



## COSBOA Submission to the Senate Inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

December 2012

*Small business people are not a group that should be vilified and blamed for things they have not done.*

*Small Business people should not be asked to do what is not possible.*

*Small business people should be given the same human rights as anyone else in society*

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The Council of Small Business Organisations of Australia (COSBOA) appreciates the opportunity to provide a submission to this inquiry.

Our organisation was founded in 1979 and was incorporated in 1985. COSBOA has a proud history of strong advocacy on small business issues ranging from taxation and workplace relations, through to competition law and retail tenancy. The Council of Small Business Australia is the country's peak body exclusively representing the interests of small businesses. Our goals are to:

- Promote and support the development of small businesses in Australia;
- Advocate to advance the interests of small business in Australia, including through policy change and regulatory reform;
- Foster an increased awareness and understanding of the role of small business in Australia amongst public servants and elected government officials, larger businesses, the media and the general community.

We engage our members and provide opportunities for them to influence outcomes affecting their business, and their industry. We act as a conduit for information from our members to Government and other organisations, and vice versa. A key activity for us is to facilitate introductions between member organisations and businesses with relevant customers, suppliers, service providers and regulators. Communication is the foundation of any good business and any good relationship, and we endeavour to be an active conduit for information.

We exist because small businesses don't have the time, the resources and often the expertise that is required to be alert to the myriad of legislative and regulatory change that affects them on an ongoing basis. Our efforts are focussed on providing accurate and timely input into decisions which will affect small businesses. Our members provide essential input to ensure the quality of our representation, as well as the substance and the credibility to back it up.

Our relationship with Government is critical to ensure that we're aware of what's happening that might help or hinder business, and equally, to convey any new or emerging issues that need to be addressed to support the small business community.

We have provided a submission based on the changing nature of society, the changing needs of people seeking employment and the changing approach to workplace relations and workplace behaviours for small businesses.

Our response is based on the facts that:

- Small businesses are run by people.
- The small workplace is inherently different from the larger workplaces where there are pay clerks, OH&S advisors and other experts. The workers in a small workplace have closer relationships with each other, and this includes the business owner.
- As at 30 June 2011 some 96% of businesses were small, they employ less than 20 people. These are the largest number of workplaces yet the systems aimed at workplaces are designed for the large workplaces.

- The small workplace will consist of a group of people all earning a living. The owner of the business and the employees will all earn income from the business.
  - Small business people have a better relationship with their employees than to be found in larger businesses. This reflects the fact that we work together on a day to day basis and rely upon each other for well being, income and health.
  - We have also used information from a recent report by The Australia Institute, “[An unhealthy obsession](#)”, that shows small workplaces to be healthier and less stressful than large workplaces.
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### **The Need for a change**

The need to combine the various pieces of legislation covering discrimination has been obvious for some time and the government is to be congratulated on undertaking this difficult task. Combining various Acts into one should make it easier to manage, communicate and understand issues and processes. Combining the Acts will remove complexity for any complainants and also for employers. It should make the task of the regulator, the Australian Human Rights Commission, easier to manage and if completed professionally the impact on small business people should be limited to the very small numbers who transgress through discrimination.

### **Onus of Proof**

The contentious area for small business people is the part that covers the onus of proof. There is concern in the sector that a small business person may be forced to prove their innocence against a vexatious claimant. There is also concern that an employer who does not have the skills to prove their innocence will be disadvantaged by the new process.

The move to shifting onus of proof only when the complainant has established a prima facie case is a step in the right direction. Previously the employer was immediately assumed to be guilty until they could prove their innocence, now at least there is a need to show that an event has actually occurred and that a case may need to be answered. This should save some small business people time and money, as well as alleviate stress.

There is still the issue that an employer is considered to be a non-human structure of some sort. This may be true for larger businesses but is obviously not true for smaller businesses that are run by a person or two. This process of moving the onus of proof does not allow for the rights of an employer:

- who has English as a second language
- who has a low education level
- who is under stress and duress due to personal or business situations
- has a mental health issue
- does not understand the process they are facing
- comes from a different cultural background.

It appears that the rights of a self employed person to natural justice will be removed once a prima facie case has been established. This is wrong and a better way needs to be developed in the case of small business.

### **The Australian Human Rights Commission as a regulator**

The AHRC is an august body with highly skilled and experienced commissioners and employees. However the one area where we believe it needs to improve is its understanding of small business and its interaction with small business people. The AHRC continues to view employers as institutions and not as people. We also do not believe they currently have the attitude and understanding needed to properly regulate this new process.

