Women With Disabilities ACT
WWDACT

Response to the ACT Law Reform Advisory Council's Community Consultation Paper *Review of the Discrimination Act 1991 (ACT)*

Women With Disabilities ACT

May 2014

Women With Disabilities Australian Capital Territory

Women with Disabilities ACT (WWDACT) is a systemic advocacy and peer support organisation for women with disabilities in the ACT. WWDACT follows a human rights philosophy, based on the Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of Discrimination against Women. WWDACT supports and encourages women with disabilities in the ACT to fully partake in every aspect of community life. WWDACT envisages a day when barriers for women with disabilities no longer exist.

This document was prepared by:

Emilia Della Torre BA(Hons) LLM (*Syd)*
WWDACT Policy/Project Officer

Enquiries on this response should be directed to:

Emilia Della Torre
Women With Disabilities ACT
Women's Centre for Health Matters
PO Box 385, Mawson, ACT, 2607
Phone (02) 6290 2166
Facsimile (02) 6286 4742
admin@whcm.org.au
www.wchm.org.au

Introduction

This response to the ACT Law Reform Advisory Council's 'Community Consultation Paper *Review of the Discrimination Act 1991* (ACT)' (Consultation Paper) focuses on the primary issue to impact on the lives of women with disabilities: multiple discrimination. It is exclusively a response to Consultation Paper Question 3: "Should the definition of discrimination be amended to include conduct on the basis of more than one attribute?"

Women With Disabilities ACT (WWDACT) has adopted the term 'multiple' discrimination' in order to conform with Article 6(1) of the United Nations Convention on the Rights of Persons with Disabilities (CRDP) that states:

> *1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.*[1]

WWDACT believes that the express proscription of multiple discrimination within the *Discrimination Act (ACT)* (1991) (The Act) will have a positive impact and result in a sustainable overall increase in wellbeing in the Territory.

Background

WWDACT views the Review as

- a means of incorporating Australia's international human rights obligations into our domestic legislation;[2]
- an opportunity to enhance the clarity and certainty of the operation ACT anti-discrimination laws and policies;
- the codification of legislative guidelines that shape the conduct of all stakeholders in a free and fair Australian society; and
- an invitation to assess the impact the legislative proscription of multiple discrimination will have on our economic and non-economic wellbeing.

[1] This paper does not make a distinction between 'additive discrimination' and 'intersectional discrimination". See Solanke, I. *Putting Race and Gender Together: A New Approach to Intersectionality* 72(5) *The Modern Law Review* 723-749 (September 2009) for discussion of this distinction. See also footnote 9 below.

[2] Australia has agreed to be bound by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as other major human rights instruments, including:

- Convention on the Political Rights of Women
- International Convention on the Elimination of all Forms of Racial Discrimination
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities.

The legislative recognition of multiple discrimination cannot operate effectively if a simple "add attributes and stir" approach is taken to The Act. Instead, multiple discrimination must be contextualised and coherently integrated into the operational details of any proposed new consolidated anti-discrimination legislation.[3]

For this reason, WWDACT is generally supportive of the responses made by other organisations representing the interests of people with disabilities to this review including:

- eliminating the formal distinction between direct and indirect unlawful discrimination
- removing the comparator test
- introducing a shifting burden of proof in discrimination claims
- clarifying that special measures aim to achieve substantive equality
- extending the duty to make 'reasonable adjustment' to any actor with any attribute(s)
- making the positive duty to achieve substantive equality express[4]

