NATIVE WOMEN'S ASSOCIATION OF CANADA

L'ASSOCIATION DES FEMMES AUTOCHTONES DU CANADA

NWAC Report on the Five-Year Review of the Impacts of the Repeal of Section 67 of the *Canadian Human Rights Act*

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Who is NWAC?

The Native Women's Association of Canada (NWAC) works collaboratively with other Aboriginal and equality-seeking human rights organizations to empower Aboriginal women by facilitating their participation in legislative and policy reforms that promote equality in all areas of their lives.

Through activism, education, policy analysis and advocacy, NWAC works to advance the well-being of Aboriginal women and girls, as well as, their families and communities. This work includes identifying gaps in the equal enjoyment of human rights by Aboriginal women and mobilizing action to address these gaps. A fundamental premise of NWAC's work is that the civil, political, cultural, social and economic rights of Aboriginal Peoples cannot be realized without identifying the gender impacts of laws and policies applied to Aboriginal Peoples and specifically addressing the needs of Aboriginal women, in a culturally relevant way.

NWAC has worked to raise the profile nationally and internationally on many issues such as: violence against women, the lack of justice response, high rates of women in prison, the under-funding to on-reserve education, multiple forms of discrimination, poverty, and ongoing sexual exploitation and trafficking of women and girls, the lack of access to clean water, along with the many other violations to our basic human rights. Part of raising this profile includes participating in the United Nations Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, the Universal Periodic Review and making submissions to these bodies.

Over the last 40 years, NWAC has demonstrated knowledge and expertise and shown true leadership in advocating for change with respect to the rights and interests of Aboriginal women in Canada. As an organization, we are continuing to build on the success and best practices learned in all areas of social, political, cultural, economic, and spiritual health and well-being seize opportunities to bring evidence to action. Three major accomplishments of NWAC include:

In 2010, NWAC was honoured by the Muriel McQueen Fergusson Foundation for the research, education and policy work of the Sisters in Spirit initiative (now known as the Evidence to Action Initiative within the Violence Prevention and Safety directorate). The award, presented annually, is named in honour of the Foundations late patron, Muriel McQueen Fergusson, O.C., Q.C. P.C. It was created in 1992 to recognize outstanding contributions toward preventing and eliminating family violence in Canada. When Sisters in Spirit began in 2005, few people knew or understood the human rights crisis impacting Aboriginal women in Canada. This award is a significant accomplishment for NWAC because it represents the voices of hundreds of Aboriginal women and families who speak out against violence and share the pain, anger, and frustration when another woman or girl is reported missing or murdered. October 4th, 2013 marked the 8th Annual Sisters in Spirit Vigils, honouring the lives of missing and murdered

Aboriginal women and girls and support families. Over 200 Vigils took place across Canada and Internationally (Bolivia, Mexico, Germany and more than 10 venues in the USA).

NWAC has developed an inter-cultural human rights approach to carrying out culturally relevant gender-based analysis. It involves making policy and legal analysis based on pre-contact gender relations and a thorough understanding of how colonial assimilation policies have impacted First Nations societies. It is based on the analysis of the current realities, in a way that reflects the cultural diversity of First Nations social and economic situations. In addition, NWAC works to identify and use strategies and solutions, which involve analyzing current social conditions and the potential effect of legislation, on a multitude of individuals and situations. Balanced gender-based equality analysis means incorporating and developing a holistic analysis of complex forms of discrimination, according to individual experiences, realizing that these experiences cannot be separately analyzed and may impact each other. We have produced policy and position papers, Joint Statements, and Shadow Reports highlighting gender impacts and ongoing human rights violations, as well as, best practices aimed at improving the lives of Aboriginal women and families.

The work in International Affairs and Human Rights (IAHR) Directorate at NWAC has continued to focus on ensuring that Aboriginal women's distinct perspectives, rights and needs in Canada are considered and met in relation to key human rights concerns. NWAC has participated in sessions with other Aboriginal and equality-seeking organizations, and the Canadian government to discuss the endorsement and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*). Of focus in these collaborations has also been to share best practices in attempt to improve the lives of Indigenous Peoples, and highlighting the importance of Indigenous women's rights and freedoms and the need for these issues to be recognized in Canada and globally. The *UNDRIP* is the universal human rights instrument that is celebrated globally and its implementation would result in significant improvements in the lives of Indigenous Peoples. NWAC's IAHR Directorate has worked to emphasize the implementation of all human rights, but have highlighted Indigenous women's rights to live free from violence and discrimination, rights to self-determination, rights related to lands, territories and resources, rights to health and well-being, the right to free, prior and informed consent, as well as other economic, social, cultural, civil and political rights.

NWAC works collaboratively with other Aboriginal women's organizations to empower Aboriginal women by facilitating their participation in legislative and policy reforms that promote equal opportunity. NWAC also works closely with its Provincial-Territorial Member Associations (PTMAs) across Canada, which include:

- The Native Women's Association of NWT
- Yukon Aboriginal Women's Council
- BC Native Women's Association

- Alberta Aboriginal Women's Society
- Saskatchewan Aboriginal Women's Circle Corporation
- Manitoba Moon Voices
- Ontario Native Women's Association
- Québec Native Women Inc.
- Nova Scotia Native Women's Association
- Newfoundland Native Women's Association
- Aboriginal Women's Association of Prince Edward Island
- New Brunswick organizations

NWAC continues to establish positive working partnerships and collaborations with other national Aboriginal and equality-seeking organizations to increase outreach and awareness for issues concerning Aboriginal women and girls. Some of those partnerships and collaborations include other Aboriginal women's organizations, human rights groups, Aboriginal communities, students, academia, police, service providers, policy and decision- makers, unions, key stakeholders, partners, government and government committees, and international bodies. NWAC continues to work strategically with Indigenous organizations in the Americas and globally while participating in meetings at the United Nations and in national and international committees in order to bring about positive social change, both in Canada and across the globe.

NWAC has worked collaboratively with the Canadian Human Rights Commission (CHRC) to develop specific information kits and presentations about the *Canadian Human Rights Act* (*CHRA*) and changes to the *Act* from 2010 – 2013, which included Aboriginal perspectives on human rights and approaches to conducting culturally relevant gender- based analysis.

NWAC also participated in the study on the readiness of First Nations to comply with the *CHRA* and contributed the findings of its study and report to the broader AANDC report, which was tabled in Parliament on June 17, 2011.

NWAC's Participation in the Five-Year Review of The Effects of the *Canadian Human Rights Act – Executive Summary*

The Native Women's Association of Canada (NWAC) was approached by the Department of Aboriginal Affairs and Northern Development Canada (AANDC) to meet regarding their upcoming departmental process involving the five-year-review of the effects of the repeal of section 67 of the *Canadian Human Rights Act*. At the end of May 2014, NWAC met with AANDC to discuss a six-week project for NWAC to participate in the five-year review process.

In June 2008, the Government of Canada passed *An Act to Amend the Canadian Human Rights Act* repealing section 67 of the *Canadian Human Rights Act*, which previously shielded decisions or actions taken pursuant to the *Indian Act* by the Government of Canada and Band Councils from complaints under the *Canadian Human Rights Act*. Subsequent to these amendments, the Native Women's Association of Canada worked jointly with the Department to provide its

analysis of the readiness of First Nations communities to comply with the *Canadian Human Rights Act*, the findings of which were included in a report that was tabled in Parliament in June 17, 2011.

Subsequent 2 (1) of *An Act Amend the Canadian Human Rights Act* requires that a comprehensive review of the effects of the repeal of section 67 be undertaken by the Government of Canada in partnership with organizations representing the interests of First Nations Peoples, and that this review be tabled in Parliament.

To do this, the Department of AANDC is working with national Aboriginal organizations, including NWAC, to fulfill this legislative requirement and complete the five-year review. In addition to the work of NWAC, and other national Aboriginal organizations that will be launching engagement processes to gauge the views and perspectives of their memberships, in the month of July 2014, the Department of AANDC also launched an online engagement on their web site to solicit views and perspectives on the impacts of the repeal of section 67 of the *Canadian Human Rights Act*.

It was the Department of AANDC's stated objective that they are affording First Nations community members, as well as Canadians, with the opportunity to contribute to this comprehensive review, either directly through the First Nations organizations or through the department of AANDC's online engagement process, which will all feed into the Final Report.

