31 January 2012

WOMEN'S LEGAL CENTRE (ACT & REGION) INCORPORATED

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

By Email: antidiscrimination@ag.gov.au

Dear Assistant Secretary,

Consolidation of Commonwealth Anti-Discrimination Laws

The Women's Legal Centre (ACT & Region) thanks the Attorney General's Department for the opportunity to provide comments on the issues raised in your comprehensive discussion paper, titled 'Consolidation of Commonwealth Anti-Discrimination Laws.'

The Women's Legal Centre (ACT and Region) Inc. (the WLC) is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been providing services to women in the ACT and surrounding region since 1996. The main areas in which we provide advice are family law, domestic violence, employment and discrimination law. Our client group includes disadvantaged women, such as those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. Around half of the women seeking assistance from the Centre in family law matters have experienced family violence.

Endorsement of ERA Submission

Our Centre has officially endorsed the submission prepared by the Equality Rights Alliance (ERA), which contains 35 recommendations for change. We believe that implementing the recommendations outlined in the ERA submission would provide the best possible federal anti-discrimination law framework for our clients.

We provide this supplementary submission to highlight a number of key recommendations made in the ERA submission. In particular, we wish to offer the Department a number of de-identified case studies which shed light on how certain aspects of discrimination law operate 'on the ground' for our client group.

ERA Recommendation 2: The comparator element should be removed from the definition of 'direct discrimination'.

As noted in page 10 of the discussion paper, the comparator test has never been used in ACT anti-discrimination law. In our jurisdiction, a complainant must simply prove that she has suffered unfavourable treatment, which caused her to experience a detriment or disadvantage, and that the treatment was due to one or more protected attributes. In our experience, it is relatively straightforward to explain to clients and to the community members who participate in our community legal education sessions, the concepts of 'unfavourable treatment' and 'detriment'. When taking instructions from a potential complainant, there is no need to undertake the complex and often hypothetical task of locating a person in comparable circumstances without the specific attribute. The ACT model ensures that the complexities associated with finding an appropriate comparator do not act as a disincentive for individuals seeking to make a complaint. For this reason, we strongly support use of the 'detriment test' rather than the 'comparator test' in the consolidated act.

ERA Recommendation 4: The burden of proof should shift to the respondent once the complainant has established a prima face case of discrimination

We agree that a complainant should be required to establish a prima facie case when making a discrimination complaint. However, we believe it is fair that having done so, the onus of proof should shift to the respondent, as is the case under the Fair Work Act. This shift would reflect the fundamental fact that it is the respondent, not the complainant, who holds the crucial knowledge relating to why a particular decision or action was taken.

Shifting the onus of proof to the respondent after a prima facie case has been made out is unlikely to cause respondents undue hardship. Rather, it gives the respondent a clear opportunity to provide reasons—if any—as to why the unfavourable treatment is *not* related to a protected attribute. As noted at page 16 of the discussion paper, '…both the UK and Fair Work Act Models have now been in operation in their respective jurisdictions for some time and do not appear to have created significant problems in practice.' The Women's Legal Centre is also aware that the option of re-allocating the burden of proof to the respondent is one of the issues currently being considered by the ACT Law Reform Advisory Council in its review of the *Discrimination Act* 1991 (ACT).

Many of the clients we advise in employment matters report that they have asked their employer or supervisor for a reason why they have been subjected to particular unfavourable treatment. In many instances, no reason is forthcoming, or the reason is so outlandish as to clearly be a smokescreen. In this situation, our client has no ability to coerce the employer to provide or explain their reasons. Accordingly, the employee can only draw on their personal knowledge and observations to determine whether the unfavourable treatment occurred due

to a protected attribute. From a purely practical standpoint, it is far more efficient for the employer to provide evidence regarding their reasons, rather than have the complainant hypothesise at length about *possible* or *likely* reasons for the treatment in question. Overall, shifting the onus of proof would therefore promote efficient resolution of disputes.

