

20 December 2012



Ms Julie Dennett  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
Canberra  
ACT 2600

**Via email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)**

Dear Ms Dennett,

## **INQUIRY INTO EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012**

The Women's Legal Centre (ACT & Region) thanks the Committee for the opportunity to provide feedback in relation to the Human Rights and Anti-Discrimination Bill 2012 ('the Bill').

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 and representation are discrimination law, employment law, family and domestic violence law. Our client group are disadvantaged women including those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. Notably, around half of the women who seek assistance from the Centre each year have experienced family violence.

### **A. Endorsement of NACLCLC and Kingsford Legal Centre Submission**

The WLC has officially endorsed the comprehensive submission prepared by the National Association of Community Legal Centres and Kingsford Legal Centre, which contains 44 recommendations for change. We believe that amending the Bill in line with these recommendations will provide the best possible federal anti-discrimination law framework for our clients.

We provide this brief supplementary submission to highlight a number of key recommendations made in the NACLCLC and KLC submission. In particular, we wish to offer the Committee a number of case studies which shed light on how certain aspects of discrimination law operate ‘on the ground’ for our client group. For reference, the recommendation numbers used below reflect those in the NACLCLC and KLC submission.

## **B. Burden of Proof**

### ***Recommendation 3: That the shared burden of proof in section 124 of the Exposure Draft Legislation be retained.***

The WLC strongly supports the introduction of a shared burden of proof, as provided for in section 124 of the Bill. In our experience, this shift reflects the fundamental fact that it is often the respondent, not the complainant, who has ready access to evidence as to why a particular decision or action has been taken.

For example, many of the clients we advise in employment matters instruct that they have unsuccessfully asked their employer or supervisor for a reason as to why they have been subjected to unfavourable treatment. In some instances, the reason provided is so outlandish as to be an obvious smokescreen. For example, a woman who has devoted many years of loyal service to her employer and has no history of performance issues is told a week after disclosing her pregnancy that she needs to engage in a performance-management process due to problems managing her workload.

In many other instances, no reason or explanation is forthcoming and the client has minimal capacity to encourage or coerce the employer to provide or explain the reasons behind certain actions. Accordingly, the employee can only draw on their personal knowledge in determining whether the unfavourable treatment was related to a protected attribute.

Sharing the burden of proof and requiring the employer to provide evidence regarding the reasons for their conduct, rather than have the complainant hypothesise at length about *possible* or *likely* reasons for the treatment in question, promises to promote timely and efficient resolution of disputes.

Below are two case studies that highlight the difficulties a complainant may currently face in trying to prove matters relating to the state of mind of the respondent, where there is no shared burden of proof.

### Case Study 1

Ms T , 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 T 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 T 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 T concludes that management has terminated her on the basis of her age, but she has very limited evidence which substantiates this conclusion.

### Case Study 2

Ms D , a woman of Sudanese background, works for a recruitment agency as a permanent part-time care provider to elderly clients in local government programs. Ms D has moderate English skills and a large family to support. Ms D applies for a permanent position in the local government department responsible for providing the care program that she has been working in for the last four years. Ms D is found unsuitable for the position, despite the fact that she has been doing identical work through the recruitment agency for several years. The department initially promises to give Ms D 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 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.

## C. Domestic and Family Violence

***Recommendation 10: That the list of protected attributes in section 17(1) be expanded to include status as a victim or survivor of domestic or family violence.***

The WLC strongly supports 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 an uninvited 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 'status as a victim or survivor of domestic or family violence' as a protected attribute would fill an important gap in the operation of the federal anti-discrimination law framework. It would provide additional legal safeguards to those individuals—our mothers, sisters, aunts, daughters, sons, husbands and children—who are *most* in need of protection in times of crisis.

### Case Study 3

Ms D 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 D has had to move herself and her two primary-school aged children to a refuge due to safety concerns. Mr D does not know the location of the refuge, so begins turning up at Ms D workplace to harass her. He stands around outside the building for hours on end, and on several occasions has approached Ms D colleagues as they enter or leave the office, to make abusive comments about Ms D. Ms D employer tells her that she should take out a Domestic Violence Order, to prevent Mr D from harassing her. The employer is concerned that Mr D's presence at the workplace is a safety risk for the other employees. Ms D 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 D more angry at her.

After doing some research, Ms D asks her employer whether he would consider taking out a workplace protection order, which could prevent Mr D from coming near the Office. The employer responds by telling Ms D 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 D is told to ‘deal’ with the situation, Ms D’s employer terminates her employment, on the basis that it is a workplace health and safety risk to the other employees to have Mr D hanging around the office.

#### **D. Reasonable adjustments regarding family or carer responsibilities**

***Recommendation 15: That protection from discrimination on the basis of family or carer responsibilities should also include a failure to make reasonable adjustments.***

The WLC welcomes inclusion in the Bill of specific recognition for the characteristics of pregnancy or potential pregnancy, family responsibilities, and breastfeeding. The following comments relate to further benefits that would reasonably flow if protection from discrimination on the basis of family or carer responsibilities also included a failure to make reasonable adjustments.

##### **i. Promoting efficient resolution of workplace disputes**

A large proportion of the discrimination matters in which the WLC provides 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.

For example, 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 in the first place.