It must be noted that many of our NWAC Board members and those attending our Annual General Assembly expressed extreme concern over the process stating that it was supposed to be comprehensive approach. They explained that they felt the department of AANDC rushed the process by having to complete it over six weeks' time and indicated that it was too short a timeframe for each of the national Aboriginal organizations to gather sufficient information from their membership. They also indicated that their participation did not constitute as legal consultation but merely as a quick engagement.

Although there were time pressures and a short window to engage with Aboriginal women, NWAC did receive an unusually high amount of input from its members because the Aboriginal women were eager to tell their stories to us and to share how they had been discriminated against, as defined by the *Canadian Human Rights Act*. Many of them continue to face discrimination today, but now have some tools on how to proceed with their current complaints.

NWAC Undertakings – July 2014

Project for the Five-Year Review of the Impacts of the Repeal of Section 67 of the *Canadian Human Rights Act*

NWAC organized and held both an online engagement and in-person meetings of its members, PTMAs and Board Members to gather information, views and perspectives on the impacts of the repeal of section 67 of the *CHRA* as part of the five- year review.

The online engagement strategy consisted of a voluntary survey, which was posted on the NWAC web site, to gauge the views and perspectives of its members, PTMAs and Board Members in respect of the impacts of the repeal of section 67 of the *CHRA*. (The survey questions and fact sheets were developed and approved by AANDC prior to being posted and distributed.)

In addition to the online survey, NWAC held in-person meetings of its members, PTMAs and Board Members between July 12-14, 2014, coinciding with its Annual General Meeting held in Halifax, Nova Scotia, to discuss the section 67 repeal and gather additional information on the views and perspectives of participants on the impacts of the repeal of section 67 of the *CHRA*.

In order to further inform participants in the engagement of the issues, both in respect of the on-line survey and the in-person meetings, NWAC developed, posted, shared electronically and distributed a Bibliography of culturally-relevant gender-based resources, background documents, Fact Sheets, three CHRC Booklets that NWAC had input to and which were completed by the CHRC on issues relating to the *CHRA*. NWAC posted the documents on the web site and distributed them to its PTMAs and Board Members to inform and guide their discussions. NWAC also promoted and invited online participation in the engagement process and survey completion through its social media accounts, such as Twitter and Facebook

NWAC also dedicated an entire section of its Spring/Summer 2014 Newsletter on the five-year review process, which included the fact sheets and a link to the survey. The Newsletters were distributed both electronically and given out to the membership and our partners.

NWAC has prepared this report on the results of both the online survey and in-person meetings outlining the findings of the online survey and the in-person discussions in respect of the views and perspectives expressed by respondents to the survey and participants in the in-person meetings. The report has been prepared for AANDC to be incorporated into the broader report to Parliament to be prepared by them.

NWAC has also included background documents at the end of this report to show NWAC's past work, recommendations, and input on the repeal of section 67 of the *CHRA* because the same concerns have been consistently raised in this process, as they were raised in the past.

NWAC's International Affairs and Human Rights department worked full-time over the six weeks to meet the timeline in attempt to have the best engagement possible with our PTMAs and our membership over such a short timeframe.

NWAC Activities Completed in July 2014:

1. A culturally-relevant gender-based summary document of resources, background and other communication documents and materials about issues relating to the *CHRA*, which were posted on the NWAC web-site and distributed to its membership PTMAs and Board members so as to inform and guide their discussions on the issues.
2. NWAC developed and launched a survey on its web site through Survey Monkey to collect data and respondent information on their views and perspectives in respect of the impacts of the repeal of section 67 of the *CHRA.*
3. NWAC promoted and invited online participation in the engagement process and survey completion through its social media accounts, such as Twitter and Facebook, and through its Spring/Summer 2014 Newsletter.
4. NWAC held an in-person meeting of its members, PTMAs and Board Members between July 12-14, 2014, coinciding with its Annual General Meeting in Halifax, Nova Scotia, to discuss the section 67 repeal and gather additional information on the views and perspectives of participants on the impacts of the repeal. There were 22 Board of Directors (BoD) present at the meeting with the BoD who represent their PTMA, and more than 100 women attended the session at the Annual General Assembly. Approximately 89 women started to fill in the survey but only 74 completed it in its entirety. NWAC cleaned and analyzed the data to ensure that our statistics were accurate and methodology sound. The survey results are based only on those surveys that were completed in their entirety.
5. NWAC has prepared this final report on the findings of the survey and the in-person meeting with its members, PTMAs and Board Members, which includes an Executive Summary.

CHRA – Five-Year Review Presentation to the Board of Directors – Highlights of the Meeting

The Director of Human Rights and International Affairs provided an overview of the changes to the CHRA, the purpose of the review, NWAC's past and present participation and drew attention to the following handbooks that were available at the NWAC booth for delegates to take back for use in their communities: "Your Guide to Understanding the *Canadian Human Rights Act,"* "Human Rights Handbook for First Nations Managers," and "A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities." She noted that

the fact sheets were also available along with a list of resources available on the topic for their information.

The Director of International Affairs and Human Rights provided an overview of the survey document entitled, "Five-Year Review of the Effects of the Repeal of Section 67 of the *Canadian Human Rights Act.*"

The NWAC Director fielded questions of clarification that included: the roles, and complaints under the jurisdiction, of the provincial, territorial and federal human rights commissions, the differing experiences of Band members living on- and off-reserve, specific scenarios of discrimination within their territory, the approach of the CHRC being of a remedial/healing nature rather than punitive and decision-makers under the *Canadian Human Rights Act* needing to give due regard to First Nations' traditional laws.

CHRA – Five-Year Review Presentation to the Annual General Assembly Membership – Highlights of the Meeting

The Director of International Affairs and Human Rights provided a review of the many documents available on the changes to the *CHRA*, the implementation of their human rights and distributed the booklets and materials available on the topic.

The NWAC Director then provided an overview of the survey entitled, "Five-Year Review of the Effects of the Repeal of Section 67 of the *Canadian Human Rights Act*" and asked the members to complete the survey at the NWAC booth or on their own over the coming days, reminding them of the deadlines required for their input.

A representative from the CHRC was present as an observer and had agreed beforehand with NWAC, to answer any questions of clarification that came from members in attendance at the meeting about the specific cases of discrimination they had personally encountered. Questions arose at this meeting about the role of the CHRC, the challenges faced when filing complaints, problems regarding jurisdictional issues among the provincial, territorial and federal human rights commissions, the differing experiences of Band members living on- and off-reserve.

A delegate later suggesting that there should be no such distinction among jurisdictions, as they were based on imaginary borders, and suggested that the approach of the CHRC, being of a remedial/healing nature rather than punitive and decision-makers under the *CHRA*, need to give due regard to First Nations' traditional laws and territories.

The NWAC Director of International Affairs and Human Rights provided an overview of the five-year review process, the one-month long human rights on-line engagement session, and

officially launched the survey, "Five-Year Review of the Effects of the Repeal of Section 67 of the *Canadian Human Rights Act."* She drew attention to four booklets that were available: Your Guide to Understanding the *Canadian Human Rights Act*, Human Rights Handbook for First Nations, Human Rights Handbook for First Nations' Managers and A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities.

The NWAC Director also followed-up after the Annual General Assembly by sending an email to all of the Board of Directors the *CHRA* documents, resources list, and links to the survey so that they could be forwarded to their membership.

The CHRC representative clarified that self-governments were not permitted to opt out of the provisions of the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act* and the CHRC had an obligation to investigate complaints falling under its jurisdiction and if a Director were aware of a situation whereby a complainant was informed that the *Canadian Human Rights Act* did not apply to those under self-government then they should contact the CHRC directly about it.

PTMA members also requested that NWAC and /or the CHRC find funding to be able to do Workshops and Training Sessions for Aboriginal women in communities because there are still so many women who are not aware of the changes to the *CHRA*, what their rights and recourses are, and that the CHRC or the Tribunal exist for women to implement their human rights.

Discussion ensued regarding the types of complaints that are currently being filed at the CHRC. The representative indicated that there have been complaints filed stating that child welfare services to Aboriginal kids on-reserve are not parallel to what is off-reserve so that is discrimination on the basis of race, and that this is the kind of complaint some people have started filing. Also, there are claims from community members that the Chief and Council are embarking on agreements without consulting their Nation and/or their community, and the Governments allegedly seem to be "allowing" this to happen, and stating that communities are not being consulted on matters affecting them all.