Below are two case studies that highlight the difficulties a complainant may face in trying to prove matters relating to the state of mind of the respondent. The issue of who holds the legal burden of proof only directly arises if a matter does not settle at conciliation. However, advice about this issue in the early stages, when a complainant is deciding whether or not to pursue a matter, can act as a significant disincentive. Many complainants feel overwhelmed at the prospect of having to successfully carry the burden of proof, fearing that they simply cannot provide sufficient evidence of the respondent's reasons. In contrast, the prospect of only having to make out a 'prima face case' seems far less daunting to a complainant who is in the favourable position of getting to decide whether to pursue their matter under the Fair Work Act, or under the relevant anti-discrimination law. We strongly support a consistent approach in Federal legislation to the issue of proof, and believe the Fair Work Act should be used as a model in the development of the consolidated act.

Case Study A

Ms Taylor, a 59 year old woman, is terminated from her long-term position as a shift supervisor in a local disability service. When she asks for a reason, she is told that management is unimpressed with an incident that occurred the previous week in relation to a particular client. Ms Taylor explains that she wasn't on shift when the incident happened, and that the particular client is not even in the room for which she is responsible when she is on shift. The employer does not provide a response, or any further reasons for the termination. Ms Taylor seeks advice from our service, noting that in the same month, three other long-term employees were also terminated in unusual circumstances, all of whom were over the age of 55. Without access to any further information, Ms Taylor can only conclude that management has terminated her on the basis of her age, but she has very limited evidence to rely on to prove this issue.

Case Study B

Ms Deng, a woman of Sudanese background, works for a recruitment agency as a permanent part-time care provider to elderly patients in government programs. Ms Deng has moderate English skills and a large family to support. Ms Deng applies for a permanent position in the government department responsible for providing the in-home care program that she has been working in for the last four years. Ms Deng is found unsuitable for the position, despite the fact that she has been doing identical work for several years. The department initially promises to give Ms Deng an explanation regarding the interview panel's decision, but the

chair of the panel moves on to a new role the following month and no reasons are forthcoming. The client is very distressed by what has happened, and thinks that her race may have been part of the reason why she wasn't selected to work permanently in the team of in-home care providers, who are all from Anglo-Australian backgrounds. Despite her efforts, she can't get anyone in the Department to give her more information about why she was found unsuitable for the role.

ERA Recommendation 6: The requirement to make reasonable adjustments should be extended to employees with family or caring responsibilities. In formulating such an obligation, it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal.

Promoting efficient resolution of workplace disputes

A large proportion of the discrimination matters in which we provide advice relate to a woman's family or caring responsibilities in the context of her employment. The WLC strongly believes that extending the 'reasonable adjustments' requirement to include family or caring responsibilities would promote efficient resolution of disputes for individual employees in the workplace.

Where appropriate, the WLC always assists women to negotiate informally with their employer before making a formal discrimination complaint. This approach maximises efficiency for all concerned, and recognises the reality that those with additional family and caring responsibilities are *least* likely to have the resources to pursue a formal complaint. WLC believes that imposing a positive duty on employers to make reasonable adjustments to accommodate an employee's family or caring responsibilities would increase the number and quality of negotiated outcomes in relevant matters.

From a practical perspective, the power imbalance present in the vast majority of employment relationships often makes it difficult for a woman to request, let alone negotiate, an adjustment to her work arrangements. Imposing a positive duty on employers, and educating workers about the presence of this duty, may empower a larger number of vulnerable employees to initiate discussions with their employer about what *kind* of adjustments might be reasonable in the circumstances. This would be a significant shift from a woman having to start discussions with arguments as to why it's reasonable for her to request that *any* adjustments be made. This is presuming that she's had the courage to broach the issue at all.