#### Case Study 4

Ms D has worked as a long-term casual for a local public relations firm, doing the same five shifts on reception every week for the past four years. Ms D 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 D always ensures that her colleagues are able to cover her phone and other reception 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 D 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 D, along with an agreement that she be able to respond to calls from her son's school as long as she made appropriate arrangements for colleagues to cover her duties. The employer refused to engage in any negotiations, telling a colleague of Ms D that 'it wasn't his responsibility to take care of someone else's kids.' The WLC offered to support Ms D to make a formal discrimination complaint, or a complaint under the Fair Work Act. However, Ms D 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.

ii. Encouraging systemic change

The Centre has found that unfavourable treatment on the basis of a woman's caring and/or family responsibilities can occur in any employment context, including within small businesses, community organisations, federal and local government departments and in 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 5

Mrs J held a permanent position as a human resources officer within an international telecommunications company for four years. Mrs J then became pregnant and took five months' paid maternity leave. Immediately prior to returning to work, Mrs J 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, twice a day, to express milk for her daughter. The employer responded by saying that there was no such room in the building, and that Mrs J would have to leave the building during her lunch break to express elsewhere. The employer also informed Mrs J that because it was a 'biological hazard', her breastmilk could not be stored on the premises. With the help of the WLC, Mrs J 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 J 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 J felt like her employment relationship with her colleagues had been irreparably damaged, and that she had no choice but to seek employment elsewhere. Mrs J reflected to the WLC that this outcome could have been avoided if the workplace had had a more supportive culture regarding employees' caring and family responsibilities.

## E. Protection for LGBTI Australians

***Recommendation 18: That the Bill should be amended to include the use of appropriate terminology that captures the whole of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities, and people perceived to be part of these communities.***

The WLC would like to make further specific recommendations in relation to the following four matters:

i) Definition of 'Gender Identity'

The WLC commends the inclusion of 'Gender Identity' in the list of protected attributes in section 17 of the Bill, recognising that transgender and intersex Australians are some of the most marginalised members of the Australian community.<sup>1</sup> However in our opinion, the Bill's existing definition of 'Gender Identity' is not broad enough to effectively address the many types of discrimination experienced by individuals in this area of the law's operation. For example, it is not unusual for our clients to experience unfavourable treatment in connection to their gender-related appearance or mannerisms, rather than solely their gender-related identity.

Accordingly, the WLC recommends that the definition of 'Gender Identity' be amended to reflect best practice in law relating to diverse sex and gender communities, as found in section 4(c) of the Tasmanian Anti-Discrimination Amendment Bill 2012, which states:

*Gender Identity* means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth and includes transsexualism and transgenderism.<sup>2</sup>

The WLC believes that this expanded definition provides necessary clarity and coverage, and will assist in countering what we have experienced to be generally poor levels of knowledge and understanding in the business sector and the community at large in relation to the meaning of 'gender identity'.

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<sup>1</sup> *Transgender Lifestyles and HIV-AIDS Risk* (1994), Roberta Perkins, School of Sociology University of NSW

<sup>2</sup> Available at: [http://www.parliament.tas.gov.au/bills/pdf/45\\_of\\_2012.pdf](http://www.parliament.tas.gov.au/bills/pdf/45_of_2012.pdf)



ii) The requirement to identify ‘on a genuine basis’

The WLC submits that it is confusing and unnecessary for the Bill’s definition of ‘gender identity’ to require that a person identify ‘on a genuine basis’. We note that the term ‘on a genuine basis’ is not defined in the Bill or used in relation to any other attribute.

The WLC is not aware of any research or body of evidence which points to the likelihood that complainants seeking protection from unfavourable treatment in relation to their gender identity are less likely to be ‘genuine’ in terms of their identification as a member of the other sex. The Centre further submits that the power given to the Australian Human Rights Commission by section 117(2)c to close any complaints that are ‘frivolous, vexatious, misconceived or lacking in substance’ would sufficiently address any concerns regarding the ‘genuineness’ of a complainant’s identity in this context.

iii) Inclusion of ‘Intersex’ as a protected attribute

The WLC notes that Intersex is not a matter of identity, but of biological fact. As noted in the submission to this inquiry by ‘Organisation Intersex International Australia’:

Intersex is a term which relates to a range of natural biological traits or variations that lie between “male” and “female”. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be clearly defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations.<sup>3</sup>

On this basis, the WLC submits that the Bill should specifically include ‘intersex’ as a protected attribute. This is the best-practice approach taken in section 4(d) of the Tasmanian Anti-Discrimination Amendment Bill 2012.<sup>4</sup>

The WLC also notes that at present, Federal Government policy—such as the National LGBTI Ageing and Aged Care Strategy and other mental health

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<sup>3</sup> See page 1 of OII’s submission to this inquiry, also available at: <http://oiaustralia.com/21433/submission-human-rights-anti-discrimination/>

<sup>4</sup> Available at: [http://www.parliament.tas.gov.au/bills/pdf/45\\_of\\_2012.pdf](http://www.parliament.tas.gov.au/bills/pdf/45_of_2012.pdf)

initiatives—are inclusive of Intersex people. For the purpose of practicality and consistency, and to make protection explicit in a context where business and the Australian community at large have a generally poor understanding of the relevant issues, the Bill should be amended to include Intersex as an independently-protected attribute.

iv) Prohibitions on discrimination

The WLC strongly supports section 33(3) of the Bill which prohibits discrimination in the provision of religious aged care services. However, the WLC is unclear as to why, in the context of a Bill aimed at implementing Australia's Human Rights obligations, this prohibition would not be extended to all Government-funded services—including those provided by religious organisations. There also appears to be insufficient justification as to why this prohibition is not extended to the employment of persons who provide that aged care. Accordingly, the WLC submits that:

- the prohibition in section 33(3) should be extended to apply to all Government-funded services; and
- to the employment of persons within such services.

**F. Summary**

Once again, the WLC thanks the Committee for the opportunity to provide our comments on these matters which are crucial to 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 on

Yours faithfully,

WOMEN'S LEGAL CENTRE

*Signed*

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