[3] For example, people with disabilities have specific difficulties in satisfying the burden of proof in discrimination law claims. AFDO states: "For many people with disability, proving that discrimination has occurred because of their protected attribute can be incredibly difficult. People with disability may find themselves simply unable to mount a case if they are continually asked to prove discrimination.
This is particularly the case with employment and education complaints, where a number of decision-making factors and internal processes may be taken into account by the respondent when deciding whether to admit a child to a school or hire a person for a job. These processes are generally not made public and it can be impossible for complainants to get the information they need to prove discrimination. Commercial-in-confidence and client confidentiality, while posing valid privacy issues, may be difficult legal areas for a complainant with disability to navigate.
Areas of discrimination which involve a depth of technical knowledge – such as whether or not it is technically feasible to provide captions on a cinema screen, or to have more than two people using wheelchairs on a plane – are also incredibly difficult for people with disability to prosecute.
AFDO believes that, as with workplace safety inspections in some jurisdictions, it should be up to the respondent to prove that they have not discriminated rather than asking the complainant to prove that they have. If the burden of proof is not fully shifted then any 'staggered' burden of proof system should:

- Not place the onus on a complainant to find information or evidence which is clearly at the respondent's disposal. Such information or evidence should be provided by the respondent and the Commission should have the power to compel respondents to provide information,
- Give complainants accessible (i.e., not overly technical) information about why a respondent does not see their action as discriminatory,
- Offer complainants and respondents the right of reply to claims made by the other side, and provide for independent support for people with disability to achieve this in cases of unavoidable technical or expert detail.

RECOMMENDATION: To avoid the disadvantage often faced by people with disability lodging complaints on their own, the burden of proof in discrimination cases should not fall solely on the complainant, and should be weighted towards the respondent as much as possible. In particular, it should make respondents responsible for producing clear and accessible information about why they have not discriminated or why reasonable adjustments are not possible."

[4] See Public Sector Equality Duty, Section 149 *Equality Act 2010* (UK) which states:
(1) A public authority must, in the exercise of its functions, have due regard to the need to—
(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
(a) tackle prejudice, and
(b) promote understanding.

- including a non-exhaustive list of attributes upon which unlawful discrimination is prohibited[5]
- adopting a general limitations clause
- establishing a no costs jurisdiction in discrimination law matters with the exception of vexatious complaints
- enabling courts to award systemic remedies as necessary and appropriate in successfully litigated matters[6]
- providing for representative complaints
- continuing to allocate current responsibilities for an attribute to a specialist Commissioner
- enabling the Commissioners to conduct an inquiry into systemic discrimination on receipt of reliable information that appears to contain well-founded indications that unlawful discrimination is being practiced
- mandating a public authority to collect statistical and other relevant data in order to monitor, implement and influence substantive equality outcomes.

WWDACT's special focus on multiple discrimination is complimentary to all these approaches taken collectively.

Legislative Approach

As well as the legislative provisions referred to in the "Background" above, WWDACT makes the following specific suggestions in relation to the proposed legislative recognition of multiple discrimination in The Act :

WWDACT suggests that a definition of unlawful discrimination should read:

> ***Unlawful discrimination is the treatment of an individual or group of individuals to their detriment. The treatment must take place on the basis of an attribute or a combination of attributes possessed by the individual or group of individuals. The treatment may be either intentional or unintentional. Treatment includes a proposal to treat an individual or group of individuals in a particular manner.***

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
(7) The relevant protected characteristics are—age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.
(8) A reference to conduct that is prohibited by or under this Act includes a reference to—
(a) a breach of an equality clause or rule;
(b) a breach of a non-discrimination rule.
(9) Schedule 18 (exceptions) has effect.

[5] See the Canadian approach taken in Article 15 of the *Canadian Charter of Rights and Freedoms*, which states: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, religion, sex, age or mental or physical disability."

[6] For a discussion of the potential operation of systemic remedies see Della Torre, E. "What Price Human Dignity? Recent Changes to Australian Capital Territory Laws", Ethos: Official Publication of the Law Society of the Australian Capital Territory, No. 211, March 2009: 16-19.