Case Study C

Ms Dimitriades has worked as a long-term casual for a local public relations firm, doing the same five shifts every week for the past four years. Ms Dimitriades has a 13 year old son who suffers from asthma. From time-to-time, she has had to leave work in the middle of her shift when the school calls to say her son is experiencing a severe asthma attack. In these circumstances, Ms Dimitriades always ensures that her colleagues are able to cover her phone-answering and client front-desk duties before leaving the office. This pattern has occurred two or three times a year for the past four years. One such episode happened last Tuesday. On Wednesday, Ms Dimitriades was called into the manager's office and told that she couldn't just 'walk off in the middle of shifts' and that she should pack up her things and not come back. Initially, the WLC wrote to the employer to determine whether it may be possible to negotiate a return to work for Ms Dimitriades, along with an agreement that she be able to respond to calls from her son's school, as long as appropriate arrangements were made for others to cover her work . The employer refused to engage in any negotiations, telling a colleague of Ms Dimitriades that 'it wasn't his responsibility to take care of someone else's kids.' The WLC offered to support Ms Dimitriades to make a discrimination complaint, or a complaint under the Fair Work Act. However, Ms Dimitriades said that with ongoing expenses and no savings, she needed to put all her energy into finding a new job, rather than pursuing a complaint.

It is foreseeable that once subject to a positive duty, employers may be more likely to consider taking, at the outset, the kinds of measures that are presently imposed following lengthy discrimination or adverse action complaints. In this sense, introducing a positive duty would assist individual clients to negotiate directly, or with the help of a solicitor, to resolve workplace disputes relating to his or her family or caring responsibilities without the need for recourse to formal complaints mechanisms.

Encouraging systemic change

The Centre continually finds that matters involving unfavourable treatment on the basis of a woman's caring and/or family responsibilities occur in all employment contexts, from small business to community organisations, federal and local government to local branches of national and multi-national corporations.

From a systemic perspective, we believe that imposing a positive duty on employers to make reasonable adjustments to accommodate an employee's family or caring responsibilities would promote a change in Australian workplace culture—across the board— to recognise the importance of providing flexible work arrangements for *all* employees with family or caring responsibilities. This would bring with it many well-documented benefits including a higher percentage of women returning to the paid workforce after

giving birth, and an increase in the likelihood that women will maintain their workforce participation, across the public, private and non-government sectors.

Case Study D

Mrs Johnson held a permanent position as a human resources officer within an international telecommunications company for four years. Mrs Johnson then became pregnant and took five months paid maternity leave. Immediately prior to returning to work, Mrs Johnson asked her supervisor whether there was a room in the company's large building where she could either lock, or block, the door for half an hour each day to express milk for her daughter. The employer responded by saying that there was no such room in the building, and that Mrs Johnson would have to leave the building during her lunch break to express elsewhere. The employer also informed Mrs Johnson that because it was a 'biological hazard', her breastmilk could not be stored on the premises. With the help of WLC, Mrs Johnson tried to negotiate a better outcome with her direct supervisor, and then the next two supervisors above her. None of the three supervisors were willing to discuss methods which would allow Mrs Johnson to express and store milk at work. Eventually, the company manager became involved and quickly offered a resolution to the issue. However by this stage, Mrs Johnson felt like her employment relationship with her colleagues had irreparably broken down,, and that she had no choice but to seek employment elsewhere. Mrs Johnson reflected that this outcome could have been avoided if the workplace had had a more supportive culture regarding caring and family responsibilities.

ERA Recommendation 10: 'Survivor of domestic or family violence status' should be included in the list of attributes upon which it is unlawful to discriminate across all areas.

The WLC strongly supports the ERA's call for increased anti-discrimination protection for persons who have been subjected to domestic or family violence. As noted above, a large proportion of the Centre's clients have experienced family or domestic violence. Such clients often have legal issues which span the criminal, civil and family law jurisdictions. It is not uncommon for these clients to also suffer unfavourable treatment in their workplace, or as a user of services such as public housing, which directly relates to their status as a survivor of domestic violence. For many women, losing their job due to disruptive harassment from their ex-partner in the workplace, or being evicted from their public housing home due to violence caused by a violent ex-partner is the 'last straw' as they try desperately to keep their lives, and those of their children, intact. We believe that introducing 'experience of domestic or family violence' as a protected attribute would fill an important gap in the operation of the federal anti-discrimination framework. It would provide additional legal safeguards to individuals who are *most* in need of protection.