Discussion continued with members claiming that they would like to bring an argument forward to the CHRC stating that there is a service being provided to one group, that is not being provided to all of their people because of race or age or national or ethnic origin, which may then be something that could be the basis of a complaint under the *CHRA*.

One of the problems discussed was in relation to human rights and that there are a lot of services that are available for the on-reserve population but if you are an off-reserve band member then you are discriminated against. This was described as a common problem among women living off-reserve.

Another concern raised was the fact that many of the Chiefs and Council do not have any legal education or knowledge on how to implement the changes to the *CHRA*, and if they do have the

training, they are often no longer in the same position in a few years so there is no corporate knowledge and/or training kept within those positions of who is in power.

Also, members discussed that there are no punitive measures in place that are severe enough to make Band Councils change their current discrimination. The representative from the CHRC validated that a lot of complaints have come from people living off-reserve claiming that they are unable to access the same service as those on reserve, stating that, "any ground of discrimination must be tied to race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted." She indicated that some of the complaints received by the CHRC are regarding off-reserve membership, and that they have noticed an increase in the number of complaints based on family status since the legislation has come into effect.

In terms of new complaints, the CHRC has noted that a higher proportion are based on what family you are from or circumstances like that, where the person resides off-reserve because maybe their mom moved off-reserve when they were kid. We've got a higher number of those complaints than we did prior to the legislative changes.

The representative of the CHRC indicated that since the legislative changes have come in, there are over five hundred people who have filed complaints saying they were discriminated against, and of those, three hundred were against First Nations. She also indicated that a number of those complaints are able to be settled at an early stage when people become aware there is the *Canadian Human Rights Act* and a process available to them. The CHRC encourages settling the matter at an early stage because the *Canadian Human Rights Act* is remedial and about resolving issues in a good way; it is supposed to bring about a remedy and it is supposed to heal the issue as opposed to being punitive.

The meeting wrapped up because the session had ran over time. The representative of the CHRC gave out her card to all those interested; as did the Director from NWAC, and the booklets and fact sheets were distributed to the membership present.

NWAC Highlights of Survey Results of the Five-Year Review on the Effects of the *CHRA*

Although *An Act to Amend the Canadian Human Rights Act* amended the CHRA to repeal section 67, a section of the CHRA that excluded matters under the *Indian Act* from human rights review, Aboriginal women still continue to face multiple barriers and discrimination in their daily lives. In the past, this exclusion had denied many Aboriginal women the same protections and access to equality than other Canadians.

The amendment to the legislation has begun to facilitate Aboriginal women's access to their human rights but there is much work that lies ahead. Although the potential for protection exists

for the most vulnerable members of the more than 600 communities from acts of discrimination that are prohibited under the *CHRA*, Aboriginal women reiterated that there are many challenges with public education and training for First Nations governments, employers and for the women themselves in understanding their rights and responsibilities.

In theory, the changes to the legislation hope to improve the accountability of the federal government in its dealings with Aboriginal communities under federal jurisdiction and with First Nations governments in its dealings with its own community members. The notion of taking into account gender and the specific impacts that affect Aboriginal women is an ongoing concern. Aboriginal women often feel that any process dealing with Aboriginal "Peoples" is usually a process designed to deal with Aboriginal men and doesn't take into account the specific barriers that Aboriginal women face. For example, more than half the Aboriginal population is women and many are single parents, yet little is done to ensure that they have access to childcare so that they can meaningfully participate in many events, including the time it takes to file a complaint or participate in a mediation or investigation process.

Many Aboriginal women have brought complaints of discrimination to the CHRC, but the Aboriginal women would argue that a majority have not. A majority of the women that NWAC has heard from have indicated that it will take more time, efforts, training and education for both the federal government and the First Nations governments, an even the CHRC to be able to effectively address the needs of Aboriginal women in a culturally relevant way so that they feel safe and able to participate in these processes.

The Aboriginal women have consistently raised the need for them to access workshops and/or training sessions so that they can be made aware of their rights, and how to implement them, whether it is at the community level or with the CHRC. Aboriginal women have repeatedly identified problems with lack of access to justice and to information in order to bring their complaints forward. They have indicated that the CHRC process is daunting and difficult and more often than not, they will sacrifice their own personal well-being by choosing to abandon a claim and not proceed with an investigation, because they feel it is too difficult for them to manage.

In other cases, they have identified complicated legal and cultural issues seeming to be at odds with one another in identifying a resolution. They have indicated that because the legislation is not designed in a cultural way, it is difficult to try to reconcile the two when reaching for a solution to a problem. They have stated that the legislation does not respect Aboriginal cultures and traditions generally, but merely takes it into account when looking at a claim.

Aboriginal women have indicated that there are multiple barriers to them accessing and implementing their human rights and that it will take years of changing attitudes and training before they will be protected from discrimination and be guaranteed equality.

The women have indicated that they did not bring their case to the CHRC because of additional obstacles stemming from poverty, parenting and family responsibilities, low education

attainment and literacy levels, or limited access to information technology within their home or community.

Aboriginal women have stated that filing a complaint can be really difficult for them if they live in a small or remote community where everyone knows each other's business. They have indicated that they fear for their well-being and often abandon discrimination complaints before they reach the investigation stage because of their fears of retaliation. They have indicated that they don't necessarily trust the CHRC or the complaints process within the justice system to be able to protect and/or help them and view it as inaccessible and re-victimizing.

Most women indicated that they did not believe that the First Nations governments had access to training or the capacity to take steps needed to comply with the *CHRA*, and to provide what is required by law or any type of accommodation within workplaces for any women alleging discrimination.

These obstacles are symptomatic of a larger issues of poverty, racism, sexism, oppression, which are common as effects of Indian Residential Schools, colonization, the imposition of the *Indian Act*, etc., which has often left some community members and their governments debilitated and lacking the tools, skills, resources and money to implement human rights within communities.

Despite all of these challenges, Aboriginal women continue to see themselves as strong, leaders and the backbone of their communities and have indicated their eagerness in achieving economic and social equality in their day-to-day lives within their communities. They see the implementing of their human rights through this process, as merely only one small part of the greater work that needs to be done to restore their families, communities and Nations. They are resilient and hopeful and believe that they will one day live the lives that Creator imagined for them to live.

NWAC Survey Results of the Five- Year Review on the Effects of the *Canadian Human Rights Act*

Aboriginal Identity and Residence

There were approximately 89 women who participated in this survey. We were unable to use 5 of them as they were incomplete. Also, there were 5 surveys completed by women who were not Aboriginal and 5 surveys were completed by Indigenous women from other countries other than Canada, so there were a total of 74 completed surveys that were analyzed for the results.

While the survey was primarily targeted towards First Nations women, there was also an Inuit participant (1), Métis participants (5), non-Indigenous participants (5) and those who identified as other (5). For accurate results, the survey was designed to prevent a non-Indigenous person to continue participating in the survey. Therefore, 74 surveys were complete and filled out by Aboriginal (First Nations, Inuit, and Métis) women in Canada.

The participants who identified as "other" did so for reasons such as, preferred the term Indigenous, multiple Aboriginal identities, or were Indigenous to South America.

While there were participants who identified as Métis, Inuit, and other, the majority of those at 79.7% identified as First Nations. Almost all of the participants were female (95.6%), however, there were two males and one transgendered woman who also participated in the survey.

Ninety-one percent (91%) of the participants who identified as First Nations are a registered, status or Treaty Indian, while 8.5% were not. In addition, 92.6% of First Nations who engaged in the survey were a member of an Indian Band.

When participants were asked where they reside, 64.7% answered off reserve, and 35% stated on reserve.

Experiencing Discrimination as described in the Canadian Human Rights Act

Have you ever experienced discrimination as described under the Canadian Human Rights Act?

The majority of participants (63.7%) stated that they have experienced discrimination as described under the *CHRA*, while 24.6% said they did not know, and 11.5% of participants have not experienced discrimination under the *CHRA.*

Have you ever contacted the Canadian Human Rights Commission about a discrimination claim?

