



**AFEI Submission to the
Senate Legal and Constitutional Affairs Committee
on the
Human Rights and Anti-Discrimination Bill 2012
January 2013**

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Australian Federation of
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Australian Federation of Employers and Industries (AFEI)

The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation.

AFEI is a key participant in representing employers and developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

Submission

1. The Federal Government has released exposure draft legislation consolidating the five existing Commonwealth anti-discrimination acts into one single piece of legislation. The proposed legislation, the *Human Rights and Anti-Discrimination Bill 2012* ('the Bill'), is promoted by the Federal Government as providing consistent protections and compliance rules across the areas of sex, race, disability and age discrimination in the federal jurisdiction. Despite introducing significant change, the Bill is described as not proposing "*significant changes to existing laws or protections but is intended to simplify and clarify the existing anti-discrimination legislative framework*".¹
2. The Bill is expressly intended to produce clearer and simpler law with no substantial change in practical outcome:

*"Clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome."*²
3. This is plainly not correct as the Bill introduces new and complex issues into an already complex area of regulation and substantially expands the opportunity for claims and litigation. As with the Federal Government's "harmonisation" of work health and safety laws, a new raft of regulation is being created with new obligations and risks for employers and other duty holders. The Bill achieves "consistency" across the current federal legislative framework by lifting the different levels of protection to the highest current standard and introducing new protections.³
4. By moving to the highest standards and significantly expanding the coverage and reach of federal discrimination laws, the Bill increases the potential liability of employers beyond current legal obligations.

¹ Explanatory Notes page 1; Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Exposure Draft of Human Rights and Anti- Discrimination Bill 2012
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/info.htm

² *ibid.*

³ Explanatory Notes *op. cit.*; Attorney General Fact Sheet Human Rights And Anti-Discrimination Bill 2012.

Key changes such as a subjective test for discrimination,⁴ the expanded grounds⁵ and a reverse onus of proof⁶ mean that employers will face an increased compliance burden and the increased likelihood of having to defend claims.

5. Significantly, while “harmonisation” of federal anti-discrimination laws may be proposed there is no intention to harmonise or repeal existing state and territory anti-discrimination legislation.⁷ Significant overlaps and inconsistencies remain with these laws and with the Fair Work Act 2009. Employers face significant uncertainty ahead if the Bill becomes law as they confront the new federal provisions and their, as yet unknown, effect on differing anti discrimination law in each jurisdiction.
6. Employers are to be liable for the discriminatory behaviour or actions of their agents (including their employees, contractors and volunteers)⁸ on expanded grounds of discrimination which include industrial and medical history.⁹ They must take reasonable precautions and exercise due diligence to ensure those they are responsible for avoid the conduct.¹⁰ While employers have been vicariously liable for the actions of workers and others in the past, the practical compliance implications of this expansion in the legislation are daunting and will not reduce compliance costs for business.
7. Further, once a claim is made, the onus of proving any actions were not discriminatory will fall to the employer with the Government taking the convenient view that the employer is in the best position to know the reason for the alleged discriminatory action and to have

⁴ Exposure Draft Bill s19.

⁵ Exposure Draft Bill s17; s22.

⁶ Exposure Draft Bill s124.

⁷ Regulatory Impact Statement (RIS) page 2.

⁸ Exposure Draft Bill s56 - s58.

⁹ Exposure Draft Bill s22.

¹⁰ Exposure Draft Bill s57(3).

access to the relevant evidence.¹¹ In practice reverse onus is intended to, and does, advantage claimants.

Key changes in the draft legislation

8. The Bill has a large number of changes which will increase the burden on employers in attempting to defend their position and will inevitably significantly increase the number of claims. These include:

Protected attributes

9. Protected attributes are those personal characteristics of an individual which the Bill will protect from discrimination.
10. In addition to consolidating the existing protections, the Bill extends the protections to prohibit discrimination on the grounds of sexual orientation and gender identity. Other extended protections applying to employment specifically, and separate to those already contained in the *Fair Work Act 2009*, are discrimination on the grounds of family responsibility, industrial history, religion, political opinion, social origin, nationality or citizenship and medical history. The Bill does not define political opinion, social origin, religion, nationality or citizenship or medical history. The definition of "industrial history" is based on the definition of "industrial activity" in the *Fair Work Act 2009*.
11. Employers will confront problems with this duplication of regulation and creation of new grounds on which to litigate, particularly as complainants will not have the cost constraints in current legislation nor will they carry the burden of proof once they have "established" the elements of discrimination. The Bill elevates the regulatory exposure of employers as discrimination on the basis of these expanded attributes, taken from the current Federal equal

¹¹ Explanatory Note para 463.

opportunity in employment legislation, was subject to conciliation, but was not unlawful (with the exception of nationality or citizenship under state legislation).

