will then need to prove that the conduct in question did not occur because of a prohibited discriminatory reason. However, this does not mean that the respondent(s) bear the onus in response to mere allegations. A claimant's case must focus on the causal connection of the "adverse action" and the prohibited reason.<sup>15</sup> Assertions by the employer that there were multiple reasons will not constitute a defence. If one or more of the reasons is prohibited then the claimant will succeed. The test as to whether or not the "adverse action" has occurred because of a prohibited discriminatory reason is objective.<sup>16</sup> The subjective intent of the person(s) who engaged in the conduct may be relevant, but is not decisive.<sup>17</sup>

**3. 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?**

Legal Aid NSW notes that the four Commonwealth Acts contain separately worded provisions for special measures. The SDA, DDA and ADA express the concept of special measures broadly and use phrases such as '*for the purpose of achieving substantive equality*', '*special needs*' or '*reduce a disadvantage*' and '*bona fide benefit*'. The RDA refers explicitly to the relevant article on special measures found in Article 1 of the Convention.<sup>18</sup> Legal Aid NSW submits that a clause for special measures should be drafted to reinforce the purpose of special measures as a means of achieving equality whilst simultaneously ensuring no loss of benefit conferred by any one of the particular acts.

A clause worded in such a general way would need to be complemented by examples of what could constitute special measures. Such a list of examples should be formulated after further consultation with stakeholders and peak bodies.

**4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how?**

Legal Aid NSW submits that clarifying the concept of 'reasonable adjustment' would serve both to avoid conflict and to provide a reference point for parties to negotiate an outcome in disputes that have already arisen. Section 31 of the DDA provides for the formulation of standards in 'any area in which it is unlawful ... for a person to discriminate against another person on the ground of a disability'. Disability standards that clarify reasonable adjustment have been formulated successfully for access to premises, education and accessible public transport.<sup>19</sup>

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<sup>15</sup> See the discussion on this issue relevant to the General Protections generally in *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109. In some respects it could be said that a claimant must establish a *prima facie* case before the onus is cast upon the respondent.

<sup>16</sup> *Barclay v The Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 14.

<sup>17</sup> *Ibid.*

<sup>18</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*

<sup>19</sup> *Disability (Access to Premises – Buildings) Standards 2010, Disability Standards for Education 2005, Disability Standards for Accessible Public Transport 2002.*

Legal Aid NSW considers disability standards to be the optimal way to clarify reasonable adjustment and the consolidated bill should preserve the beneficial measures contained in section 31.

It is noted that disability standards have not been formulated in all areas of public life. It would be desirable that the definition of 'reasonable adjustment' be clarified through the use of examples drawn from the standards that have been formulated. In this way the standards can provide a reference point to assist in the resolution of disputes not directly covered by the existing standards.

**Should the duty to make reasonable adjustments in the DDA apply to other attributes?**

As stated in the Discussion Paper the concept of indirect discrimination, which applies to all protected attributes, already contains an implied concept of reasonable adjustment. Legal Aid NSW submits that an explicit duty to make reasonable adjustments for all protected attributes is a natural progression which would serve to give effect to the purpose and intent of the anti-discrimination frameworks. Accordingly, Legal Aid NSW suggests that it would be desirable if this implied concept could be explicitly formulated into a duty to make reasonable adjustments that applies to all attributes in the specified areas of public life.

Legal Aid NSW submits that the alternative to formulating a duty of reasonable adjustment is to have the implied duty within the concept of indirect discrimination made explicit. As noted in the Discussion Paper, applicants and respondents have difficulties with the scope of an implied concept within the definition. Given that the Legal Aid NSW experience suggests that indirect discrimination is a difficult concept for members of the public it is submitted that clarification of what is, or is not, indirect discrimination should be provided by including examples of reasonable adjustment.

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

Legal Aid NSW supports initiatives that progress the development of anti-discrimination compliance beyond the longstanding reliance on individual complaints. In particular, it is agreed that individual complaints do not provide an effective mechanism to address systemic issues. Legal Aid NSW believes that discrimination law is no longer a novel concept and that it is unlikely that public sector organisations will incur excessive adverse burden to be more proactive in reducing discrimination in public life.

Legal Aid NSW acknowledges, however, that a move to the introduction of a 'positive duty to eliminate' discrimination and harassment' is likely to require further consultation in relation to the way in which such a positive duty is defined, its practical implications and the resources required to meet the duty.

**6. Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?**

As noted in the Discussion Paper, 'case law indicates that harassment will be discrimination where it is based on a protected attribute'. Legal Aid NSW submits that the developments in case law should be explicitly recognised within the legislation. While understood by practitioners, the current case law protections do not provide consistency in a way that is clear to an individual affected by harassment. There is no good policy reason for the prohibition against harassment not to be extended to cover all protected attributes.

Explicit and clear recognition of the prohibition against harassment is best achieved by a specific provision in the consolidated bill. Harassment is a particularly aggravated form of discrimination and often involves the exploitation of a power imbalance over continued period of time. A specific provision will make the prohibition clear to both the individual perpetrator and those whose rights are affected.

**Protected Attributes**

**7. How should sexual orientation and gender identity be defined?**

Legal Aid NSW submits that the consolidated bill should provide protection for both 'sexual orientation' and 'gender identity' as attributes. The attributes should be defined to ensure the broadest possible coverage.

Legal Aid NSW recommends that protection for sexual orientation should extend to people who identify as lesbian, gay, transgender or diverse orientations. Critically, the definition should refer to how the person self-identifies, while simultaneously protecting from discrimination on the basis of perceived or imputed sexual orientation.

Legal Aid NSW acknowledges the complexity of the gender identity concept. Submissions from organisations and experts in the field should be considered with care. The Legal Aid NSW recommendation in relation to this issue is to provide support for a definition used to describe 'gender identity' which refers to how the person self-identifies subject to submissions from experts in the field.