Though the greater part of participants has experienced discrimination under the *CHRA*, many (63.9%) have never contacted the CHRC about a discrimination claim. Approximately 32.7% of participants said they filed a discrimination claim, while 3.2% did not know if they had.

When you contacted the Canadian Human Rights Commission to explain your situation, did you experience any difficulties/challenges while dealing with them?

Of those who contacted the CHRC, 75% experienced difficulties/challenges when dealing with them. Some of these challenges were as follows:

- Told to contact the Department of Indian and Northern Affairs Canada
- Said they had no way to help the individual.
- An individual had to quit their job because of harassment, however, the individual was unable to make a complaint because they were told by the CHRC that they had to stay in their job to complain and couldn't make a complaint after leaving the workplace.
- An individual complained about the lack of transparency on their reserve and the CHRC said that it was a Governance issue and that they had no authority over their case.
- The CHRC said they would investigate but the individual's boss covered his tracks so there

was no one to prove the individual's story of being sexually harassed by their boss.
- The CHRC said to try to work it out within the individual's community.
- No one at the CHRC responded to messages and the individual was put on hold numerous times.
- They were told to take their case to court because the *CHRA* didn't apply on reserve.
- The CHRC does not always view discrimination the way an Aboriginal woman would.

***Was your case considered for an investigation by the Canadian Human Rights Commission*?**

Many of the participants (60%) stated that their case was considered for an investigation by the CHRC before 2008, while 25% reported that their case was considered for investigation after 2008.

Once you explained your claim, and the Canadian Human Rights Commission did an investigation, was a formal complaint filed?

Forty percent (40%) of participants said that a formal complaint was filed, after they explained their claim and the CHRC did an investigation; however 45% stated that no formal complaint was filed, and 15% said they did not know if their case did proceed to a become a formal complaint.

Did you find it a difficult process to lodge a complaint?

Sixty-five percent (65%) of participants said it was a difficult process to lodge a complaint for several reasons. These included: they did not want to have to retell their story, or they felt embarrassed or traumatized and didn't want to go over it – reliving it again. Twenty-five percent (25%) said they did not have any difficulty and 10% stated that they do not remember why it was difficult. For those who did not experience difficulty, one participant remarked that it was because she was a lawyer and was able to navigate the system without difficulty.

Once you filed the complaint, did you experience retaliation from the person that you filed the complaint against?

Once the complaint was filed, 40% said they did experience retaliation from the person that they had complained against, while 55% said they did not. One participant explained that the complaint she made against her Band led to her family being removed from their home on the reserve. Another respondent told of how she was labelled as a drunk and a drug-addict by her employer in retaliation to her complaint.

Did your discrimination complaint to the Canadian Human Rights Commission involve behavior that occurred on reserve?

Of the 20 participants who answered this specific question, 60% said that their discrimination complaint to the CHRC involved behaviour that occurred on reserve and 40% stated that their discrimination complaint occurred off reserve.

Before going to the Canadian Human Rights Commission, did you try to resolve your complaint on your own?

Ninety percent (90%) of participants stated that they tried to resolve the complaint on their own, while 10% did not.

What prevented you from making a complaint to the Canadian Human Rights Commission?

When asked what prevented participants from making a complaint, almost all respondents identified that they did not have knowledge of the process necessary for making a complaint. Respondents explained that they did not know who to contact initially or where to seek help with carrying out the complaint process.

In what ways were you discriminated against?

Many of the participants (74.4%) were discriminated against based on race and sex, while 27.59% stated that there were other reasons for discrimination aside from the list of 11 discriminatory practices. Upon commenting, one respondent explained that she was unhappy with that discriminatory Status system that has restricted her children from receiving their status rights. Another respondent explained that she felt discriminated against for attempting to use her Status card when picking up a prescription. Four respondents told of unhappiness with how their band deals with Band members living off reserve. Language, both French and Aboriginal, as well as living a traditional lifestyle was also identified as reasons for discrimination, not listed.

How would you rate your understanding of the Canadian Human Rights Act and the repeal of section 67?

The majority of participants (66.1%) have some knowledge of the *CHRA*. In accordance with this survey, there are approximately the same amounts of participants who have an excellent understanding of the *CHRA* (16.9%) and do not understand it at all (16.9%).

Do you think that the repeal of section 67 has helped First Nations women experiencing discrimination?

Sixty-four percent (64%) of participants said that they did not know if the repeal of section 67 has helped First Nations women experiencing discrimination; however 23.4% indicated that it did, and 12.5% stated that it did not. In regards to helping First Nations women experiencing discrimination in the future, 50% said that the repeal of section 67 will help First nations women, 42.1% stated they did not know, and 7.8% said it would not help them.

Do you have access to free legal resources in your community to help you understand the impacts of the repeal, and/or to inform you of the work of the Canadian Human Rights Commission?

Many of the participants (43.7%) indicated that they did not have access to free legal resources in their community to help them understand the impacts of the repeal, and/or to inform them of the work of the CHRC. Thirty-seven percent (37%) said they did not know and only 18.7% stated they did have access to resources.

Do you know if your Chief and Council, and/or Band Managers and/or Employees have had access to legal training on the changes to the Canadian Human Rights Act?

Do you know if your Chief and Council and/or Band Managers and/or Employees are aware of the work being undertaken by the Canadian Human Rights Commission?

When asked if they knew if their Chief and Council and/or Band Members have access to legal training about the changes made to the *CHRA* 12.7% of respondents answered Yes, 41.3% said No, and the remaining 46% said they did not know. When asked if they knew if their Chief and Council or Band employees are aware of the work being done by the CHRC the results were similar with 12.7% responding Yes, 44.5% responding No, and 42.9% said they did not know.

Do you know if anyone in your community has had access to legal training to help them understand the changes to the Canadian Human Rights Act or to help them understand their rights?

Do you know if anyone in your community is aware of the work of the Canadian Human Rights Commission?

Most participants (46%) did not know if anyone in their community has access to legal training to help them understand the changes to the *CHRA* or to help them understand their rights. Sixteen percent (16%) of participants responded Yes, while 38% responded No. When asked if to their knowledge anyone in their community is aware of the work of the CHRC 20.6% replied Yes, while 33.3% said no. The majority of participants (46%) indicated that they did not know.

Once you made a complaint to the Canadian Human Rights Commission, did you receive help or support throughout the rest of the process?

The participants that indicated that they had previously made a complaint to the CHRC were asked if after making the complaint they received help or support throughout the rest of the process. Of the respondents, only 15.5% replied Yes, they did receive help or support. The remaining 47.5% replied No and 37.29% said that they did not remember. Three participants indicated that it was a Human Rights Officer who helped them in their process.

Did you participate in any Alternative Dispute Resolution to resolve your complaint of discrimination?

When asked if they participated in any Alternative Dispute Resolution to resolve their complaint of discrimination, a small percentage of 8.7% replied Yes. The majority of participants (66.7%)

replied that they did not take part in an ADR, and 24.5% replied that they did not know. In the comments three participants indicated that an ADR was desired but was not carried out.

Were you successful in resolving your complaint?

In addition, the participants were asked if they were successful in resolving their complaint. Of the respondents, 12.5% said that they were successful and 44.6% said that they were not, with 42.8% responding that they did not know. In the comments some participants shared their stories of discontent with the results of their complaint. One participant shared that the person she had made the complaint about received a large severance package in order to resign, despite this person having multiple complaints against them.

Do you feel as though the Commission, Canadian Human Rights Tribunal, or court respected First Nations legal traditions and customary laws in dealing with your complaint of discrimination?

Of the respondents only 1.9% felt as though the Commission, Canadian Human Rights Tribunal (CHRT) or court respected First Nations legal traditions and customary laws when dealing with their complaint of discrimination. The majority of respondents (56.6%) said that they did not feel First Nations legal traditions were respected and 41.5% said they were somewhat respected.

Do you feel satisfied with whichever process that you went through?

Finally when asked if they felt satisfied with which ever process that they went through 55.6% of participants replied that they were not satisfied. The remaining 5.6% replied Yes, they were satisfied and 40.7% percent said that they were somewhat satisfied.

Please see the detailed charts for further information and responses on all the participants.

