

EXPOSURE DRAFT of HUMAN RIGHTS and ANTI-DISCRIMINATION BILL 2012

SUBMISSION BY

***SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES'
ASSOCIATION***

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Shop, Distributive and Allied Employees' Association (SDAEA)

Submission to the Senate Legal and Constitutional Affairs Committee

Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

The Shop, Distributive and Allied Employees' Association (SDAEA) is Australia's largest single trade union with over 210,000 members. Its principal membership coverage is the Retail Industry. It also has members in warehousing and distribution, fast food, petrol stations, pharmacy, hairdressing, beauty and the modeling industries.

Given that discrimination, harassment and sexual harassment are predominantly found in employment, especially in the service industries, the SDAEA has great concerns with the current system and is very interested in improving the effectiveness of anti-discrimination legislation in promoting equality, and making real progress towards eliminating the incidence of these behaviours.

We welcome this opportunity to comment on the Exposure Draft of *The Human Rights and Anti-Discrimination Bill 2012*. We note, however, the very short time frame at a particularly busy time of the year, in which to absorb and digest what is very lengthy and complex legislation, and to provide comment. We, therefore, foreshadow that we may wish to provide further comment on the legislation in the future.

The SDAEA supports in principle the consolidation of the relevant legislative instruments.

However, it must be recognized that such an exercise does carry with it many challenges which must be effectively dealt with.

Protection of Human Rights

The most fundamental challenge in this exercise of consolidation is to ensure that basic human rights and freedoms are protected and, if possible, enhanced in the drafting of new legislation.

Among the most basic of human rights and freedoms are freedom of expression, freedom of association and freedom of belief. The only acceptable and valid caveats on such freedoms are where their exercise would seriously endanger public safety or security.

The fact that someone may say something which offends or upsets another person is not a sufficiently valid reason to curtail their freedom of expression. To provide that someone who merely offends is guilty of an offense opens the door to the banning of all but the most benign publications and even the gaoling of anyone who voices a view on any controversial matter. This is fundamentally anti democratic and the first step towards totalitarianism.

Freedom of religious belief is a fundamental human right. It is recognised as such in international covenants to which Australia is a signatory. It is a responsibility and duty of the government to give effect to the covenants to which it is party.

The Universal Declaration of Human Rights at Article 1 states:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Article 8 of the same document states:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

The International Covenant on Civil and Political Rights at Article 18 states:

“1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2 No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

3 Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”

Anti discrimination laws, applying these fundamental principles, can contribute to the well-being of society. Conversely, where these principles are not fully observed there can be a curtailment of basic human rights.

The government has an overwhelming responsibility to ensure that its' legislation protects and enhances human rights.

The SDA is concerned with the language used in the draft bill in regard to “exceptions”. The word ‘exceptions’ in the context of the legislation seems to imply special “permission to discriminate”. In the case of religion and individuals or religious organisations being free to operate without undue state control of their affairs, this should not be seen as “permission to discriminate” but rather as protection of basic human rights.

It follows from this that individuals or organisations manifesting particular views or beliefs must be accorded appropriate protection by the law.

The SDA is concerned that the section of the proposed legislation dealing with the provision of goods and services does not adequately protect the basic human rights of those expected to provide the goods or services. In accordance with the United Nations instruments cited above individuals must have the right to act or not act in accordance with their conscience when charged with the matter of having to determine whether to provide a particular good or service.

Further, where a particular facility such as a school or aged care facility is operated by an organisation in accordance with its beliefs, it must be free to select the participants. To provide otherwise would amount to endure state interference in matters in which the state should not be involved and would serve to undermine the basic human rights of those involved.

Workplace Issues

1. Inherent Requirements

An area of grave concern is Clause 24 *Exception for inherent requirements of work*. This clause has the ability to seriously undermine the effectiveness of the Act, and as such the SDAEA objects to the provisions of Clause 24 in the strongest possible terms.

Clause 24 allows discrimination on any or all of the protected attributes where it is connected with work, and where the person is unable to carry out the “inherent requirements” of the job because of the protected attribute or combination of attributes.