12. Employers have already experienced a major expansion of discriminatory and protective provisions in the *Fair Work Act 2009*. The inclusion of these expanded grounds in a Bill intended to rationalise, streamline and simplify regulation raises the question as to why it is necessary to duplicate these protections already present in the *Fair Work Act 2009* in new and separate legislation. Employer submissions to the 2012 review of the *Fair Work Act 2009* demonstrate the high level of employer concern about the operation of Part 3-1 of the *Fair Work Act 2009*.¹² These concerns include the all-encompassing nature of a “workplace complaint” the reversed onus of proof and the susceptibility of Part 3-1 to abuse by vexatious employees. This unfair and unbalanced workplace regulation is now to be compounded with similar provisions in Federal anti discrimination legislation. Such duplication will only encourage “forum shopping” by aggrieved employees.
13. Additionally, the Bill extends protection to attributes which do not presently exist but may “possibly” exist in the future. This will create practical and legal difficulties for employers to manage and will compound the difficulties in defending their actions.

Definition of discrimination

14. The Bill sets out the elements of discrimination as being:
 - A person must have a protected attribute or attributes.
 - The alleged discriminator must treat, or propose to treat, the person unfavourably. It is not necessary to make a comparison to any other person to determine whether treatment is unfavourable.

¹² <http://home.deewr.gov.au/submissions/FairWorkActReview/Initial.htm>

- The treatment or proposed treatment must be because the person has a protected attribute or a number of attributes. It is not necessary to have a discriminatory motive or for the person's attribute to be the dominant reason for their treatment. It is only necessary to establish that their protected attribute(s) was one reason for their alleged discriminatory treatment.
15. Further, the Bill provides that discrimination can occur where a "policy" (defined as a *"condition, requirement, practice"*) has, or is likely to have, the effect of disadvantaging people with a particular protected attribute or attributes.
16. The Bill further extends the meaning of having a protected attribute by having it include:
- *an associate of the person has the attribute (for example, a person is refused entry to a club because they are with someone who is Asian)*
 - *the person, or an associate, had the attribute in the past (for example, a person is not employed because of a history of mental illness)*
 - *the person, or an associate, may in the future have the attribute (for example, not permitting an employee to go on training because they will soon reach retirement age),*
 - *assuming the person, or an associate, has the attribute (for example, it would be unlawful for an employer to discriminate against an employee because they assumed that the employee or their associate was involved in union activities or had a medical condition)."*¹³

¹³ Explanatory Notes para 112.

What this will mean for employers

17. Changes to the definition of discrimination ("*unfavourable treatment*") in the Bill will significantly extend the range of conduct that is unlawful. The test of what constitutes unlawful conduct has moved from the current objective test to a subjective test based on the complainant's allegation that the conduct offends or insults them. The concept of discrimination as adverse, differential treatment has apparently been replaced with the concept of unfavourable treatment which is determined by reference to the alleged subjective effect or impact on the person with the attribute.
18. Consequently, employees and others at the workplace (eg customers, suppliers) can make a complaint if they are offended by words, conduct or a policy or condition of employment. Employers will have to disprove this offensive conduct allegation based on a subjective test of the effect on the complainant, and, with the removal of "less" favourable, will be unable to argue that they would have treated another person in the same manner.
19. This major change to include conduct that simply "offends" sets a very low threshold for complainants. It means that any communication or interaction between individuals that results in a person feeling offended, insulted or intimidated could be a cause for complaint. If the complainant has a relevant attribute (or a number of attributes), and this may be construed as a reason for the conduct which offends them, they can make a complaint.
20. Employer exposure to costly litigation is significantly increased and they are subject to the complexities of establishing that their actions are justifiable. For example, when recruiting for a job an employer chooses the applicant thought to be the best. Another applicant, with a protected attribute is not successful and claims discrimination. All the elements of the alleged breach are established and the employer is required to prove a defence. This will be a common occurrence with attendant loss of the employer's time and money.