History of NWAC's Involvement and Ongoing Issues Raised:

The 2008 amendments to the *CHRA* allowed for the repeal of section 67 of the *CHRA.* The *CHRA* routinely prohibited specific forms of discrimination by federally regulated employers and service providers, in matters relating to employment, the provision of services and accommodation. However, the *Indian Act* was historically exempted from the application of the *CHRA* due to its distinct and unique provisions of services for Indians on reserve status lands, in accordance with the *Indian Act*. After the amendment, First Nations and their governments were allowed a three-year moratorium from the application of the *CHRA* to allow them to adjust and further study how the application of the *CHRA* will affect their respective communities. This moratorium came to an end and the application of the *CHRA* to First Nations government took effect on June 18, 2011.

NWAC has known that the scope of application of the *CHRA* to First Nation communities would be broader than it was before, as a result of the amendments. The repeal of section 67 meant that provisions of the *Indian Act* itself could be reviewed for compliance with the *CHRA*, as well as policies used to apply the *Indian Act.* The repeal of section 67 also meant that by-laws passed under the authority of the *Indian Act* or other decisions taken under its authority could be the subject of a complaint, where they concern matters of employment, the provision of services or accommodation by a First Nation government or the federal government.

Section 2 of the *Canadian Human Rights Act,* reads as follows:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. [1976-77, c.33, s.2; 1980-81-82-83, c.143, ss.1, 28.][i]

Two interpretive provisions were included in the 2008 amendments. The first of these, s.1.1, confirms that the constitutionally protected Aboriginal and Treaty Rights of First Nations are not to be affected by the repeal of section 67 *CHRA.* A second interpretive provision, s. 1.2, ensures that when a complaint of discrimination is made under the *CHRA* against a First Nation government (this includes *Indian Act* Band Councils), the *CHRA* shall be interpreted and applied in a way "that gives due regard to First Nations legal traditions and customary laws." This means that there must be a balance in applying and interpreting matters of both individual rights and collective rights, in all *CHRA* decisions. This interpretive provision must also always be applied in a manner "consistent with the principle of gender equality". The applicable sections read as follows:

Section 1.2 of the *Canadian Human Rights Act:*

> **1.2** In relation a complaint made under the *Canadian Human Rights Act* against a First Nations government, including a Band Council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

Based on an analysis written by gender equality specialists and legal scholars for the Native Women's Association of Canada, an Executive Summary Paper was written to do an analysis of

the potential gender equality issues and legal concerns arising in the application of the *CHRA*, to First Nations' governments and organizations.[ii] NWAC also presented the Department of AANDC with the focus group recommendations that were gathered from meetings it held nationally with First Nations women in communities on the application of the *CHRA* in 2010.[iii]

The *Indian Act* and Gender Analysis: Prior Concerns Reiterated

The *Indian Act* has been a pervasive theme in the lives of First Nations people at every level since its enactment in 1876. The *Lavell* case brought the gender inequity to the forefront in 1974.[iv] By 1985, the Bill C-31 amendment to the *Indian Act* attempted to remedy the colonial *Indian Act* provision, primarily related to status and membership.

However, in addition to bringing forward issues of status and membership, many cases also bring forward issues of race, gender, culture, marriage and family status, which the *Indian Act* continues to perpetuate. It must be emphasized that issues of discrimination with gender is not the only issue that has since come forward, as a result of the more expansive application of the *CHRA* to First Nations governments. The *CHRA* now addresses a wide range of decisions and practices by both the federal government and First Nations governments in employment matters related to providing services to First Nations, including, discriminatory policies respecting the registration of persons as "Indians," and various government funding formulas, in the provision of essential government services on reserves.

From a collective perspective, there are inclusion and exclusion boundaries associated with status entitlements and reserve residence identity.[v] Aboriginal people negotiate their identities. Generally, Band Councils are creations of the *Indian Act* and questions remain as to whether Band Councils act in accordance with legal traditions or customary law, in dealing with individual rights and identity issues. The imposition of section 74 of the *Indian Act*, regarding elections, has also effectively controlled the customary and collective rights of First Nations peoples to determine elections according to custom, as well as, land management/wills and estates which also impact upon individual's rights. These have since been subject to review with complaints coming forward. From a native women's perspective, the potential isolation and retribution upon Human Rights complainants is a real concern given the patriarchal nature of First Nations governments.[vi] This is an ongoing concern for the women who have contacted NWAC prior to this review occurring and has been raised in the surveys that have been completed by participants.

The cross-cutting and multi-generational impacts of discrimination affecting particular segments of the First Nations population, particularly those that attended residential schools, and their children, play an important factor. For example, systemic discrimination in the funding of child

welfare programs and education on reserve most directly affects First Nations children, but also serves to perpetuate inequalities between First Nations Peoples and Canadians generally, over the long-term. These issues have been raised with NWAC for at least 10 years by our membership.

Direct discrimination based on sex against First Nations women under the *Indian Act* likewise has had many multi-generational impacts and negative impacts on First Nations communities. Sex-based discrimination combined with other forms of discrimination in the determination of Indian status entitlement or band membership under the *Indian Act*, (ie: the arbitrariness of the second-generation cut-off rule as in *McIvor*) create very complex issues of discrimination analysis in First Nations communities.

In addition, these are further compounded by unresolved issues in federal funding formulas in many areas of basic government services (education, child welfare, capital funding, etc.). Violence and intolerance is perpetuated against women in decisions that consistently fail to meet the needs of women by not addressing budgets related to the need for shelters and housing allocations in capital plans and budgets.

In the context of the *CHRA* dealing with complaints of discrimination arising from First Nations communities, a culturally relevant gender-based analysis is required as a skill by the Commission, as well with CHRT procedures and resources, to identify and appropriately apply the legal traditions and customary laws of a specific First Nations while respecting the "principle of gender equality."

Aboriginal women's experience of discrimination often involves multiple aspects of identity and grounds for discrimination. Even when a single ground of discrimination (sex or gender) may be the focus of a given fact situation as in sexual harassment in employment situations, there must be an attempt to understand the larger context of Aboriginal women's experience in Canadian society. An understanding of racism, violence and stereotypes about Aboriginal women are necessary to fully understand the dynamics of harassment in its many forms, which are experienced by Aboriginal women.

To try to address these issues, NWAC has worked collaboratively with the CHRC to develop information booklets and tools over the last four years so that they take into account specific impacts and issues directly relating to First Nations women regarding the implementation and/or exercising of their human rights while on reserve.

Aboriginal women can experience discrimination through manifestations of many forms. Discrimination can be based on any combination of gender, race and culture, and it can intersect with any combination of age, disability, sexual orientation or other ground of discrimination.

Ensuring the equal enjoyment of all human rights by Aboriginal peoples necessarily involves the assertion of fundamental human rights at the collective, as well as, the individual level. NWAC emphasizes that there are ongoing collective inclusion and exclusion boundaries associated with status entitlements and reserve residence identity.[vii] Many forms of discrimination and oppression experienced by Aboriginal women within their communities, and outside them, are the products of colonization, the denial of First Nations right to self-determination and the long historical imposition of Eurocentric policies upon them. These policies were characterized "by patriarchal norms which had a negative impact on the status of Aboriginal women in Canadian society and within Aboriginal societies in Canada, as well".[viii]

Gender-based analysis warns also about how adopting an exclusive focus on gender alone can obscure other discriminatory practices affecting Aboriginal women from being considered. The Canadian Research Institute for the Advancement of Women acknowledges the need for this type of approach, as follows:

> While GBA has brought greater awareness of women's inequality relative to men, a 'gender only' lens that primarily looks at differential gender impacts or discrimination between women and men fails to account for the complexity of women's lives. Prioritizing one identity entry point (gender) or one relation of power (patriarchy) to the exclusion of others, (race and class), misrepresents the full diversity of women's realities, applying only one entry point into analysis simplifies and reduces what are actually very complex systems of oppression.

For example, discrimination experienced by First Nation women who "married out" prior to 1985, is about more than gender and racial discrimination. It often involves assumptions about people who have lived off-reserve for a period of time. Being a person reinstated under the 1985 amendments has become a label in itself that can become a ground for a claim of discrimination.