For drafting purposes, we commend to the Department the definition of 'domestic violence' outlined in the Final Report of the Australian Law Reform Commission's inquiry into Family Violence.[1]

Case Study E

Ms Daniels has been working as a successful Real Estate Agent for the same company for the past four years. Last month, she initiated separation from her husband following many years of physical and psychological abuse. Ms Daniels has had to move herself and her two primary-school aged children to a refuge due to safety concerns. Mr Daniels does not know the location of the refuge, so begins turning up at Ms Daniels' workplace to harass her. He stands around outside the building for hours on end, and on several occasions has approached Ms Daniels' colleagues as they enter or leave the office, to make abusive comments about Ms Daniels. Ms Daniels' employer tells her that she should take out a Domestic Violence Order, to prevent Mr Daniels from harassing her. The employer is concerned that Mr Daniels' presence at the workplace is a safety risk for the other employees. Ms Daniels explains that she doesn't want to get herself and the kids involved in legal proceedings about an order because she doesn't have time to go to court, and an order is just likely to make Mr Daniels more angry.

After doing some research, Ms Daniels asks her employer whether he would consider taking out a workplace protection order, which could prevent Mr Daniels from coming near the Office. The employer responds by telling Ms Daniels that this is 'her problem' and he's not interested in even considering a workplace order. After two written warnings and a face-to-face conversation where Ms Daniels is told to 'deal' with the situation, Ms Daniels' employer terminates her employment, on the basis that it is an occupational health and safety risk to the other employees to have Mr Daniels hanging around the office.

ERA Recommendation 23: The AHRC should receive increased funding to enable the collection, publication and use of de-identified complaint data for research purposes as an education mechanism for both potential complainants and respondents.

The WLC strongly supports increasing AHRC funding to enable the collection and publication of de-identified complaint data. We believe that these activities would positively impact the number of women who are willing to make discrimination complaints, and would also aid efficient resolution of complaints by encouraging both complainants and respondents to take a realistic approach to settlement.

---

[1] Recommendation 5-1, *Family Violence- A National Legal Response (ALRC Report 114)*, Final Report (2010), p246.

Encouraging and empowering vulnerable clients

For many WLC clients, the filing of an official complaint, often after failed negotiations, is an intimidating and overwhelming prospect. Vulnerable clients, such as indigenous clients, clients with disabilities, clients from non-english speaking backgrounds or clients who work for minimum wages, are often particularly reticent to engage the legal system to address what they consider to be unacceptable, but 'unstoppable' actions from those in positions of power. In general terms, such clients often reflect that they are 'small fish in a big pond', and that there's no way that they, or anyone in their situation, could successfully confront the powers that be.

The value of being able to refer such clients to a documented example of where someone in similar, or comparable, circumstances has obtained a good outcome via the AHRC complaints process, cannot be overestimated. Whilst the WLC is careful to advise clients that all cases are decided on their merits according to the particular facts, knowledge of how similar cases have been resolved can be of great assistance in helping clients to jump an often unsurpassable hurdle, which is a sense that their case is too 'hopeless' or too 'unworthy' to pursue. WLC solicitors can discuss, using de-identified examples, the Centre's own experience in a range of cases, and cases we are aware of due to our connections with other community legal centres. However, access to de-identified information about a much broader range of AHRC cases, via the AHRC website or in hard-copy publications, would substantially assist our work to encourage some of the most vulnerable members of our community to pursue justice.

Encouraging efficient settlement of complaints

Publishing de-identified information about complaints would also provide the general public with a better understanding of the number and type of complaints that are being made. This information would hopefully act as a general disincentive to employers who may otherwise gloss over, or entirely disregard, their obligations in discrimination law. However, the WLC believes that publication of such information would also assist complainants *and* respondents to take a practical and realistic approach to settlement where a complaint has been made.