“Inherent requirements” is not defined in the Bill, and the Explanatory Memorandum states that ‘inherent requirements’ of particular work is an existing and well-understood exception to unlawful discrimination in work in both domestic and international anti-discrimination law. The SDAEA’s experience is that the term is not well understood, and in fact is grossly abused by employers as a mechanism to discriminate against, and terminate employees.

The provisions of Clause 24, as they now stand, would conceivably allow Retail employers (the largest employers of women in Australia) to discriminate against employees, including in regard to offering or terminating employment, and determining or applying terms or conditions of employment, for example:

- Retail employers could say to employees with family responsibilities that their business is a 24 hour business and it is an inherent requirement of the job to be available to work whenever the store is open for business.
- Retail employers could say to employees with family responsibilities and no child care after 6pm or on weekends, that their business is open nights and weekends and that it is an inherent requirement of the job to work at least one or two nights per week and at least one day every weekend.
- Retail employers could say to pregnant employees that it is an inherent requirement of the job to stand for a 12 hour shift, or climb ladders to stock shelves, or lift heavy weights.
- Retail employers could say to a mature age worker that it is an inherent requirement of the job to be able to squat, and that they need to pass a ‘squat test’.
- Retail employers could say to an employee needing time to breast feed or express milk during a shift, that it is an inherent requirement of the job to be on the shop floor for the full shift, and not to be taking extended breaks.

These are not just matters of theoretical possibility and in fact, the SDAEA has had members report that retail employers have already actually made these statements to employees, usually preceding them with “I have a business to run” and following them with “If you can’t meet the inherent requirements of the job, then you will have to leave.”

Current legislation has offered employees some protection, if they are aware of it. It has, however, only applied in the areas of Disability, Age and Sex Discrimination. By contrast, the more expansive provisions in the exposure draft will make it easier for employers to discriminate on the basis of any of the protected attributes by claiming that it will prevent the employee from being able to meet any ‘inherent requirement’ of the job the employer nominates.

Further, the application of this exception across all the protected attributes is not accompanied by a requirement to make reasonable adjustments across all the protected attributes. The only protection available to employees will be to become involved in lengthy arguments as to whether the requirement is an “essential element” of the position, the results of which would be very uncertain. In these scenarios the onus is on the employee who is in a vulnerable situation, to be informed of their rights, and to argue for their retention at the workplace, when it should be clear in the legislation that these scenarios would constitute discrimination.

Current State anti-discrimination legislation does not have these wide reaching exceptions.

The Parliament of Australia Senate Committees website information in regard to this Bill states “The Bill does not propose significant changes to existing laws or protections but is intended to simplify and clarify the existing anti-discrimination legislative framework.”

Clause 24 of the Exposure Draft does propose significant change to, and extension of, exceptions under existing laws and will mean that many workers will be disadvantaged by it.

The SDAEA recommends that Clause 24 of the proposed legislation be amended so that it includes what is currently provided in separate legislation. It may be argued that this is not a simplification process but neither does it extend the exception of “inherent requirements of the job” to additional protected attributes. Existing clauses are supported by precedent case law, which gives employers and employees some certainty as to what is allowable. The SDAEA therefore recommends that Clause 24 of the Exposure Draft be amended along the lines of what we have set out in Appendix 1.

2. Compliance Codes

The SDAEA has concerns in regard to the Compliance Codes as they are described in the Exposure Draft:

- With their role, especially as the Commission can:
 - make guidelines to assist people to avoid engaging in unlawful conduct
 - review organisations’ policies or programs for compliance, and
 - receive and publish “Action Plans”.

- Clause 76(4) states that the Commission may make a compliance code on application from one or more persons or bodies. This means that separate organisations could apply to have their own Compliance Code. It needs to be very clear in the legislation just who can apply to have a Compliance Code. The idea that any individual employer could have their own code is potentially unworkable. A plethora of codes could emerge. There should be no capacity for codes below the level of industry wide application.
- Their status as a complete defence against claims of discrimination is problematic, without it being clear how it will be established that they have been fully implemented and adhered to. This needs to be clear in the legislation.
- Consultation with unions and employees is not required in their development, and in fact it is stated in the section of the *Legislative Instruments Act 2003* with which the Commission will be required to comply, that an instrument which relates to employment is an example of a circumstance where consultation may not be required. Consultation with relevant unions should be mandatory in the development and review of any Codes of Compliance, and be specified in the legislation.
- The standards by which the AHRC will judge Compliance Codes to be satisfactory (other than clause 76(2)(b) which requires them to be consistent with the objects of the Act), and how those standards will be established, with what consultation, are all yet to be determined.
- The longevity of Compliance Codes, despite the requirement for 5 year reviews, as again, unions and employees are not required to be consulted.