Legal Aid NSW recommends that intersex identity should be separately identified as a protected attribute.

**8. How should discrimination against a person based on the attribute of an associate be protected?**

Legal Aid NSW recommends that the consolidated bill extend protection from unlawful discrimination to associates of persons with any protected attribute (or attributes).

In order to avoid uncertainty Legal Aid NSW suggests the consolidated bill provide an explicit definition of 'associate'.

## **9. Are the current protections against discrimination on the basis of these attributes appropriate?**

Legal Aid NSW submits that the consolidated bill should provide for a broader range of protected attributes, across all areas of life, with greater adequacy of protection.

### Range of attributes

Legal Aid NSW submits that the consolidated bill should provide protective coverage to the additional attributes prescribed under:

- the International Labour Organization Convention (ILO) No. 111<sup>20</sup> (including the additional employment related grounds added to the standard ILO attributes by Australia)<sup>21</sup>,
- the FW Act,<sup>22</sup> and

the additional attribute of status as a victim of domestic violence (addressed below).

### Adequacy of protection

Legal Aid NSW contends that the current protection for discrimination on the basis of ILO attributes is inadequate. The Legal Aid NSW experience suggests that the lack of enforceable remedies allowed for by the AHRC Act for such discrimination dissuades potential complainants from pursuing a complaint.

### Adequacy of coverage

In addition to improving remedies Legal Aid NSW recommends that protection for ILO discrimination attributes should be expanded to all areas of public life and should not be limited to employment only.

### Victim of domestic violence status

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<sup>20</sup> Schedule 1 to the AHRC Act.

<sup>21</sup> Australian Human Rights Commission Regulations 1989

<sup>22</sup> The relevant anti-discrimination provisions in the FW Act are within in the Part 3-1 "General Protections". The prohibited grounds of discrimination are very comprehensive. They are: *race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin*. See s351 of the FW Act.

Legal Aid NSW notes and endorses the submission by the Australian Domestic & Family Violence Clearinghouse.<sup>23</sup> In support of this submission and its recommendations the following case examples have been provided by the Legal Aid NSW funded Women's Domestic Violence Court Advocacy Program (WDVCAP).

#### **WDVCAP Case Examples – Discrimination as a result of domestic violence**

##### **'Jenny' - client treated unfairly in the workplace as a result of domestic violence**

Jenny is a very experienced accountant whose employment with a large commercial firm was initially undermined when her abusive partner, Paul, began phoning her workplace to speak to her work colleagues about his failing relationship with Jenny. When Jenny was badly assaulted by Paul in front of her two children, she and the children moved into her mother's small unit. Police charged Paul with assault and over the following months, Jenny was required on numerous occasions to take time off work to attend both the local court for the assault charges and related Apprehended Violence Order and the Family Court for parenting orders. Jenny also needed to take time off work to have maxillary surgery as a result of the injuries she sustained in the assault.

During the court process, Jenny described herself as desperate to attend counselling with her children, but was afraid to ask for any more time off work. When Jenny did request a day's leave to organise alternative accommodation, she was called to a formal meeting at her workplace and was accused by colleagues of 'not pulling her weight'. Jenny resigned and now has casual employment as a bookkeeper, and as a result has not been able to afford to move out of her mother's small unit.

##### **'Sally' - client treated unfairly in the workplace as a result of domestic violence**

Police applied for an Apprehended Violence Order to protect Sally from the abusive and controlling behaviour of her ex-boyfriend, Michael. Both Sally and Michael work for the same large organization: Sally in an administrative capacity, and Michael in an executive position. Sally is in her late teens, and Michael is some years older. Sally reported her relationship with Michael began two years ago, and when she recently tried to end the relationship, Michael became abusive and threatening. One of Michael's threats was that Sally would lose her job if she ended the relationship.

Sally reported that when the restrictions on the provisional Apprehended Violence Order were put in place, the organisation expected her to make changes to her normal duties and her hours of work in order to accommodate Michael's work needs, including his use of the workplace gymnasium. The organisation also made it difficult for Sally to take time off to attend court, with the result that Sally was unwilling to continue with the Apprehended Violence Order for fear of losing her employment.

##### **'Amelia' – client treated unfairly by landlord as a result of domestic violence**

Amelia is an Aboriginal woman, and the mother of two young children. She was assaulted by her ex-partner in her own home, and was badly injured in the assault. A number of walls, a door and a window were damaged in the assault and within days Amelia's landlord sought to terminate her lease, notwithstanding a provisional Apprehended Violence Order excluding the ex-partner from the property.

<sup>23</sup> Australian Domestic & Family Violence Clearing House (31 January 2012) 'Submission to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper: Improving Protection for Victims of Domestic Violence'

**10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?**

Legal Aid NSW submits that the consolidated bill should recognise and prohibit intersectional discrimination and that intersectional discrimination should be explicitly included in the list of protected attributes.

Legal Aid NSW endorses the comment made by the National Association of Community Legal Centres that '[t]he failure of discrimination law to address this type of discrimination has meant that discrimination law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex and multiple forms of discrimination'.<sup>24</sup> Further to this point, Legal Aid NSW experience suggests that intersectional discrimination is a particular problem in severely disadvantaged communities, including remote, rural and regional Aboriginal communities.

To aid in facilitating explanation of the concept of intersectional discrimination, consideration should be given to explicit legislative drafting along the lines of that employed in section 3.1 of the Canadian Human Rights Act.

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<sup>24</sup> National Association of Community Legal Centres (April 2011) 'NACLC Submission to the Attorney General. Areas for increased protection in discrimination law: Consolidation of Federal Anti-Discrimination Legislation' at F.