Discrimination law is an area where the majority of matters settle prior to litigation, often as a result of the AHRC's confidential conciliation process. As such, there are generally very few precedents for complainants and respondents to draw on in determining what the court might consider to a 'reasonable settlement' in a particular case. For example, the damages awarded in discrimination cases tend to be much lower than those in personal injury cases. Perhaps the key exception to this trend are the few 'headline' discrimination cases—such as Kirsty Fraser-Kirk v David Jones —that receive widespread media coverage. This mix of factors can make it very difficult for complainants, particularly self-represented complainants, to determine what an appropriate settlement might look like.

Case Study F

Ms Green approached the WLC for assistance with resolving a sexual harassment complaint against her employer. When tidying the office of the small business where she worked, Ms Green discovered a handwritten note from her employer to another employee, referring to the type of clothing worn by Ms Green and another female employee. Ms Green was outraged by the note and tendered her resignation. In the process of giving instructions, Ms Green informed her WLC solicitor that she had already submitted her AHRC complaint, and that she had requested, and expected to receive, a large compensation payout, in the order of over 15 thousand dollars, to compensate her for lost wages and the pain and suffering associated with the incident. The solicitor had to advise her that given the size and resources of the business, and the facts of the case, it was unlikely that she would receive this amount in damages.

The WLC believes that having access to information about the types of settlements reached in discrimination matters would assist complainants *and* respondents to have realistic expectations regarding the type and quantum of settlements, leading to more efficient resolution. It may also assist parties to think more broadly and creatively about what type of agreement could best resolves disputes. For example, the WLC has negotiated deeds of agreement where employers have agreed to engage staff in anti-discrimination training, institute regular cross-cultural training workshops, establish a breastmilk expressing room and fridge, publish an apology in a church newsletter, discount a child's school tuition and pay for taxi vouchers to a new work building.

ERA Recommendation 29: Working women's centre, community legal centres, specialist low cost legal services and legal aid should receive increased funding so they have the resources to provide advice about matters under the consolidated act.

The WLC strongly believes that Community Legal Centres, Working Women's Centres and Legal Aid Commissions should receive increased funding so that they have the resources to provide community legal education, advice *and* representation about matters under the consolidated act.

It is well understood that Community Legal Centres provide significant economic value to government and the community at large. A study undertaken in 2006 by the Institute of Sustainable Future on the economic value of Community Legal Centres concluded that every dollar spent on legal services at a community legal centre saves at least $100 in avoided costs.[2] In total CLC's are leveraging more than $23 million worth of free legal assistance each year.[3]

[2] The Economic Value and Social Benefit of Community Legal Centres produced by the National Association of Community Legal Centres (NACLC) 2008.
[3] Why Community Legal Centre are good value, National Association of Community Legal Centres (NACLC), (2008).

As a Community Legal Centre working with limited resources, our approach to anti-discrimination and employment law is multi-faceted. Our community legal education programs aim to prevent employment and discrimination-related disputes by informing individuals about their legal rights and obligations. Our advice and casework service focuses heavily on negotiation and settlement, with recourse to formal complaints mechanisms as required. Unfortunately, there are many occasions where we cannot afford to represent a client in formal proceedings, even when litigating the matter would have strong prospects of success. We do our best to assist clients to access pro bono representation, but again, the pool of private practitioners with expertise in discrimination law who are willing to undertake pro bono work, particularly in a relatively small jurisdiction like the ACT, is very small. As a result, many women simply settle for far less than they would be awarded if they were pursue the matter in court.

A consolidated act will necessarily require the development and delivery of revised community legal education programs. It is also likely that our Centre— and other free legal services— will receive an increase in requests for assistance from clients who are uncertain about where they stand in relation to the new law. Accordingly, it is essential that Community Legal Centres, Working Women's Centres and Legal Aid Commissions are appropriately funded to provide expert advice and assistance in light of the new federal anti-discrimination regime.

Summary

Once again, the WLC thanks the Department for the opportunity to provide our input on these matters that are crucial for our clients, many of whom are the most vulnerable members of our community. If you would like to discuss any aspect of this submission, please contact Heidi Yates, at the Women's Legal Centre in Canberra on [Phone number removed] or [Email removed]

Yours sincerely,

signed

Heidi Yates
Solicitor
Women's Legal Centre (ACT & Region)