The SDAEA is supportive of organisations and Industry bodies developing pre-emptive measures and dedicating resources to the prevention of discrimination.

The SDAEA would prefer to replace the Codes of Compliance described in the Exposure draft with the model used by Work Safe, where Standards are developed at a National level, in genuine consultation with all stakeholders, including unions, and all organisations are expected to adhere to them, unless they can demonstrate why that is not appropriate. This approach should be clearly reflected in the legislation.

Employers are very aware of safety issues and generally treat Equal Employment Opportunity issues on the same continuum as bullying and harassment, often including them in the same policy and grievance procedure documents.

They are also very familiar with Work Safe Australia Standards and Codes of Practice, and there is a high level of engagement by employers and unions in the process of their development.

3. Positive duty

The SDAEA notes with regret that the Bill does not contain a positive duty on public and private sector employers to eliminate discrimination and sexual harassment or to promote equality.

Under Section 106 of the federal *Sex Discrimination Act 1984*, employers may be held “vicariously liable” unless they take “all reasonable steps” to prevent sexual harassment from occurring. Case law and AHRC Guidelines have for some time informed employers as to what these steps are. Our experience, supported by our research, demonstrates that few employers are taking all of these steps. It is time they were legally obliged to do so, before complaints are made.

A concerning number of companies choose not to devote sufficient resources to taking “all reasonable steps” to prevent sexual harassment and discrimination, particularly failing to make their policies and procedures known to all their staff, and properly training them. Therefore there is a risk of people “falling through the cracks” (i.e. employees experiencing discrimination or sexual harassment) and making complaints.

This “hope for the best” approach is a characteristic of poor management and would not be acceptable in other operational areas of the business. At worst, it is a callous and dismissive mentality to the severe impact on individuals who experience discrimination and harassment and at best, reveals a poor understanding of the wide reaching implications for the whole of the workplace, as well as the family and community. This situation exists despite the existence of very good educative material produced by AHRC and the Equal Opportunity for Women in the Workplace Agency, which is readily available.

The creation of a positive duty upon employers would, if enforced, have a positive effect in many areas of employment. It would, undoubtedly have a positive impact on workforce participation and on the productivity and economic prosperity of the nation.”

The SDAEA recommends that these views be reflected in the Bill.

4. ‘Family and caring responsibilities’ as a ground of discrimination

The term ‘family responsibilities’ should be changed to ‘family and caring responsibilities’ throughout the draft Bill to make it consistent with the terminology used throughout the *Workplace Gender Equality Act 2012* and in section 351(1) of the *Fair Work Act 2009*.

‘Family and caring responsibilities’ as a ground of discrimination, should go beyond employment and be unlawful in all areas of public life.

5. The extension of ‘reasonable adjustments’ beyond disability

The obligation on employers to make ‘reasonable adjustments’ to accommodate the needs of people with a disability, is well known and accepted.

Further to our comments on 'inherent requirements', we believe that this concept should be extended to all protected attributes.

In particular, the requirement to make reasonable adjustments in the workplace should be extended to pregnant employees and women and men with family or caring responsibilities. These are fundamental equity issues and also have repercussions in regard to Australian fertility rates and workforce participation.

In the Human Rights and Equal Opportunity Commission Report, "Pregnant and Productive – It's a right not a privilege to work while pregnant" (1999), the report notes "Policies and laws that promote the harmonisation of work, pregnancy and family responsibilities must apply and be seen as applying equally to men and women. In the context of pregnancy and work, it is essential that policies and laws treat pregnancy and family responsibilities as neither a disability nor a liability, rather as a part of the normal cycle encountered by many workforce participants."