21. It would appear that a comparator may still be used to establish the employer's alleged reasons for the unfavourable (not less favourable) treatment i.e. whether the unfavourable treatment was *because of* the protected attribute. So the stated rationale to simplify the test for discrimination by removing the comparator test in establishing discrimination does not appear to have been met in the Bill:¹⁴.

*".....the Bill defines discrimination by reference to unfavourable treatment only, rather than requiring the construction of a comparator. However, in many cases, a comparative analysis will be useful to determine whether the unfavourable treatment was because of the protected attribute."*¹⁵

21. Further the complexity and risk of unlawful conduct presented by the proposed legislation for employers is compounded by the extension of protection to a person based on their association with another person who has a protected attribute (which is to include industrial history, medical history, political opinion, etc) and the very broad definition of "associate". The attributes have been imported from the equal opportunity in employment discrimination regime in which protections were not extended to associates (and where recommendations were not enforceable). The protection afforded persons based on association is compounded by Section 45 of the Bill which excludes all exceptions in the Bill, other than *justifiable conduct*, from applying to associates and assumptions that a person or associate of a person has a protected attribute.

Burden of proof

22. The complainant will be required to establish a *prima facie* case that the unlawful discrimination occurred. The burden of proof then shifts to the respondent (the employer) to demonstrate a non-

¹⁴ RIS pages 22-23; page 85.

¹⁵ Explanatory Notes para 117.

discriminatory reason for the action, that the conduct is justifiable or that another exception applies.¹⁶

23. This is a significant departure from the current approach of applying the full burden of proof to the complainant in both Federal and State jurisdictions.

Exclusions

24. In introducing a general exceptions clause and moving from reasonableness in establishing a defence to “justifiable” conduct it is clear that employers are to be caught up in a new area of regulatory uncertainty, litigation and the setting of new regulatory standards. This much is recognised in the Regulatory Impact Statement (RIS):

*“Many businesses and not-for-profit organisations are likely to consider that the replacement of most existing specific exceptions and exemptions with a general principle increases uncertainty. This is because the definition of what is justifiable will be left to the Commission and courts to develop over time, rather than being specified in legislation. As a result, some businesses may become more cautious and either spend more on legal advice or potentially adopt less efficient practices to avoid challenge, such as not firing unproductive staff where they have a protected attribute. The extent of this behaviour cannot be estimated, but to help avoid this cost the measures at part 4) are also proposed. A small number of businesses may also incur legal costs in clarifying the new provisions through the courts. Over time, however, uncertainty should decrease as case law develops.”*¹⁷

25. The notion that the likely adverse consequences of uncertainty and conservation might diminish over time as case law develops brings to mind the introduction of federal unfair dismissal law in the 1990’s which spawned a whole new body of law, which continues to evolve,

¹⁶ Exposure Draft Bill s124.

¹⁷ RIS page 44.

and thousands of claims each year. Employers routinely adopt "*less efficient practices*" to avoid the time and cost such claims involve, or pay "go away money" to minimise their losses even in so-called unmeritorious claims. The message from this experience is clear – don't make law which is certain produce the same unproductive and unbalanced outcome

26. It also appears that the defence of justifiable conduct is only available where the respondent had a particular aim in mind. Unintentional conduct is not covered. It would also appear from s23 (3)b that the courts are to be asked to decide what is a legitimate aim or decision on the part of an employer or business in the course of deciding what is justifiable conduct.

Expanded range of those liable for discrimination – vicarious liability

27. Vicarious liability can be incurred in relation to any actions of employees, officers, volunteers, etc, in connection with their duties, except where the organisation has taken reasonable precautions and exercised due diligence.¹⁸ This uses the broadest coverage test that applies in some of the current legislation – "*in connection with their duties*" is a wider test than "*within the scope of actual or apparent authority*"¹⁹. Consequently, this test, combined with the extended protections, will enable any offence caused to someone because of their political opinions or industrial history, etc, which can be connected to duties at work to be potentially unlawful.