### Legal Aid NSW experience

'Discrimination Toolkit Workshops' for Aboriginal community workers in regional New South Wales.

Legal Aid's *Discrimination Toolkit* workshops are targeted at Aboriginal community workers, however the workshop content covers all prescribed grounds of discrimination in state and Federal law (although racial discrimination and vilification are of particular interest and relevance to participants for obvious reasons).

During the workshop, participants have the opportunity to identify examples of discrimination they have come across in their work or have personally experienced. Sometimes these involve two or more potential grounds of discrimination. For example:

- Aboriginal youth being unfairly targeted, harassed and barred by security officers at a shopping centre (race and/or age);
- Aboriginal single mothers being refused rental accommodation (race, marital status, indirect sex and/or family responsibilities);
- Aboriginal person with a speech impairment being denied entry to a nightclub because door staff thought they were drunk (race and/or disability);
- Many examples of discrimination towards Aboriginal kids with disabilities and learning difficulties in schools (disability and/or race).

Under the current regime, actioning these matters would require separate discrimination complaints under two or more Acts. This is onerous and confusing for complainants and a disincentive to lodging complaints, particularly in communities experiencing "discrimination fatigue". The workshop experience reiterates that discrimination often cannot be neatly compartmentalised into distinct and separate grounds.

### **13. How should the consolidation bill protect voluntary workers from discrimination and harassment?**

Legal Aid NSW supports the protection of voluntary workers from discrimination and harassment. Legal Aid NSW is of the opinion that the availability of a discrimination and harassment free environment is likely to encourage volunteers to donate their time and energy.

As noted in the Discussion Paper concerns have been raised that protection of volunteer workers could place an unreasonable compliance burden on some organisations. Legal Aid NSW observes, however, that these organisations are largely already required to comply with anti-discrimination laws when providing services. Nevertheless, Legal Aid NSW concedes that the extent and breadth of, for

<sup>25</sup> Human Rights Law Centre (May 2011) 'Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality' at 82.

<sup>26</sup> Human Rights Law Centre (May 2011) 'Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality' at 84.

instance, the FW Act obligations may not be suitable for volunteer organisations. Legal Aid NSW will note with interest the submissions in relation to this issue.

**14. Should the consolidation bill protect domestic workers from discrimination? If so, how?**

In principle, Legal Aid NSW submits that as many workers as possible should be protected from discrimination. It is, however, acknowledged that the law should be less rigorous as it relates to work in private residences. Accordingly, Legal Aid NSW supports an approach modelled on the following:

- an exemption can exist for household residents in a decision to directly employ (or not employ or cease to employ) an individual to perform domestic duties in a private residence;
- no exemption should exist in relation to discriminatory harassment of a domestic worker after they have commenced employment;
- no exemption should exist where the employment has connection with a business of the employer;
- no exemption should exist for an agency recruiting or employing domestic workers who will be dispatched to perform work in private residences.

**15. What is the best approach to coverage of clubs and member-based associations?**

Legal Aid NSW supports an approach to coverage modelled on the current provisions of the DDA where 'club' is defined broadly to include associations (whether incorporated or not) that provide and maintain their facilities from the funds of the association.

Legal Aid NSW agrees with observations made elsewhere that the 'minimum membership number' approach, such as that employed by the SDA, involves an arbitrary cut-off point.<sup>27</sup> Further, Legal Aid NSW contends that such an approach may have disproportionate effects in regional areas where there are limited club and member based-association alternatives. For example, a sporting or recreation club in a small regional centre may be small in membership number but the only one of its type available in the area. Accordingly, Legal Aid NSW would not support an approach modelled on the 'minimum membership number' of the SDA. Further, as noted in the Discussion Paper, employing such an approach in a consolidated bill would reduce the level of protection for disability and thus be inconsistent with the Government's commitment to no diminution of protections.

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<sup>27</sup> New South Wales Law Reform Commission 'Report 92 Review of the Anti-Discrimination Act 1977 (NSW)' at 4.256; Australian Human Rights Commission (6 December 2011) 'Consolidation of Commonwealth Discrimination law: Australian Human Rights Commission Submission to the Attorney-General's Department' at 122.

Legal Aid NSW also agrees that there should be a policy rationale for the chosen approach beyond whether the club sells or supplies alcohol.<sup>28</sup> Accordingly, Legal Aid NSW would not support an approach modelled on the current *Anti-Discrimination Act 1977* (NSW) (ADA NSW).

To avoid any uncertainty, note is made that the consolidated bill should protect employees and other paid workers of clubs and association from unlawful discrimination.

**16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?**

Legal Aid NSW submits that there is no compelling reason for limiting the application of the consolidated bill to partnerships of an arbitrarily selected size. All partners should be protected from discrimination (including so called 'equity' and 'salaried partners') irrespective of the number of partners in the enterprise.

**16B. (Additional) Coverage of small business.**

Legal Aid NSW notes that our experience suggests significant discrimination against workers who work for small and medium sized business. Submission is made that there are no compelling or just reasons why there should be any exemption from workplace anti-discrimination laws for small business in the consolidated bill. In this regard we make the following points:

- workers should not be subjected to discrimination by reason alone of the fact they work for a small business – many workers must take up work with small businesses as a matter of necessity, not choice;
- it is often observed that small businesses, as a group, are the largest (or among the largest) aggregate of employers. To exempt small business from anti-discrimination laws may expose a huge number of Australian workers to discrimination;
- in other areas, such as service delivery, small businesses do not have a general exemption from anti-discrimination laws.

**17. Should discrimination in sport be separately covered? If so, what is the best way to do so?**

Legal Aid NSW has no formal comment for this issue.