While discrimination on grounds of sex is prohibited under the *CHRA*, the *Act* must further define "the principle of gender equality." The CHRC has explained the meaning of "gender bias" in the context of federal employment equity legislation, as "any factor or behaviour, which even unintentionally, unfairly favours one sex over the other."[ix] Gender bias would be evident, for example, in a consistent pattern of inequitable access to resources by women within the community, such as: housing or employment. This has been and continues to be a real concern for native women.

Legal Analysis - Defenses and Interpretive Provisions within the *CHRA*: Prior Concerns Reiterated

The most common defences used to justify an infringement of an individual right under the *CHRA* are those of bona fide occupational requirement in s. 15(1)(a) and bona fide justification in s. 15(1)(g) of the *CHRA*. NWAC cautions that the consideration of these two defenses,

including the "undue hardship" defence may open the door to the mediation of substantive equality rights and interests. NWAC maintains that under this approach, section 1.2 cannot be treated as an exemption or a technical defence. Section 1.2 is best viewed as a general interpretive guideline that may have application at each stage of the analysis from determining the standing of the complaint to the resolution of the complaint, which includes the assessment and application of any defence, asserted by a First Nations defendant.

This analytical approach would also mean, for example, in appropriate cases that the socially-constructed nature of identity concepts like "Indian," "band member" or "First Nation citizen" as they are used in First Nations laws, by-laws, policies and other First Nation decision-making tools, must be examined. These instruments ultimately determine access to programs, services, accommodation or employment in First Nations governments or organizations.

Prior to the 2008 amendments, several cases were brought forward by First Nations women essentially based on their status as persons reinstated to Indian status under "Bill C-31," explicitly relying on multiple grounds of discrimination; such as: sex and marital status or sex and family status. These complainants met with mixed success for various reasons, including the operation of the section 67 exemption, they were: "Indian", "Native", "white male" (*Dawson* v. *Eskasoni* [x]); "Caucasian", "native", "aboriginal" (*Dewald* v. *Dawson Indian Band Council*[xi]); "native", "caucasian", "white", "white non-native" (*MacNutt* v. *Shubenacadie Indian Band Council*[xii]); "white father", "Indian" (*Raphael* v. *Conseil des Montagnais du Lac Saint-Jean*[xiii]) ; "native Indian", "aboriginal." Joanne St-Lewis notes that European-based values and practices of analysis are so pervasive that these terms would be rendered "invisible" or neutral as aspects of the Canadian legal system.[xiv] She adds that the power of outside bodies like the CHRT to determine these kinds of issues carries a risk of perpetuating colonial biases.[xv]

The arbitrary way in which the *Indian Act* band membership and Indian registration provisions with regard to federal decisions is now reviewable under the *CHRA.* First Nations membership codes and residency by-laws will be reviewable under the *CHRA.* To deal with these cases in a culturally relevant gender-based manner, the CHRT has to continue to take into account concepts of race, culture, band membership and First Nation citizenship and needs to carefully consider and explain any terms it may use to refer to issues involving race, culture or citizenship, when identifying and analyzing issues of equality, under the *Indian Act.*

CHRC Tribunal Powers: Prior Concerns Reiterated

A special CHRT has been established to deal with equality rights generally and First Nations equality rights, in particular. This Tribunal will be charged with dealing with employment, accommodations (housing) and provisions of service, to streamline the CHRT complaint process.

This will allow the courts to deal with complex constitutional issues. Since the Supreme Court cases of *Conway and Druken,* it has been determined that the Tribunal does have the ability to strike down and declare subordinate legislation, such as: a regulation or by-laws, as inoperative. The question to be determined in *CHRA* cases is whether the matter in dispute is considered a "service."[xvi] Since 1985, Indian status entitlement is primarily used to determine entitlement and federal funding responsibility for a wide range of programs and services. Band membership under the *Indian Act* determines entitlement to vote in First Nations Band Council elections, as well as, access to other collective rights and interests under the *Indian Act*. The uncertainty about what the term "services" means that under the *Indian Act* will have to be scrutinized in *CHRA* cases that come before the Tribunal.

Former Analysis of First Nations Legal Traditions and Customary Laws

There is a tendency to equate the terms First Nations legal traditions and customary laws with "existing and Aboriginal and Treaty rights."[xvii]The balancing of customary laws and traditions with individual rights and interests is the ultimate objective of the section 1.2 *CHRA* analyses. It is important to know what the terms may mean.

A holistic, complementary perspective on the relationship between individual and collective rights is more typical of indigenous perspectives. Indigenous peoples generally recognize that collective and individual rights are mutually interactive, rather than in competition."[xviii]

Again, the historical effect of the *Indian Act* and its undermining of individual and collective rights now pose challenges to the understanding First Nations customary forms of kinship, identity, family, cohesion, community and nationhood. First Nations customary practices may not always be held as a valid basis for defenses against discrimination with regard to individual rights or interests. Procedures or techniques are needed to distinguish between what is 'traditional' or 'customary' and what is derived from introduced forms where a claim on individual rights is made, particularly on important issues affecting women.

Culturally Relevant Gender-Based Analysis in a First Nations context means the marrying of legal traditions and customary law to bring gender equality forward. In examining discrimination claims against First Nations governments under the *CHRA*, an I*ntercultural Human Rights Approach* is needed to assist in bridging differences between First Nations and Western knowledge traditions, legal traditions and approaches to problem-solving in a consistent equality rights context. This "intercultural" approach signifies an understanding of what substantive equality means.[xix]

NWAC has identified an *Intercultural Human Rights Approach* to carrying out culturally relevant gender-based analysis. It involves making policy and legal analysis based[xx] on pre-contact gender relations and a thorough understanding of how colonial assimilation policies have impacted First Nations societies. It is based on the analysis of the current realities, in a way that reflects the cultural diversity of First Nations social and economic situations. In addition, there must be strategies and solutions, which involve analyzing current social conditions and the potential effect of legislation, on a multitude of individuals and situations.[xxi] Balanced gender-based equality analysis means incorporating and developing a holistic analysis of complex forms of discrimination, according to individual experiences, realizing that these experiences cannot be separately analyzed and may impact each other.

An I*ntercultural Human Rights Approach* to interpreting and applying section 1.2 would view the right of self-determination and individual human rights of First Nations people as inter-dependent and complementary which reinforce one another, consistent with international human rights theory and law.[xxii] It is important to note that culture applies to all concepts of property and how people relate to land use, territory, entitlements and in their procurements of goods. In the absence of the recognition of First Nations governments through policy, legislation or constitutional amendments, the pre-colonial *Indian Act* continues to apply in First Nations' communities which affect how people relate to one another. Indian status, band membership, wills and estates, elections and reserve land management have been flagged as examples.

This continues to be an important issue for our membership when considering the CHRT working through the claims involving the persistent gendered definitions of Indian status and band membership which lie at the heart of claims of residual sex discrimination under the *Indian Act.* This includes other claims of discrimination against persons reinstated under the 1985 amendments to the *Indian Act* or any legislation adopted to respond to the *McIvor* case. Changes in approaches to investigation techniques, mediation techniques and evidentiary requirements may be needed to ensure the CHRC and the CHRT has an adequate factual basis on which to deal with these complaints, such as: procedures to explore the complainant's and respondent's understanding of various identity terms.

A culturally relevant gender based analysis of systemic discrimination, for example, might examine relevant facts, such as: the role the *Indian Act*, and the role that Indian agents played in excluding women from land allotments. Another aspect of such an analysis would examine how such biases may have been carried forward or corrected by First Nations councils in their decision-making policies and the federal government in their funding formulas.

The principle of individual participation rights raises the issue of how best to ensure the participation of First Nations women in any discussions of what constitutes First Nation legal traditions and customary laws and cautions on the dangers of having judicial on non-Aboriginal

decision-makers hold all of the power, in determining matters relating to tradition in societies of which they are not members or for which they may have little knowledge.

Regarding collective rights protections for culture, Brems argues that when issues regarding protection of cultural values arise, there cannot be a static understanding of "tradition."[xxiii] She further argues that community members, male and female, must have an opportunity to shape the legal expression of contemporary cultural norms. The principle of individual participation rights raises questions about how best to ensure the participation of First Nations women in any discussions of what constitutes a First Nation legal tradition and customary law and questions about the dangers of judicial decision-makers drawn from outside the nation having the power to determine matters relating to tradition in societies of which they are not members.