We suggest that that The Act should include a non-exhaustive list of protected attributes on the basis of which a claim of unlawful discrimination lies. This might be expressed in the following terms:

1. ***Reference to an attribute includes an attribute of the kind such as age, race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or other status.***

2a. ***An individual or group of individuals making a claim in an anti-discrimination matter is known as an applicant.***

2b. ***Discrimination on the basis of an attribute or on the basis of a combination of attributes includes discrimination on the basis***

(i) ***an applicant has the attribute or a combination of attributes or had it in the past;***

(ii) ***of a characteristic that an applicant with that attribute or a combination of attributes generally has or is generally imputed to a person with that attribute; and***

(iii) ***an applicant is presumed to have an attribute or a combination of attributes or to have had it/them at any time.***

2c. ***Treatment for the purposes of unlawful discrimination applies to the treatment of a person who is an associate of person with a disability in the same way as it applies in relation to an applicant with a disability. An associate, includes a spouse of the person with disability; another person who is living with the person with disability on a genuine domestic basis; a relative of the person with disability; (d) a carer of the person with disability; and (e) another person who is in a business, sporting or recreational relationship with the person with disability.***

3. ***For the purpose of unlawful discrimination, an applicant must show that (a) an attribute was the basis of their treatment or (b) a combination of attributes was materially relevant to their treatment.***

The test ‘materially relevant’ is a civil law test. In general, to say evidence is ‘materially relevant’ means that the evidence is admissible in the absence of a rule of exclusion. The ‘materially relevant’ test would operate, in effect, as a rebuttable presumption.

We endorse the inclusion of a limitations clause in a consolidated Act. For example:

Discrimination is not unlawful if the treatment of an individual or group of individuals is a lawful and proportionate means of achieving a legitimate aim.

A limitations clause is the necessary recognition that rights and responsibilities are not unlimited.

> *… the treatment … is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*[7]

For example: In the case of *Bilka-Kaufhaus GmbH v. Weber Von Hartz* sixty-five part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store in the United Kingdom), complained that this constituted indirect discrimination against women, since they made up the vast majority of part-time workers. The European Court of Justice found that this would amount to indirect discrimination, unless the difference in employment could be justified. In order to be justified, it would need to be shown that: 'the … measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end'.[8] Bilka argued that the aim behind the difference in treatment was to discourage part-time work and incentivise full-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing. The Court found that this could constitute a legitimate aim. However, it did not answer the question of whether excluding part-time workers from the pension scheme was necessary and proportionate to achieving this aim. It was left to the national court of the United Kingdom to apply the law to the facts of the case. The European Court of Justice stated:

> *It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified on economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of [non-discrimination on the basis of sex].*[9]

---

[7] *ECtHR, Burden v. UK [GC]* (No. 13378/05), 29 April 2008, para. 60 See European Court of Human Rights *Handbook on Discrimination Law* at 44. See http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-3CDB68B0133E/0/FRA_CASE_LAW_HANDBOOK_ENG.pdf
[8] *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986] ECR 1607, 13 May 1986.
[9] Ibid at 36.

The decision in Patrick's Case is a relatively recent Australian indication of how a limitations clause might operate in a consolidated Act.[10]

Multiple Discrimination

4.1 Express recognition and inclusion of multiple discrimination

WWDACT fully support the express recognition and inclusion of multiple discrimination in The Act.[11] To this end, the definition of discrimination should include the words "*treatment on the basis of an attribute or a combination of attributes".*

While the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) focuses specifically on distinctions grounded in sex, and the CRPD highlights distinctions grounded in ability, recent debates have identified the limitation of a single factor analysis of discrimination. These recent debates are encapsulated in the terms of Article 6 of the CRPD which states:

1. *States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.*

2. *States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women [with disabilities], for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.*

The term 'multiple discrimination' recognises that some individuals experience discrimination on the basis of more than one aspect of their identity.[12] Multiple discrimination reveals 'both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination'.[13] It has an exponential impact on the lives of individuals and actively creates a dynamic of disempowerment.