The House of Representatives Report "Who cares? The report on the Inquiry into better support for Carers" (May 2009) identified the significant detrimental effect that inflexible work practices have on carers' participation in work. The current provisions in the *Fair Work Act 2009* (FWA) are insufficient. The FWA contains a limited right for employees with 12 months service to request flexible working arrangements only if they have children under school age or a child with a disability under 18 years of age. The employer can refuse the request on reasonable business grounds, but is not required to demonstrate the existence of these grounds, furthermore the employee has no right of appeal.

In the interests of increased participation in the workforce of parents and carers, and the consequent opportunity for the increased emotional, psychological and physical well being of carers and their dependents, there should be a requirement on employers to make reasonable adjustments in their workplaces to accommodate the needs of parents and carers, unless to do so would cause them unjustifiable hardship. If employers claim unjustifiable hardship, then they should be required to demonstrate the existence of such unjustifiable hardship.

6. Consultation when making a Disability standard

The making of a disability standard – Clause 71(3) of the draft Bill, refers to Part 3 of the *Legislative Instruments Act 2003* in regard to consultation. This section specifically states that an instrument that relates to employment is an example of a circumstance where consultation may be unnecessary or inappropriate. There is no mention of consultation with unions or employees. The Bill must be much stronger and clearly require consultation with stakeholders, including unions and employees, when making disability standards which impact on workplaces and employment.

7. Legal advocacy and advice for complainants

The SDAEA welcomes the reduction of costs in the jurisdiction, where each party to a court dispute bears their own costs.

However, the complaints process in anti-discrimination jurisdictions is very legalistic. Although the complaint process for Australia's anti-discrimination laws is intended to be efficient, informal and low cost for both complainants and respondents, this is not our experience.

It is common for companies to attend conciliations with a solicitor and/or barrister to represent them and the complainant can be faced with a 'wall of suits' on the other side of the table. The individual may have union representation, but equally may just have their mother or husband to support them. Needless to say this is a very intimidating situation for the worker, who is likely to be completely out of their depth in trying to argue a reasonable settlement.

To try to create some balance in the situation, and therefore increase the likelihood of a fairer outcome, individuals feel they are forced to obtain and pay for legal representation at the conciliation stage. Legal representation is definitely required post an unsuccessful conciliation, and depending on the solicitor, they may also recommend the services of a barrister. This is all very costly and beyond the means of most workers, especially if their situation has meant that they are no longer employed. Free or low cost legal advocacy and advice should be made available to complainants to assist them through the process.

8. Better penalties and remedies

Current anti-discrimination jurisdictions do not provide adequate penalties and remedies for breaches of the law.

The consolidated Act should contain civil penalty provisions similar to those in the FWA which can assist a complainant with mitigating their costs.

The Act must give the court the powers to;

- Provide appropriate remedies to reflect the seriousness of a complaint and which properly values the loss suffered in discrimination cases, including future loss of pay and career advancement
- Provide significantly higher penalties, especially when 99% of claimants lose their employment as a result of making a claim. Current poor payouts are a deterrent to pursuing claims.
- Ensure that sufficient remedies are available to not only compensate a complainant but also to act as a deterrent against discriminatory practices
- Allow representative complaints provisions which will enable organisations to engage in strategic litigation on behalf of complainants

Chapter 4 – Compliance and Enforcement of the *Fair Work Act 2009* provides penalties and remedies for breaches, including for instances of adverse actions taken on the basis of protected attributes in anti-discrimination law. The SDAEA advocates that a similar model be adopted in the *Human Rights and Anti-discrimination Act*, which would provide consistency across the jurisdictions.

APPENDIX 1

Clause 24 Exception for inherent requirements of work

- (1) The exception in this section applies in relation to the protected attributes of Sex, Age and Disability.

Exception for inherent requirements in regard to Sex Discrimination

- (2) It is not unlawful for a person (the **first person**) to discriminate against another person on the protected attribute of Sex, or a combination of the protected attributes of Sex and disability and/or age if:

- (a) The discrimination is connected with work and work-related areas; and
- (b) The other person is unable to carry out the inherent requirements of the particular work because he or she has the protected attribute of Sex or a combination of protected attributes; and
- (c) The other person is unable to carry out those inherent requirements.