For example if an employee makes an accusation that the AHRC considers to have a prima facie case then the employer will be forced to prove their innocence. The experience that we have with small business people over many decades is that it is a rare small business person who will be able to prove their innocence without employing legal advice. This is a cost to the person that should not occur. Our experience is that many small business people either pay a fine or pay an ex employee 'go away' money just so they can get on with their business not because they are guilty of any wrong doing.

We need a process that ensures fairness for all people involved and there needs to be checks and balances on the AHRC to ensure that their ideology and lack of awareness of the needs of small business does not disadvantage any person or groups in this process.

### **The reality of discrimination**

We have a concern that small business people continue to be vilified and accused of behaviour that in the main does not exist. Last year we understand that there was some 2,600 complaints made to the AHRC concerning discrimination and of these some 150 went to court. When it is considered that there are over 2.5 million small businesses in Australia who employ some 5 million other people than the problem is not one that should be exaggerated, and certainly we should not be blaming small business people when over 98% of them are not doing anything wrong.

Any discussion around discrimination should always include a statement that the small business community is actually a group of people who employ other people from all groups and backgrounds and do so without problems or conflict except in a very small number of cases. The AHRC exists for the small number of people who have been wronged and need assistance or compensation and do a good job in those few cases.

Small business people should not be vilified to meet the ideological need of a few people. Reality is far better than what is communicated. Examples of the AHRC's lack of understanding about small business people can be found on their website. Below we have copied some statements from the AHRC website with our comments in bold. The first three statements are on a webpage with the heading "Help for Small Business".

*These responsibilities (of an employer) are set out in a range of Commonwealth and state and territory anti-discrimination laws - the goal being to protect people from unlawful behaviour. **This statement asks a small business person to have the same skills, knowledge, time and resources as big business. This asks a small business person to do what is not possible for one person to achieve.***

*A significant number of complaints received each year by the Commission are against small business, which reflects the unique working conditions that occur in many small business environments. **This statement shows a lack of due diligence from the AHRC. The use of hyperbole to vilify a group of 2.5 million people when the actual number of complaints is minute is unacceptable.***

*For instance, the potential for harassment to occur in the context of close working relationships, where employees are on familiar terms with each another, can be high. **This statement is completely wrong. The recent [report from the Australia Institute](#) states the opposite – “Interestingly, employees of small businesses report feeling more comfortable discussing work life and workplace issues with their managers than employees of medium and large organisations. This is likely to reflect the relative proximity of employees to the senior management and the capacity of management in small business to implement changes in response to feedback from employees.” Small business workplaces are better because of familiarity and closeness of the workers.***

The AHRC website also offers some advice as follows:

*Employers in small business should nominate themselves or a responsible senior employee as a discrimination or harassment complaints officer. This person should be provided with any training or resources offered by employer organisations, small business associations, industry associations, the Australian Human Rights Commission (the Commission) or state/territory anti-discrimination agencies. The general principles that apply to informal and formal complaint procedures should be observed.*

This is plainly designed for big business. A small business person will not have the time or capacity to do this and most would not have even accessed the site or read this statement.

Under ‘vicarious liability’ the website provides the following “*It is recommended that employers take the following ‘reasonable steps’ to prevent harassment and reduce their vicarious liability:*” the website then lists seventeen actions that an employer should take. The word reasonable seems to be misplaced as this is not a reasonable expectation of a small business person.

Further reading of the AHRC website shows a distinct lack of respect for the small business person. The website must change and become small business friendly and reflect reality not ideology if it is to be in any way a useful resource.

It is also worth noting that discrimination also occurs against individual employers but is not recorded or considered to be a problem. If an employee abuses his or her

employer with racial slurs or sexist comments it is the employer who may end up being fined under vicarious responsibility processes. If an employee quits his or her job because he or she does not want to work for a woman or someone from a particular ethnic group then that is OK. It will cost that employer time and money to find a replacement and train that person so the act of discrimination has created a costs as well as stress. We cannot imagine an employee would ever be bought to task for discriminating against a person who employs them but we should make sure that there is fairness in the way any employer is treated.

Small business people need to have their rights protected in any process. COSBOA strongly recommends that the AHRC release a statement confirming that a small business employer is a person with rights and how they will ensure those rights are protected during any process they may instigate. Without a strong statement from the AHRC we will continue to lack confidence in a process where our human rights are removed.

**Ends**