[10] *PJB v Melbourne Health & Anor* (Patrick's case) [2011] VSC 327 (19 July 2011) at paras 234 – 289 (incl) where Bell J held that the decision to appoint an administrator was not a proportionate exercise of a tribunal's administrative power under the Guardianship and Administration Act 1986 (Vict) pursuant to s7(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

[11] Our approach is in direct contrast to section 14 of the *Equality Act 2010* (UK) which states:

> (1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

The UK model is a reintroduction of the comparator test for direct discrimination: a position that we reject.

[12] For an insightful discussion into intersectional discrimination see Kimberle Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics," in *Feminist Legal Theory: Foundations*, ed. D Kelly Weisberg (Philadelphia: Temple University Press, 1993).

[13] "C: Intersectional subordination of women" in UN Division for the Advancement of Women, *Gender and Racial Discrimination, Report of the Expert Group Meetin*g (New York: United Nations, 2000) <http://www.un.org/womenwatch/daw/csw/genrac/index.html

The United Nations Committee to Eliminate Discrimination against Women (CEDAW) has also recognised the importance of a multiple analysis in a general recommendation on temporary special measures:

> *... certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compound negative impact on them.*[14]

4.2 The comparator test should not be adopted under The Act.

It is uncontroversial that the High Court of Australia has not been able to helpfully apply the comparator test in anti-discrimination cases.[15] Moreover, in a specific situation – a workplace or a school or a club, for example - often there is no other employee/student/customer with the same combination of attributes with whom a woman with a disability may be able to be compared. The comparator test would, therefore, provide an impossible evidentiary burden on a woman with a disability - let alone a woman with a disability from an indigenous background; or a Muslim woman with a disability or a lesbian with a disability - to make out even a *prima facie* case that unlawful discrimination had taken place under the comparator test. In our view, this is a strong – indeed conclusive – argument against the inclusion of the comparator test in all discrimination legislation. A comparator might be an indicator of unlawful discrimination but it is neither necessary nor decisive.

The U.S.A. jurisprudence is helpful in this regard. For example, see *Olmstaed v. L.C. ex rel* Zimring 527 U.S. 581, 598 (1999) which rejected outright the need for a comparator in reaching the conclusion that segregation of disabled children was discrimination in the context; Vasequez *v. County of L.A*. 349 F.3d 634, 653-55 (9th Cir. 2003) regarding a comment about the plaintiff having a 'typical Hispanic macho attitude' in the workplace;

---

http://www.un.org/womenwatch/daw/csw/genrac/index.html> at page 7. This UN Report looks at specific examples of sexual trafficking, armed conflict, sterilisation and domestic violence to illustrate how, in the past, there has been an under-inclusive analysis of these forms of intersectional discrimination. The report has a highly nuanced approach to intersectional discrimination and distinguishes between compound; multiple; targeted and structural forms of intersectional discrimination. These highly nuanced distinctions are not adopted in this WWDA/WWDACT response. See also footnote 1 above.

[14] www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf See also European Council directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *Official Journal L 303 , 02/12/2000 P. 0016-0022* at para. 3 states: 'In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equalities between men and women, especially since women are often the victim of multiple discrimination.' And also *European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU* (Tuesday 27 May 2008) at para 30.

[15] See as far back as *Australian Iron and Steel Pty Ltd v Banovic* [1989] HCA 56; (1989) 168 CLR 165 F.C. 89/052.

Anthony v. County of Sacrimento 898 F. Supp. 1435, 1445 (E.D. Cal. 1995) stating that 'the epithet "black bitch" cannot be designated exclusively as either racist or sexist'; *Jeffries v. Harris Cnty Comty Action Association* 615 F.2d 1025, 1032 (5th Cir. 1980) which is authority for the proposition that an employer should not escape from liability for discrimination against black females by showing that it does not discriminate against blacks and that it does not

discriminate against females; and *Rogers v. American Airlines* 527 F. Supp. 229 (S.D.N.Y. 1981) in which a federal court rejected a claim that the airline's prohibition of cornrows amounted to race discrimination.