**18. How should the consolidation bill prohibit discriminatory requests for information?**

Legal Aid NSW has considered this issue in an employment context only. Note is made that this is a difficult area in which to legislate. There could be numerous

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<sup>28</sup> New South Wales Law Reform Commission 'Report 92 Review of the Anti-Discrimination Act 1977 (NSW)' at 4.256.

legitimate and illegitimate reasons for requesting information. Legal Aid NSW experience suggests that this issue is most relevant in the context of worker recruitment, contracting and induction.

Legal Aid NSW submits that consideration be given to a broad legislative requirement in which requests for information (which are related to protected attributes<sup>29</sup>) must have some reasonable relevance to:

- the inherent requirements of the position/job;
- the design and/or implementation of flexibility arrangements;
- making accommodation for the needs of the employee (for example to accommodate an employee's disability or carer's responsibilities); or
- some legal obligation of the employer/person engaging the worker.

### **19. Can the vicarious liability provisions be clarified in the consolidation bill?**

In the context of the workplace, if anti-discrimination legislation is to prevent workplace discrimination, Legal Aid NSW is of the view that liability should attach to any person who unlawfully participates in discrimination against a worker. The FW Act approach to concurrent liability is highly relevant to this aim and consideration should be given to using the FW Act approach as a model for the consolidated bill.

The FW Act provides for the concurrent liability of persons involved in the discrimination. This is of particular importance where the person or organisation engaging a worker is a corporation, yet in reality natural persons have engaged in and directed the "*adverse action*".

Under the FW Act the following conduct also gives rise to liability:

- organising "*adverse action*",<sup>30</sup>
- advising, encouraging, inciting or coercing another entity/person to take "*adverse action*",<sup>31</sup>
- involvement in a contravention (which is to be treated as actual contravention).<sup>32</sup>

It is now widespread practice in FW Act "*General Protections*" litigation to join directors and senior managers (alongside the corporate employer) where these individuals have been involved in the contravention. Legal Aid NSW submits that consideration should be given to adopting this approach in the consolidated bill.

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<sup>29</sup> Protected attributes means *race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin, etc.*

<sup>30</sup> Section 342(2)(b) of the FW Act.

<sup>31</sup> Section 362 of the FW Act.

<sup>32</sup> Section 550 of the FW Act.

Legal Aid NSW also submits that any clarification of the law of vicarious liability should not narrow the relevant common law. Furthermore, the consolidated bill should also ensure that principals are liable for the conduct of independent contractors, where the contractor works on the premises of the principal and/or the principal is able to monitor or control the performance of work/conduct of the contractor. This will ensure that principals remain responsible for preventing discrimination in the workplace where contractors (as well as employees) are engaged.

## **Exemptions and exceptions**

### **20. Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?**

Legal Aid NSW agrees with the view presented in the Discussion Paper that inconsistent use of exemptions contributes to community misunderstanding about both obligations and rights. To aid community understanding there is a need to replace the various wide-ranging permanent exceptions with a general limitations clause.

Legal Aid NSW supports and endorses the approach outlined by the Discrimination Law Experts' Group submission<sup>33</sup>, with the introduction of a "defence of justification". Such a defence, narrowly construed through human rights principles in a simple framework of a unified definition of discrimination, would provide a more sensible and logical way to consider all the issues relevant to justifying discrimination. It is considered unnecessary to retain any specific exception if the approach advocated by the Discrimination Law Experts Group is adopted. If any of the exceptions are to be retained then Legal Aid NSW supports the proposed procedural reforms suggested by the Group.

### **21. How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?**

Legal Aid NSW supports the adoption of a "defence of justification" which would require an employer to justify discrimination on specified grounds and endorse the proposed approach of the Discrimination Law Experts' Group. A general defence in the terms proposed by the Discrimination Law Experts' Group negates the need for having a "single inherent requirements" or "genuine occupational qualifications" test.

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<sup>33</sup> Discrimination Law Experts' Group (13 December 2011) 'Consolidation of Commonwealth Anti-Discrimination Laws – Submission'.

**22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?**

Legal Aid NSW does not support the retention of any exemption on religious grounds. We do not accept that the rights of individuals to be treated in a non-discriminatory way should be subject to religious rights in public sphere activities. Exceptions should not be available where a religious organisation carries out public sphere activities using government money; public funds should not be used in a discriminatory way. If the exceptions are maintained then we agree with the Discrimination Law Experts' Group submissions on this point and that any exception should only be available in the narrowest possible manner.<sup>34</sup>

**23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?**

Legal Aid NSW supports the retention of temporary exemptions but recommends that a unified and consistent process be adopted across all grounds of discrimination. Temporary exemptions should only be granted in the narrowest of circumstances and for the least amount of time. Legal Aid NSW supports the continued role of the AHRC and endorses the Discrimination Law Experts' Group recommendation of the process through which the AHRC considers granting an exemption.<sup>35</sup>

## Complaints and compliance

**24. Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?**

The current individual, complaint-based, model of Commonwealth anti-discrimination laws has been widely criticised as a partial, ad hoc and generally ineffective response to reducing discrimination.<sup>36</sup> Legal Aid NSW suggests that, while mechanisms for individual redress will always be a fundamental feature of equality laws, it is equally important that the system incorporates an effective compliance regime that supports a systemic response to discrimination.

Reliance on complaints as a primary driver for systemic compliance is problematic. Legal Aid NSW experience suggests that the following may contribute to potential complainants not lodging discrimination complaints:

<sup>34</sup> Discrimination Law Experts' Group (13 December 2011) 'Consolidation of Commonwealth Anti-Discrimination Laws – Submission' at section 6.

<sup>35</sup> Discrimination Law Experts' Group (13 December 2011) 'Consolidation of Commonwealth Anti-Discrimination Laws – Submission' at section 7.

<sup>36</sup> See for example Discrimination Law Experts Roundtable (31 March 2011), Report on recommendations for a consolidated federal anti-discrimination law in Australia, p 24.