Wendy Hulko notes that an individual's social location can determine perceptions, experiences and participation and can vary in different circumstances. This can affect the degree of privilege (institutionalized power) or oppression (imposed disadvantage) an individual may experience in any given context. [xxiv] An individual's social location shapes his or her experiences across different socio-cultural contexts, in terms of the relative degree of privilege and oppression he or she is afforded and has at his or her disposal. In addition, a person's social location itself can be influenced by the particular phase of their life course.[xxv] The same concept of social location and its impact on rights also applies to the privileged position of outside judicial decision-makers empowered to make rulings about First Nations legal traditions and customary laws and deciding issues of equality, in First Nations communities. Due to their privileged position in a legal system, they fail to acknowledge and recognize the inherent law-making powers of First Nations.

There are many ways of carrying out culturally relevant gender-based analysis, whether for a single First Nation or a national organization. As a national organization concerned with issues of law and policy affecting Aboriginal women, NWAC continues to promote an approach to carrying out culturally relevant gender-based analysis with four key elements:[xxvi]

1. Grounding all policy and legal analysis in an understanding of pre-contact gender relations when Aboriginal citizens, female and male, were valued equally and lived in self-determining communities.
2. Identifying the negative impacts on individuals, families and nations of colonization and assimilation policies including the negative impact on gender relations that accompanied colonization.
3. Conducting an analysis of current realities (informed by the first two elements) and identifying areas requiring for change to meet all the equality needs and rights of Aboriginal women (e.g. as women, as indigenous, as disabled, etc.) and in a way that reflects the cultural diversity of Aboriginal peoples and their varying economic and social situations. This can involve collecting relevant socio-economic statistics, analyzing

current social conditions and analyzing the impacts of legislation that lead to gender inequalities.

4. Developing and implementing strategies and solutions informed by the first three elements. These strategies and solutions may require sameness of treatment in some cases and in others, equality may require gender-specific measures, indigenous-specific measures and/or measures specifically developed for indigenous women or women with disabilities or other needs.[xxvii]

These four elements are visually represented as points around a circle with the foundational concept of 'balance' situated in the centre. The concept of "Balance" represents an approach that recognizes the relationship between gender inequality and other forms of discrimination and oppression and embraces diverse traditional Aboriginal values that are consistent with the values of both women and men.

Due to the fact that the legislation has been applied is from outside the community, there is an ongoing learning process by First Nations governments and the CHRT to come to terms with the equality provisions of the *CHRA* and to strike a balance in understanding the unique aspects of customary laws and practices, from a First Nations' perspective. Given that limited resources have been allocated to train Chief and Band Councils about the changes to the *CHRA*, it will take several years to create change within First Nations communities.

The CHRC has worked to promote public education and awareness across Canada, but with the limited funds allocated for the process, our membership have indicated that neither the Band Councils nor the women are fully aware of their human rights and the changes to the *CHRA* and the impacts for communities. This makes the importance of culturally gender-based analysis even more imperative. It must be noted that the *CHRA* places the burden on complainants to come forward who do not always have access to legal resources within their communities or they may not feel that they are able to (Native Women's Association of Canada emphasis added).[xxviii]

Culturally Appropriate Dispute Resolution – Former Relevant Research Reiterated

The CHRC anticipates that its programs will need to be "more accessible and culturally sensitive to First Nations people and communities"[xxix] and that it will need more resources to ensure its complaint process is "culturally appropriate."[xxx] In its Still *A Matter of Rights* report, the Commission argued that a transition period was necessary to phase in the repeal of section 67 as its affects First Nation governments, in order to allow for the implementation of "culturally appropriate, community level initiatives to prevent discrimination, and to ensure that complaints are resolved quickly and with a minimum of conflict."[xxxi] The CHRC also emphasizes that it

focuses much of its efforts on prevention and early resolution of complaints, including the use of alternative dispute resolution (ADR).

Conflict resolution values and processes tend to be culturally bound. Court annexed ADR processes in Canada must be aware of the diverse cultures from which litigants come. Nevertheless, the professional practice of ADR in Canada is still dominated by conflict resolution values and procedures reflective of "Western" societies. The presumption that conventional western ADR practices are culturally neutral is considered problematic for Indigenous peoples and other peoples, who have experienced colonization and 'racialization.' Legal systems and dispute resolution processes that presume their own neutrality despite the exclusion and silencing of indigenous values and perspectives constitute a continuation of the colonization process."[xxxii]

The CHRC has not yet described how it will approach early conflict resolution in First Nations communities or how its current techniques of mediation and conciliation are considered workable or not in a First Nations context. The CHRC commissioned some preliminary research work,[xxxiii]which summarized the work of Bell and Kahane[xxxiv] and others on what the issues and challenges are. What is needed are concrete models of how conflict resolution can be applied to human rights disputes, under the *CHRA* to First Nations communities. Such models must take into account gender issues. This brings forward the issue regarding how the CHRC plans to modify or adapt its current reliance of Western models of conflict resolution to accommodate the diversity of First Nations models of conflict resolution, and how it will take into account gender based approaches to community based conflict resolution.

Cultural differences can affect what people expect from a conflict resolution process and what they perceive as fair outcomes. Indigenous approaches to conflict resolution are often described as focused on "conflict transformation," in that they seek to heal relationships and restore harmony. While western conflict resolution methods focus on immediate and substantive outcomes, in the form of an agreement between parties. Differences in cultural values relating to individualism and collectivism are reflected, including the role of the mediator or process facilitator by way of how the facts are brought out, the way conflict is analyzed and understood and the degree of formality of the conflict resolution process itself.[xxxv]

Where issues arise respecting indigenous perspectives on the balancing of collective and individual rights, the design of conflict resolution processes must ensure that men's and women's voices are given equal weight and value.

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, has suggested that the implementation by indigenous peoples of the UN *Declaration on the Rights of Indigenous Peoples* may require indigenous peoples to develop or revise their own institutions, traditions or customs through their

own decision-making procedures.[xxxvi] He notes the Declaration suggests the functioning of indigenous institutions should be "in accordance with International Human Rights standards" (art. 34) and that the Declaration calls for particular attention "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities," including the elimination of all forms of discrimination and violence against indigenous children and women (art. 22).

Human rights instruments, such as, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *United Nations Declaration on the Rights of Indigenous Peoples,* also provide direction on gender equality issues. Article 5 of the CEDAW requires State parties to take all appropriate actions to eliminate prejudices, customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. This is a very comprehensive reference, capturing prejudices and all other practices, as well as, customary practices.

Former Relevant Focus Group Recommendations Reiterated:

The Focus Group Presentation Approach

Each of the five focus groups were organized with the assistance of First Nation community members or a First Nation Women's organization– Sagamok Anishnawbek First Nation (February 17 & 18, 2010), Mothers of Red Nations (March 19, 2010), Aboriginal Women's Association of PEI (March 20, 2010), Nova Scotia Native Women's Association (Halifax, March 6, 2010), Eskasoni First Nation women/Nova Scotia Native Women's Association (March 9, 2010). A sixth focus group was planned for March 31st at Musqueam First Nation but had to be cancelled due to the death of an Elder.

At each focus group, an information kit, prepared by NWAC, was provided to the participants. The kit provided general information about the *CHRA:* the Roles of the CHRC and the CHRT, the Process of Making a Complaint, the Purpose and the Limitations of the *Act*, and some commentary on Aboriginal Perspectives on Human Rights and Approaches to Conducting Culturally Relevant Gender-based Analysis. While these five sessions may present limitations on making final recommendation and conclusions, the roll up of the comments made by participants tended to be consistent in each focus group so as to constitute valid recommendations under nine major subject headings.

The meetings' facilitators clarified that the focus group would review the *CHRC* and not the *Charter of Rights and Freedoms* and explained some of the differences between the two human

rights instruments. It was also noted that both the constitutionally protected Aboriginal and Treaty Rights and the UN *Declaration on the Rights of Indigenous Peoples* form an important context to the understanding the application of the *CHRA* to Aboriginal peoples. Both the Constitution and the UN Declaration were raised as important questions about how the *CHRA* would be interpreted and applied in various Aboriginal contexts both on and off-reserve. The following recommendations represent a roll-up of the five focus group discussions held nationally in 2010 on the upcoming application of the *CHRA*.