4.3 Evidentiary burden of proof: Is it materially relevant?

In a case of alleged multiple discrimination, WWDACT recommends that the evidentiary burden of proof to make out a claim of unlawful discrimination should be proportionately lowered to reflect the exponential impact that unlawful multiple discrimination has on an individual. We suggest the test to be adopted in instances of multiple discrimination might be expressed as: ***whether the combination of attributes* was *'materially relevant' to the treatment under consideration***. "This [approach] reflects a well established common law principle that evidence should be weighed according to the capacity of the party to produce it".[16]

[16] Australian Human Rights Commission Submission to the Attorney-General's Department Consolidation of Commonwealth Discrimination Law 6 December 2011 at 15 < http://www.hreoc.gov.au/legal/submissions/2011/20111206_consolidation.html>. The AHRC Submission continues at 16 and 17 :
"This would be an appropriate and adapted extension of the settled rule in Jones v Dunkel that an adverse inference may be drawn where particular information is within the domain of a particular party who fails to present it. For example, in *G v H*, Deane, Dawson and Gaudron JJ stated.
[I]t is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so.
[156] Similarly, the Full Federal Court recently confirmed that, when assessing whether evidence supports an inference of discrimination, courts should apply .
...the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict...
[157] A similar approach was taken by the UK courts (prior to the enactment of s 63A, discussed below) in discrimination matters. For example, in *King v Great-Britain-China Centre*, Neil LJ noted that once an applicant had established a prima facie case of less favourable treatment in circumstances where race was a possible basis: .
...the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the tribunal to infer that the discrimination was on racial grounds.
[158] Similarly, in *Shamoon*, Lord Scott noted that, in assessing whether evidence gave rise to an inference of discrimination:.
Unconvincing denials of a discriminatory intent given by the alleged discriminatory, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice ." ....
"Under the ADA as introduced, and the DDA and SDA as amended, but not the RDA, there is express provision that once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging people with the relevant attribute, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the alleged discriminator. No clear rationale is apparent for this same shift in onus not applying similarly to racial discrimination matters.
In those instances where appropriate justification of an action constitutes a defence or an exception (such as unjustifiable hardship, inherent requirements, or compliance with a prescribed law), the onus of proof lies with the respondent as a matter of course. Consolidation of disparate exceptions and limitations into instances of a single concept of reasonableness or legitimacy and proportionality could assist in simplifying and rationalising approaches to onus of proof.

The Act must recognise that multiple discrimination has an exponential impact on an individual. In the words of Iyiola Solanke: "Intersectional claims based on race and gender are qualitatively different because these two 'isms' compound each other in specific, complex ways. The bigotry is not only doubled but deepened because it rests upon assumptions so embedded and tenacious that they are barely visible.'[17] Again:

> *It is not enough to describe gender inequality of women with disabilities as simply a problem within the disability community. The 'disability' intersects with gender inequality and therefore produces severe forms of discrimination against women with disabilities. It is a totally different, harder to fight discrimination that only women with disabilities can experience.*[18]

To require a woman with a disability to prove she was unlawfully discriminated against as a woman and additionally to also require that same person to prove she was unlawfully discriminated against on the basis of her disability[19] would be to more than double the evidentiary hurdle she must overcome to make out unlawful discrimination has occurred in a particular case. To require this level of proof would be to discriminate against this individual in a manner diametrically opposed to the purpose of anti-discrimination legislation. Moreover, it would most likely fail to capture the real dynamics of her particular situation.[20]

For example: Bahar is 35 years of age, married with three children. She has a disability. She was the client of a private Job Network Agency. This agency sent Bahar to a pre-employment course. However, Bahar failed to complete the course. In accordance with the agency's requirements, Bahar's Job Capacity Assessment Provider has deemed that Bahar is not fit for employment because she failed the pre-employment course. As a consequence, Bahar is removed from the agency's disability employment program.