- Lack of faith in the system and a perception that it has limited capacity to achieve genuine change;
- Fear of victimisation, particularly in small regional communities where services and employment opportunities are more limited;
- Concern that making a complaint will result in the discrimination becoming more subtle and harder to prove;
- Perception that the complaint process is onerous and lengthy and that compensation is low;
- Competing realities, particularly for people with multiple needs, where discrimination is not at the top of their life priorities;
- Discrimination fatigue i.e. relentless exposure to daily discriminatory experiences that wear people down and erode their motivation to complain.

Accordingly, we suggest that the benefits of a compliance-based approach are twofold:

- It can provide practical guidance to duty holders on how to best meet their legal obligations and, if accompanied by appropriate monitoring and enforcement, is an incentive to address discrimination in a positive and proactive way;
- It reduces the reliance on individual victims to expose and action discriminatory behaviour.

Legal Aid NSW submits that discrimination could be tackled more systemically if duty holders were provided with detailed guidance and regulatory incentives to comply with their legal obligations, including the following measures:

- Inclusion of a positive statutory duty not to discriminate (imposed ideally on both public and private duty holders) with a monitoring and enforcement role for the AHRC. Aside from being an important and symbolic statement of principle, a positive duty would also articulate a clear expectation that duty holders need to be proactive in their response to discrimination;
- Enhanced regulatory functions for the AHRC, including the power to issue best practice standards or codes of practice, developed in consultation with particular industries or sectors. Compliance with the standards or codes would carry evidentiary weight in any proceedings;
- Conciliation agreements to be registered and made publically available to maximise their educative potential and to promote compliance;
- The Federal Courts to be given explicit authority to make corrective and/or penalty-based (rather than merely compensatory) orders that could result in broader systemic change;
- AHRC be able to initiate or support complaints if, for example, it is alerted to discrimination “hot spots” or where it considers it is in the public interest to do so.

### Legal Aid NSW experience

'Discrimination Toolkit Workshops' for Aboriginal community workers in regional New South Wales.

Participants in the *Discrimination Toolkit* workshops have shared many examples of discrimination in their own and their clients' everyday lives. Of the seventy-nine participants to date, all have disclosed actionable discrimination experiences during the workshops. However, only one participant has advised that they responded to the discrimination by lodging a formal discrimination complaint.

Comments to this effect from workshop participants have included:

*"I could lodge a complaint every 2 weeks."*

*"What are we supposed to do about it when it happens every day?"*

*"Discrimination is so normal for us."*

To illustrate, a recurring issue reported by participants in the workshops has been the extent of discrimination experienced by Aboriginal people seeking rental accommodation. For example, one participant had asked to see a list of rental properties in town and was advised by the real estate agent that nothing was available. She asked a non-Aboriginal friend to make the same enquiry, and the friend was shown a list of vacant properties. Another participant advised that members of particular families "only have to mention their last name" and they will be refused any rental accommodation because they are known to be Aboriginal. Another participant reported that some agents will refuse to rent to Aboriginal tenants on instructions from the landlord. As far as we know, none of these anecdotal examples of discrimination have been the subject of a formal complaint.

Evidence from the workshops suggests that there are limitations to a system that only allows the victims of prohibited discrimination to commence action for a breach. People often choose not to lodge complaints for legitimate reasons and our equality laws need to respond to this reality. A greater emphasis on compliance by duty holders would go some way to relieving the burden carried by individuals under the current Federal system.

#### **25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?**

Legal Aid NSW submits that the consolidated bill should ensure improved accessibility for the conciliation process to make it more effective in resolving disputes. To this effect it would be beneficial for the consolidated bill to include

objectives or principles regarding sufficient safeguards to ensure the accessibility of processes.

Legal Aid NSW experience suggests that the following aspects of the conciliation process can act as barriers to accessibility and therefore reduce the effectiveness of the process:

- Lengthy conciliation process timeframe;
- Formality of conciliation process;
- Need for assistance (including the need for assistance with drafting complaints);
- Information imbalance (procedural fairness);
- Location of conciliation.

#### Lengthy conciliation process timeframe

Legal Aid NSW submits that the lengthy (on average) timeframe for resolution of complaints acts as a deterrent for potential complainants. In some cases clients will instruct that they don't wish to pursue a complaint due to the anticipated lengthy timeframe. Notably, Legal Aid NSW solicitors regularly provide advice to individuals who attend Legal Aid NSW after dropping out of the conciliation process due to the delay. Legal Aid NSW experience suggests that the deterrent effect of a lengthy process is heightened for severely disadvantaged individuals with a myriad of complex legal and non-legal issues.

Legal Aid NSW draws comparison with the FW Act conciliation process. In "*General Protections*" litigation, the dispute is first conciliated at Fair Work Australia (FWA). This occurs within a relatively short period - currently within 1 or 2 months from the filing of the application with FW Act. The short time frame within which the FWA conciliation occurs is of great benefit – drawing the parties into negotiations soon after relevant events. There is a very high rate of settlement at Fair Work Australia conciliations.<sup>37</sup> Consideration should be given to adopting a speedy dispute handling process similar to that which occurs under the FW Act in FWA.

#### Formality of the conciliation process

The Legal Aid NSW experience suggests that, despite the efforts of the AHRC, the conciliation process is perceived as daunting by many Legal Aid NSW clients. When the AHRC DVD demonstrating the conciliation process is shown in community worker discrimination workshops feedback is consistently received that the process appears 'formal and intimidating'. Feedback suggests this is in part a result of the conciliation process retaining the use of some legal language.

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<sup>37</sup> In the year 2010-2011 76% of matters were settled. In the year 2009-2010 81% of matters were settled (source *Annual Report of Fair Work Australia 1 July 2010–30 June 2011*). These figures include "General Protections" matters and Unfair Dismissal matters. Notwithstanding that this data includes more than discrimination type claims, it well demonstrates the capacity of Fair Work Australia to settle the vast majority of disputes that come before it.