¹⁸ Exposure Draft Bill s57.

¹⁹ RIS page 54 The RIS describes "within the scope of actual or apparent authority" as "arguably more confusing " (page 44). It certainly is less all encompassing than "in connection with their duties".

28. Despite assurances in the RIS that:

*"Current distinctions are legalistic and technical only – adopting the current highest standard will simplify the law and have minimal practical impact."*²⁰

employer compliance requirements will be considerably expanded in attempting to meet their reasonable precautions and due diligence duties to cover the myriad range of possibilities arising from this change.

Costs

28. The presumption that each party bears their own costs in discrimination matters heard before the courts will remove existing disincentives to lodging a complaint. From our experience with adverse action claims under the *Fair Work Act 2009* this is the likely outcome of this proposed change in the Bill. The ability to award costs by the Fair Work Commission is a discretionary power as it is taken that the parties bear their own costs and no deterrents for unmeritorious claims. The outcome has been that applications are almost encouraged because the vast majority settle at the early stage (given the respondent's onus of proof and the legal costs of proceeding) and claimants will obtain additional money for very little output. As observed in the RIS, costs can exceed \$100,000 for defending complex discrimination cases.²¹

Likely increase in claims

29. Given the expansion in protected attributes, the changed definition of discrimination and the respondent's onus of proof, employers do not take comfort from the assurances that the legislation is intended to

²⁰ RIS page 54.

²¹ RIS page 36.

enhance the Australian Human Rights Commission's ('AHRC') ability to dismiss "*clearly*" unmeritorious complaints.²² Our experience with adverse action claims under the *Fair Work Act 2009* has demonstrated that to the contrary, legislation framed in this manner will encourage complaints and litigation. Establishing unmeritorious claims is unlikely to be an easily resolved or straightforward matter, particularly given the expanded ambit of the proposed legislation. Again, employer submissions to the 2012 Review of the *Fair Work Act 2009* concerning the operation of its general protection provisions demonstrates this widespread experience. Adverse action claims continue to escalate.²³

30. Further, even if a claim is closed in accordance with s117 of the Bill, a claimant may then take action in the Federal Court. In addition, the Bill extends the range of those who may make a complaint so that unions may make complaints on behalf of others.

New role for AHRC and extended compliance activities

31. The AHRC is able to "certify" an organisation's policies and procedures, as well as create industry-specific "voluntary codes" and provide other forms of guidance and assistance. There is clear potential for a raft of additional compliance requirements and interventionist activities on the part of the regulator. Whilst much of what is proposed in the Bill is presented as assisting duty holders to comply, in reality employers and business will face additional red tape, time and effort expended on adjusting their activities to conform with the requirements of the AHRC. While this increase will be likely to be used to justify expansion of the regulator, in size and influence, it will do little to assist employers to focus on their dual role of employing Australians and being productive, efficient and competitive providers of goods and services.

²² Explanatory Notes page 3.

²³ Fair Work Australia Annual Report 2011-12 page 26; Fair Work Commission Quarterly Reports Jul-Sept 2012 – Jul- Sept 2011.

Conclusion

32. The significant regulatory change proposed in the Bill continues the ongoing and continuous legislative change business has had to manage in the past few years. In addition to dealing with the introduction of the *Fair Work Act 2009* and the complexities of modern awards, employers have confronted major legislative changes in work health safety, parental leave, superannuation, gender equity and now discrimination laws. There have been inquiries or other initiatives taken to expand workplace regulation on issues such as domestic violence, bullying, "work life balance", "flexible" work and "secure" work which remain on the political agenda. This list does not include other major changes in taxation and corporate regulatory law.
33. The collective weight of these and many other areas of regulation, especially to the extent that they reflect over regulation or poorly conceived regulation, has a negative impact on the ability to innovate, expand and produce jobs. This is demonstrated to us on a daily basis with employers seeking advice and representation on a multitude of compliance, regulatory and strategic issues and how to manage the cost of doing so.
34. Additional regulatory complexity, such as is introduced by this Bill, places additional constraints on workplace flexibility, requires additional resources to manage legislative obligations and contributes to declining workplace productivity and higher levels of workplace conflict.
35. The net long term effect is already evident in Australia's higher costs, reduced competitiveness and reduced jobs.