How is this unlawful multiple discrimination? Bahar's Job Capacity Assessment Provider did not take into account Bahar's cultural values and home life. Women do not work or study outside the home in the part of Turkey from which Bahar and her family come. Each time Bahar came home from the pre-employment course she had to attend she was ridiculed and belittled and ostracised by her family. Discouraged and depressed, isolated from extended family back in Turkey and without friends in Australia, Bahar began feeling so distressed she that she was unable to think clearly. This was why Bahar was not able to complete her pre-

---

In some instances the same approach may be appropriately applicable not only to issues of reasonableness but to establishing disparate impact, given that for example many employers or service providers may have more ready access to employment or customer records than an employee or customer would."

[17] Solanke, I. *Putting Race and Gender Together: A New Approach to Intersectionality* 72(5) *The Modern Law Review* 723-749 (September 2009)

[18] Kim, M. *Disability Issues are Women's Issues* Development, 2009 52(2) 230-232 at 231. Emphasis added.

[19] See "Background" above.

[20] Contrast the approach of the British Courts in *Bahl v Law Society* [2004] IRLR 799, [2004] EWCA Civ 1070 with the approach of the USA Courts in *Jeffries v Harris City Community Action Association* 615 F. 2nd (5th Cir. 1980).

employment course. She now feels she has shamed her family in two ways: by attempting to find work and by failing to do so.

For gender-specific cultural reasons, Bahar cannot discuss these issues directly with her Provider. In other words, because Bahar is a woman from a particular cultural background she has faced specific pre-employment cultural barriers. These gendered cultural barriers have in turn excluded Bahar from accessing services to which she is otherwise eligible on account of her disability. In the absence of provisions that recognise multiple discrimination, Bahar cannot rely on race or gender or disability discrimination alone to successfully redress her situation. The provision of multiple discrimination in a consolidated Act would place a positive obligation on the service provider to take all Bahar's circumstances into account.

We can assume that her Job Capacity Assessment Provider has excelled at making all reasonable allowances for Bahar's disability. Yet this alone does not help her stay on this program. It is on account of the intersection of Bahar's gender and race that (through her family circumstances) Bahar has not met the requirement to complete her pre-employment course. If the Job Capacity Assessment Provider had had an obligation to consider the multiple discrimination experienced by Bahar, it is likely that Bahar's family circumstances would have come to light; her capacity to complete her pre-employment course facilitated in a more culturally sensitive and gender specific manner; and her opportunity to benefit from a disability-specific employment program realised. In this example, it is not only Bahar but also broader society that misses out on the encouragement and advancement of a productive member of the community.

Recommendation

WWDACT believes that the express inclusion of multiple discrimination in The Act will impact positively on the overall wellbeing of the Australian people.[21] WWDACT acknowledge that the implementation of such a legislative provision will incur costs. However, we believe the overall benefits on the life-expectancy, income, consumption, productivity, education levels, unemployment levels, health and social capital of all stakeholders in Australian society will far outweigh these costs.

We urge the ACT Law reform Advisory Council to recommend to the Attorney-General expressly include provision for multiple discrimination in the Discrimination Act 1991 (ACT).

To this end, we urge government to take into account the following issues:

- How would the express inclusion of multiple discrimination in The Act impact on the relative financial security of women with disabilities and others?
- Will women with disabilities and others have an increased capacity to obtain goods and services to satisfy their needs and wants?
- Will the impact of horizontal equity result in a greater overall benefit because the re-distribution of economic wellbeing for women with disabilities and others in Australian society will have mutually enhanced outcomes?
- Will the impact of vertical equity result in a greater overall benefit because the re-distribution of economic wellbeing for women with disabilities and others in our society will have mutually enhanced outcomes?

Emilia DELLA TORRE BA(Hons) LLM (*Syd*)
Principal Policy Officer
Women With Disabilities ACT
Canberra
22 May 2014

[21] See Policy Advice and Treasury's Wellbeing Framework (Winter 2004) at http://www.treasury.gov.au/documents/876/HTML/docshell.asp?URL=Policy_advice_Treasury_wellbeing_framework.htm