Legal Aid NSW notes the difficulty in legislating against 'formality', nevertheless, it is our experience that this element of the conciliation process can deter potential complainants.

#### Need for assistance (including the need for assistance with drafting complaints)

It is reiterated that the Legal Aid NSW experience consistently suggests that anti-discrimination laws are difficult for potential complainants to understand. In light of this issue, Legal Aid NSW submits there is a benefit in complainants accessing early expert advice and assistance (especially where the respondent is legally represented).

Legal Aid NSW notes the recommendation made the Law Council of Australia that consideration should be given to provisions whereby complainants are provided with assistance in drafting complaints.<sup>38</sup> It is the case that Legal Aid NSW solicitors regularly see complainants to provide advice after the complaint has been lodged without legal assistance. Often, the consequences of this lack of early assistance are that:

- not all respondents are named in the complaint,
- acts of discrimination have not been included in the complaint (or, in some cases, not picked up by conciliator),
- complaints of victimisation have not been identified.

Once a complaint is terminated by AHRC, if a complainant wants to proceed to the federal courts, any attempts to amend that complaint to rectify such deficiencies can be difficult and add significantly to costs. If a complainant is not successful in amending the complaint, the result is that significant parts of a complaint will not be determined by the court.

Legal Aid NSW acknowledges that the provision of assistance for complaint drafting and/or ongoing advocacy through the conciliation process is likely to require a commitment of significant resources. It is noted that a grant of legal aid is not available for representation at the AHRC stage of a complaint. Experience suggests that it is also difficult for individuals to access assistance from the private sector. AHRC opinion should be sought as to the viability of providing such assistance.

#### Information imbalance

Legal Aid NSW submits that, as matter of course, AHRC staff should seek a written response to the complaint from the respondent. It is Legal Aid NSW understanding that this has previously been the practice, but that a policy change took place whereby it became a discretionary matter for AHRC staff as to whether to dispense with seeking a response and proceeding to conciliation. Observation suggests that

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<sup>38</sup> Law Council of Australia (March 2011) 'Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws' at 23.

proceeding to conciliation where the respondent is aware of the complainant's case (and its strengths and weaknesses) but not vice versa, is procedurally unfair. This further exacerbates the power imbalance and lessens the bargaining power of the complainant. Legal Aid NSW suggests that this results in complainants settling matters on less favourable terms, or not settling them at all and then not proceeding to federal courts.

Legal Aid NSW also submits that the investigative functions and powers of AHRC generally should be bolstered. This is especially important in light of the burden of proof issues discussed at Question 2.

#### Location of conciliation

Legal Aid NSW supports any consideration of a mechanism to ensure that conciliation takes place in a location, and appropriate venue, as close as possible to the complainant. This could be affected by having the consolidated bill include objectives or principles regarding sufficient safeguards to ensure the accessibility of processes.

#### **Enforceability of settlement agreements**

In addition to addressing the above accessibility barriers Legal Aid NSW submits that the lack of enforceability of settlement agreements is problematic. It is noted that even where settlement is in the form of deed which can be sued upon in event of non-compliance, experience suggests that complainants are rarely, if ever, in a financial or emotional position where such a course of action is a real option. This problem is exacerbated by the fact that most agreed sums of compensation are so little that suing becomes more emotional investment for less gain and involves court proceedings for which legal representation would be difficult to obtain. Legal Aid NSW supports the suggestion by the Discrimination Law Experts' Group for consideration to be given to empowering the AHRC to issue compliance notices, with civil penalties and the possibility of damages for breach of notice.<sup>39</sup>

The suggestion by the Discrimination Law Experts' Group for the registration of conciliation agreements is also supported.<sup>40</sup>

#### **26. Are any improvements needed to the court process for anti-discrimination complaints?**

Legal Aid NSW submits that the following aspects of the court process for anti-discrimination complaints require improvement:

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<sup>39</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at recommendation 19.

<sup>40</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at recommendation 19.

- Litigation costs;
- Lack of legal representation;
- Accessibility issues in regional locations;
- Court processes and fees;
- Awards and remedies.

### Litigation costs

Legal Aid NSW suggests that litigation costs are a significant deterrent for clients pursuing a discrimination complaint in the federal jurisdiction. This experience includes clients seen in legal advice clinics who may be on moderate incomes.

Legal Aid NSW notes and endorses the recommendation made by the Discrimination Law Experts' Group,<sup>41</sup> and elsewhere,<sup>42</sup> that the consolidated bill model cost order provisions on the current FW Act approach. According to this approach, at all stages of "*General Protections*" discrimination litigation (i.e. in FWA and in the Courts) each party pays their own costs unless:

- the claim is vexatious or brought without reasonable cause
- a party has unreasonably caused another party to incur costs
- a party unreasonably refused to participate in conciliation before FW Act.

Legal Aid NSW submits that this approach provides sufficient protection against situations where well resourced respondents, and their lawyers, make aggressive threats about adverse cost orders to deter financially vulnerable claimants with meritorious cases.

### Legal representation

In light of the complexity of the current laws and the issues of power imbalance, where respondents are invariably legally represented, Legal Aid NSW acknowledges the importance of legal representation for complainants in the federal courts.

Legal Aid NSW is aware that obtaining legal assistance for federal court discrimination matters is difficult. Complainants have difficulty obtaining assistance from the private sector as awards are generally lower than fees. Legal Aid NSW civil law duty assistance is not available in the Federal Magistrates Court or Federal Court. Grants of legal aid are available for discrimination matters subject to a means test, merit test, availability of funds test and the additional requirements detailed in Legal Aid NSW policy online paragraphs 6.8.1 to 6.8.4 (See Addendum A). The availability of legal aid is subject to these requirements due to limited funding.