- (3) It is a genuine inherent requirement of the particular work, in a particular position, to be a person of a particular sex (in this subsection referred to as the **relevant sex**) if:

- (a) The duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of the opposite sex to the relevant sex;
- (b) The duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex;
- (c) The duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;
- (d) The duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex;
- (e) The occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex;
- (f) The occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position and:
 - (i) the premises are not equipped with separate sleeping accommodation and sanitary facilities for persons of each sex;
 - (ii) the premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of the opposite sex to the relevant sex; and
 - (iii) it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex;
- (g) The occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress; or

- (h) The position is declared, by regulations made for the purposes of this paragraph, to be in a position in relation to which it is a genuine inherent requirement of the particular work to be a person of a particular sex.

Exception for inherent requirements in regard to Age Discrimination

- (4) It is not unlawful for a person (the **first person**) to discriminate against another person on the protected attribute of Age, or a combination of the protected attributes of Age and disability and/or Sex if:
 - (a) The discrimination is connected with work and work-related areas; and
 - (b) The other person is unable to carry out the inherent requirements of the particular work because he or she has the protected attribute of Age or a combination of protected attributes; and
 - (c) The other person is unable to carry out those inherent requirements.
- (5) In deciding whether the other person is unable to carry out those requirements because of his or her age, the following factors should be taken into account:
 - (a) The other person's past training, qualifications and experience relevant to the particular employment; and
 - (b) If the other person is already employed by the employer – the other person's performance as an employee; and
 - (c) All other relevant factors that it is reasonable to take into account.

Exception for inherent requirements in regard to Disability Discrimination

- (6) It is not unlawful for a person (the **discriminator**) to discriminate against another person (the **aggrieved** person) on the protected attribute of Disability, or a combination of the protected attributes of Disability and Sex and/or Age of the aggrieved person if:
 - (a) The discrimination is connected with work and work-related areas; and
 - (b) The aggrieved person is unable to carry out the inherent requirements of the particular work because he or she has the protected attribute of Disability or a combination of protected attributes; and
 - (c) The aggrieved person is unable to carry out those inherent requirements, even if the relevant employer, principal or partnership made reasonable adjustments for aggrieved person.
- (7) For the purposes of paragraphs (4)(b) and (4)(c), the following factors are to be taken into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the particular work:
 - (a) The aggrieved person's past training, qualifications and experience relevant to the particular work;
 - (b) If the aggrieved person already works for the discriminator – the aggrieved person's performance in working for the discriminator;
 - (c) Any other factor that is reasonable to take into account.

SDAEA RECOMMENDATIONS

- 1. The legislation must be redrafted to ensure that fundamental human rights are fully protected.**
- 2. Clause 24 should be amended so that it includes what is currently provided in separate legislation, which while not simplifying the legislation, neither does it extend the exemption of “inherent requirements of the job” to additional protected attributes.**
- 3. The requirement on employers to make reasonable adjustments in their workplaces should be extended across all the protected attributes, but especially to include pregnant employees and those with family or caring responsibilities. It should be clear that these reasonable adjustments should be made unless those adjustments will cause unjustifiable hardship to the employer, in which case the employer should be required to demonstrate the existence of these unjustifiable hardships.**
- 4. If there are to be Codes of Compliance then the legislation should be redrafted so that they are consistent in drafting and application with the model used by Work Safe, where Standards are developed at a National level, in genuine consultation with all stakeholders, including unions, and all organisations are expected to adhere to them, unless they can demonstrate why that is not appropriate.**
- 5. The term ‘family responsibilities’ should be changed to ‘family and caring responsibilities’ throughout the draft Bill to make it consistent with the terminology used throughout the *Workplace Gender Equality Act 2012* and in section 351(1) of the *Fair Work Act 2009*.**
- 6. ‘Family and caring responsibilities’ as a ground of discrimination, should go beyond employment and be unlawful in all areas of public life.**
- 7. There should be a creation of a positive duty for equal treatment of people at work who possess nominated attributes or who are in nominated circumstances. This positive duty should include mandatory actions employers are expected to take to ensure that they provide a discrimination free workplace.**
- 8. Free or low cost legal advocacy and advice should be made available to complainants to assist them through the complaints process.**
- 9. The Bill should adopt a guide to damages for use by judicial officers in discrimination cases, similar to the model used in Chapter 4 – Compliance and Enforcement of the *Fair Work Act 2009*. There should be the capacity to award compensation and punitive damages.**