Recommendation 1: The Meaning of Customary Law

- Focus group participants consistently expressed that they do not know what their customary laws and clan systems are within their nations. First Nations languages are important to this understanding of what customary laws are.

- Others feel that customary laws exist in the teaching of the Elders and in the oral traditions. Kinship is an aspect of the clan system. Some felt that not all customary practices should be considered laws. For example, non-interference was cited as a traditional custom. How might this customary practice be reconciled with laws?

- There is also a need to know what customary law and legal traditions are and how have they merged? There was also a serious concern expressed about outsiders being able to understand what customary law means.

Therefore, education on what customary laws are and how they are to be applied is needed within First Nations communities. Access to fiscal resources are needed to understand and work through the meaning and application of customary laws by way of a community consultation process with scholars, language professionals, women and Elders. There must be research projects focused on Traditional Governance Systems and how these compare and are reconciled with Western systems.

Recommendation 2: First Nations Systems

- Focus Groups stated that First Nations need their own processes and procedures for addressing human rights complaints.

- Other participants felt that there was not enough training and awareness about the complaints process.

- Some participants expressed that they might be more apt to bring a compliant forward if they were certain that their matters were to be addressed independently and promptly with the assurance that there will be no retaliation or retribution. Some stated that they were unsure whether the process should involve Chief and Council.

Therefore, it is recommended that First Nations be encouraged to develop their own complaints and grievance processes as well as, conflict resolution and tribunals to decide on matters of *CHRA* individual human rights complaints. It is also recommended that existing and new policies be reviewed to ensure compliance.

Recommendation 3: Legal Resources

- While there was a need for more information on the *CHRA* and CHRT in every session, there was also a grave need for information on the *Canada Labour Code* related to employment-related matters, in general.

- There was an overall need for lawyers, legal knowledge and resources in First Nations and Aboriginal communities, including the expressed need for mediators and alternate dispute personnel and resources.

- There is also a need for written resources on legal matters.

Therefore, funding for legal resources and personnel must be made available to First Nations in every capacity: **lawyers, mediators, alternate dispute personnel.**

Recommendation 4: Membership

- What constitutes membership was also expressed as a concern for discussion in the focus groups. Membership varies from one nation to another.

- Some expressed concern that blood quantum is a prevalent factor for membership and others expressed that connection and spirituality for membership are important.

- There was some discussion on the understanding of the *McIvor* decision where there one generation is accepted as having Indian status identity and the next is not under the *Indian Act*. There was a need for assistance in dealing with the section 6(1) and 6(2) issue, the unrecognized paternity issue and how this will affect funding.

Therefore, membership is an issue which must be seriously analyzed where human rights complaints come forward. Effort must be made and funding must be made available to help determine these issues in a fair and equitable manner.

Recommendation 5: *CHRA* and CHRT Application Awareness

- There was some discussion on the *CHRA* and how it applies. Some felt that community promotion and education awareness is needed on the *CHRA*.

- Questions asked were: How long the applications take to process? Are there Aboriginal researchers on the CHRT? What are the procedures once a formal complaint is made?

Therefore, education and awareness must take place in First Nations communities on the procedural aspects of the *CHRA* and the CHRT along with a cultural sensitivity and awareness component to these activities. There need to be a Human Right Navigator position in place in communities, as well as, *CHRA* and CHRT Communication Strategies.

Recommendation 6: Women's Needs, Employment and Services

- First Nations have special needs both on and off-reserve. It was expressed that women are often cast aside without resources.
- Others expressed that certain issues are not just women issues.
- Women feel they need an outside resource person or complaints person, such as: an Ombudsmen or mediator. Some processes are in place but often they are "ad hoc."
- There is favoritism, nepotism and unfairness in employment, unfair job practices, 'boys clubs,' dual role-playing and a concentration of power on Councils.
- There is a need for lawyers, mediators, ADR.
- Many focus groups expressed the need for particular outreach to women in this *CHRA* awareness process, by way of: information sessions, guest speakers, notices, web-site promotion, networking, etc.
- More Aboriginal women are needed in First Nations Governments, in employment and at the *CHRA* and the CHRT.

Therefore, women should be the focus of *CHRA* and CHRT awareness campaigns. Women should also take part in these initiatives. Aboriginal women must be part of the *CHRA* and CHRT. Resources, funding and capacity development are needed to ensure that sound administrative processes and practices, as well as, mediation and ADR are put into place to ensure compliance so that equal rights exist in employment and services for everyone.

Recommendation 7: Disability, Housing Needs and Substance Abuse Treatment Issues

- Focus group members expressed the need to ready their communities on disability, housing and substance abuse treatment issues.
- There are substance treatment issues and housing policy concerns which need to be addressed at the community level, which affect employment participation and stability.
- People with special needs require support, including front-line services that meet their needs.

- People also have special housing needs and sometimes there is no support for them because they are Native or living with a non-Native spouse.

Therefore, it is recommended that disability, housing and treatment issues be a focus of targeted awareness.

Recommendation 8: Policy Resources and Sampling Templates

- Focus Groups stated that there is a need to develop more of a policy-driven approach to any *CHRA* and CHRT awareness campaign.
- There is a strong need to assist communities in identifying policy resource documents and instructions on how they should be followed.
- Due to the fact that First Nations traditional ways of dealing with issues are in jeopardy, policy resources are needed now more than ever.

Therefore, policy resources and sample documents should be made available to First Nations as part of the *CHRA* and CHRT awareness campaign.

Recommendation 9: Well-being and the *CHRA*

- Some Focus Group participants expressed concern for lack of preparation for the upcoming legislation and the need for formal processes to provide help to the communities in many other areas, related to health and well-being.

Therefore, further preparation is need to instruct all players, managers, community members, women, men children on the implementation of the *CHRA* and CHRT. Health and well-being are important parts of this; the *CHRA* awareness must be an integral component of every service delivered to and in participation with First Nation and Aboriginal communities.

Appendix A: Fact Sheet 1

Appendix A: Fact Sheet 2

Appendix A: Fact Sheet 3

Appendix B: Survey Questions

Appendix B: NWAC CHRA Survey Final Results and Written Responses

Appendix C: Culturally Relevant Gender-Based Resources on the Repeal of Section 67 of the *Canadian Human Rights Act*

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Appendix D: NWAC Spring/Summer Newsletter – Documents on the Repeal of Section 67 of the *Canadian Human Rights Act*

Endnotes:

[i] *Canadian Human Rights Act*. [1976-77, c.33, s.1.]

[ii] Culturally Relevant Gender Based Analysis: An Issue paper. Ottawa: the Association (March 31, 2010).

[iii] First Nation Women's organization– Sagamok Anishnawbek First Nation (February 17 & 18, 2010); Mothers of Red Nations (March 19, 2010); Aboriginal Women's Association of PEI (March 20, 2010); Nova Scotia Native Women's Association (Halifax, March 6, 2010);Eskasoni First Nation women/Nova Scotia Native Women's Association (March 9, 2010).

[iv] *Lavell* v. *Canada (Attorney-General*) [1974] S.C.R. 1349 (S.C.C.).

[v] Lawrence, Bonita. *"Real" Indians and Others*. Vancouver Toronto: UBC Press, 2006.

[vi] Part III of the Balancing Individual and Collective Rights Report, 62.

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[ix] Canadian Human Rights Commission website, http://www.chrc-ccdp.ca/publications/federal_jurisdiction-en.asp?highlight=1

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[xv] Ibid.

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[xxi] Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis An Issue Paper*. Ottawa: The Association 7.

[xxii] It should be noted that while the application of the *CHRA* to First Nations governments may be rationalized as an integral part of Canada's accountability to the international human rights system to ensure the universal application of human rights to all people in Canada, this rationale does not answer how Canada is accountable for ensuring respect of First Nations' right to self-determination consistent with international law as articulated by the *United Nations Declaration on the Rights of Indigenous Peoples*.

[xxiii] Brems, Eva. Human Rights: Universality and Diversity at 490; Brems, Protecting the Human Rights of Women at 124.

[xxiv] Hulko, Wendy. "The Time and Context-Contingent nature of Intersectionality and Interlocking Oppressions," Journal of Women and Social work 24 (2009) 44.

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[xxvi] Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis An Issue Paper*. Ottawa: The Association.

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[xxxvi] *Anaya*, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* at para 79.