### Accessibility issues in regional locations

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<sup>41</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at recommendation 20.2

<sup>42</sup> Law Council of Australia (March 2011) 'Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws' at 28.

Legal Aid NSW submits that applicants should be able to file originating application and subsequent documents in the court registry closest to them. When regional complainants are required to file originating applications and subsequent court documents in metropolitan federal court registries Legal Aid NSW experience suggests this can result in the following:

- a delay in the filing of the documents, often where time is of the essence to ensure compliance with the 60 day time limit for filing the application. This can be compounded in circumstances where the court registry identifies some deficiency in the documents being filed by an applicant, which regularly occurs because most applicants are self-represented, and sends the documents back to the applicant to remedy and refile;
- a lack of awareness by self-represented applicants of their right to apply to have the proceedings transferred to a closer location where a court is available. This can result in applicants having to travel long distances to reach a metropolitan location which imposes additional and unnecessary stress, time and costs on already disadvantaged persons;
- where an applicant is aware of their right to apply for a transfer of proceedings, additional time and costs are incurred by the court and all parties in the making and determining of this application.

#### Court processes and fees

Legal Aid NSW submits that the current requirement for an applicant to file 'Genuine Steps Statement' when filing originating application is an unnecessary burden in light of the preceding AHRC process whereby the applicant has already made genuine steps to try to resolve the matter.

Legal Aid NSW also suggests that the costs and burdens associated with the requirement that complainants serve copies of their applications on the AHRC should be borne by the AHRC or federal courts.

Legal Aid NSW also notes the amendments to the *Federal Magistrates Regulations 2004* and *Federal Court of Australia Regulations 2004* which commenced on 1 November 2010. The effect of the changes is that exemptions and waivers of filing fees are no longer available in the FMC and Federal Court for applicants in situations of severe financial hardship, including legally aided applicants. Whilst noting that the filing fee for applications under section 46PO and 46 PP of the AHRC Act is less than the reduced fee allowed for by the changes we nevertheless submit that hardship waiver provisions should be restored.

#### Compensation, awards and remedies

Legal Aid NSW experience suggests that the low range of compensation for discrimination matters acts as a major deterrent for clients proceeding with a

complaint. Further, low levels of compensation may contribute to a finding of no merit in relation to an application for a grant of legal aid when subject to cost-benefit analysis.<sup>43</sup>

Legal Aid NSW notes and endorses the observation of the Discrimination Law Experts' Group that:

*In any comparison with legal claims that give rise to compensation for wrongful conduct, anti-discrimination complainants have been poorly compensated.*<sup>44</sup>

As observed by the Discrimination Law Experts' Group a systemic approach should be taken to preventing and addressing discrimination which includes 'providing guidance for the assessment of compensation'.<sup>45</sup>

Legal Aid submit that, in principle, remedies, including compensation for discrimination should be reflective of the inherent value placed on the principle of non-discrimination and the harm done where breached. It is suggested that the prospect of orders for significant damages can be an important systemic deterrent for unlawful behaviour.

Notably, under the FW Act respondents may also be fined and the Court may order that the fine be paid to the employee, the Commonwealth or a particular person. This reinforces the deterrent nature of the provisions and Legal Aid NSW supports this approach.

**27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?**

Legal Aid NSW notes and endorses the submission made by the Human Rights Law Centre for the AHRC power to be expanded to include the following:

- Empower the Commission to investigate human rights breaches;
- Permit the Commission to enter into an enforceable undertaking;
- Permit the Commission to issue compliance notices.<sup>46</sup>

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<sup>43</sup> See Legal Aid NSW Policy Online 8 'Merit Test' available at <

<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/8.-merit-test>>

<sup>44</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at recommendation 19. See also Law Council of Australia (March 2011) 'Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws' at 24.

<sup>45</sup> Discrimination Law Experts' Group (13 December 2011), Consolidation of Commonwealth Anti-discrimination laws - Submission, at recommendation 19.

<sup>46</sup> Human Rights Law Centre (May 2011) 'Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality' at 163 – 172.

## Interaction with Other Laws and Application to State and Territory Governments

### 28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

Legal Aid NSW notes the provisions of the FW Act that manage its interaction with other anti-discrimination laws and processes, in particular where a worker is seeking redress for discrimination.<sup>47</sup> The upshot of these provisions is that an aggrieved person must choose between:

- making an application to FWA under the FW Act; or
- making a complaint/application to another competent forum under other anti-discrimination laws (federal or state).<sup>48</sup>

In general, it is submitted that the avoidance of forum shopping and double jeopardy objectives are best addressed by ensuring consistency in protections in the consolidated bill and the prohibitions of adverse action in employment based on a protected attribute. Legal Aid NSW suggests that, presuming the consolidated bill provides consistent protections, the current mechanisms governing the interaction of the laws are adequate.

Having a mechanism where a claimant/applicant cannot make and maintain multiple actions in relation to alleged discrimination does raise the question as to why an aggrieved person would choose one forum and not the other. Put briefly, Legal Aid NSW experience suggests that the following factors may be considered in the complainant's decision:

#### Time limits

Currently, where there has been a discriminatory dismissal, a worker has only 60 days to apply to FW Act, whereas a complainant has 12 months to apply to the AHRC. Legal Aid NSW submits that consistency would be preferable and, observing the commitment to no diminution, 12 months recommended;

#### Process

An application to FW Act is made by filing a 'Form 8' as required by the FW Act *Rules*. Some workers may find this daunting and prefer the AHRC procedure.

<sup>47</sup> Sections 725 to 734 of the FW Act contain technical provisions preventing multiple actions in relation to the same discriminatory events.

<sup>48</sup> Where the aggrieved person has already made a particular complaint/application, the person may only make a second complaint/application where the first has been withdrawn or has failed for want of jurisdiction.

Conversely, it seems that in many instances an applicant may obtain a conciliation date at FWA much earlier than a mediation date in AHRC. Also, prior to FWA conciliation, the respondent is required to file a response to the matters raised by the applicant.

### Concurrent claims

It is noted that where the worker has other employment/industrial law claims (as well as a discrimination claim), the best course may be to make an application in respect of all matters to FWA. An example of this is where a worker has a workplace rights claim under the FW Act "*General Protections*" and a discrimination claim.

### Costs

As previously discussed under the FW Act an applicant cannot be ordered to pay costs (unless an application is vexatious or unreasonable) - even where the application proceeds to a court. Similar limitations on cost orders may not exist in discrimination matters under other legislation where that matter is determined by a court. (Although we submit that the FW Act approach to costs should be adopted in the consolidation bill).

### Advisor familiarity

It is also Legal Aid NSW observation that the area of practice of the worker's representative may play a part in the choice of forum. An employee association/union representing a worker will be more likely to apply to FW Act, as would an employment/industrial law specialist lawyer. Whereas a human rights lawyer may be more likely to make an application to the AHRC.

## **29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?**

Legal Aid NSW submits that the interaction between the consolidated bill and State and Territory anti-discrimination laws be governed according to the approach used by the RDA and SDA. Legal Aid NSW suggests that removing an explicit requirement of consistency with underlying international conventions would be contrary to the Governments non diminution commitment.

In relation to general State and Territory laws, Legal Aid NSW endorses the recommendation made by the AHRC.<sup>49</sup> The AHRC submission states that rather than creating a blanket exemption, the legislature should turn its mind to what particular legislation it wishes to exempt from the operation of the consolidated bill and exempt such legislation by regulation. This is the approach taken by the existing DDA. As noted by the AHRC, any blanket exemption would effectively reduce the current

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<sup>49</sup> Australian Human Rights Commission (6 December 2011) 'Consolidation of Commonwealth Discrimination law: Australian Human Rights Commission Submission to the Attorney-General's Department' at 9.2

protection offered in the SDA and RDA, which provide no exemption for acts done in compliance with State or Territory laws.

**30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?**

Currently the ADA, DDA and RDA all apply to the Crown in rights of the States and Territories. The SDA, however, only applies to discrimination by the Crown in rights of the States and Territories (and State instrumentalities) in some areas of public life. Legal Aid NSW suggests there is little justification for this inconsistency. In keeping with the principal of maintaining protections, the consolidation bill should adopt the approach taken in the ADA, DDA and RDA.

## **Addendum A**

### **6.8. Discrimination matters**

[6.8.1 When legal aid is available for discrimination matters](#)

[6.8.2 Proceedings before the Administrative Decisions Tribunal](#)

[6.8.3 Appeals from the Administrative Decisions Tribunal](#)

[6.8.4 Commonwealth discrimination matters](#)

#### **6.8.1 When legal aid is available for discrimination matters**

Legal aid is available for [discrimination matters](#) as set out in sections 6.8.2 and 6.8.3 below and may include matters relating to:

- sexual discrimination
- race discrimination
- gender discrimination
- age discrimination
- discrimination on the basis of disability
- sexual harassment
- discrimination on the basis of health
- discrimination on the basis of marital status.

#### **6.8.2 Proceedings before the Administrative Decisions Tribunal**

Legal aid is available for matters which are before the Equal Opportunity Division of the [Administrative Decisions Tribunal](#).

For legal aid to be granted in these matters the following tests must be satisfied:

- the applicant meets the [Means Test](#)
- the matter meets [Merit Test A](#), and
- the [Availability of Funds Test](#).

For guideline on requirements to attend ADR see [Civil Guideline 3.2](#).

For guideline on grants of aid for test cases see [Civil Guideline 3.8](#).

#### **6.8.3 Appeals from the Administrative Decisions Tribunal**

Legal aid is available for an appeal from the Equal Opportunity Division of the Administrative Decisions Tribunal.

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the applicant meets the [Means Test](#)
- the matter meets [Merit Test A](#), and
- the [Availability of Funds Test](#).

For guideline on requirements to attend ADR see [Civil Guideline 3.2](#).

For guideline on grants of aid for test cases see [Civil Guideline 3.8](#).

### **What matters are not included under this policy**

Legal aid is not available under this policy for matters which are about intra association disputes, for example, between members of unions or clubs, or for defamation proceedings. However legal aid may be available, if:

- the applicant is at [special disadvantage](#), and
- there are exceptional circumstances, **and**
- the applicant would suffer undue hardship if legal aid was not granted.

See civil law policy sections at [6.25](#).

### **6.8.4 Commonwealth discrimination matters**

Legal Aid is available for [Commonwealth](#) discrimination matters.

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the applicant meets the [Means Test](#)
- the matter meets [Merit Test A](#), and
- the [Availability of Funds Test](#), and

Legal Aid NSW must be satisfied there is a real prospect of a substantial benefit to be gained by the applicant in either:

- initiating proceedings in the [Federal Court](#), the Federal Magistrates Court or the [High Court](#), or
- appealing to the Federal Court or the High Court.

Unless there are exceptional circumstances, if the action is likely to result in the applicant receiving an award of damages or property, Legal Aid NSW must be satisfied from the material provided, that either:

- the action could not reasonably be expected to be conducted under a conditional costs agreement or similar arrangement with a private legal practitioner, or
- the applicant cannot obtain appropriate legal assistance from another source.

For guideline on requirements to attend ADR see [Civil Guideline 3.2](#).

For guideline on grants of aid for test cases see [Civil Guideline 3.8](#).

For procedure on applying tests in Commonwealth matters see [Civil Guideline 3.10](#).