



Australian Education Union

Submission to the

Senate Legal and Constitutional Affairs Committee Inquiry into Exposure Draft of Human Rights and Anti Discrimination Bill 2012

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Introduction

The AEU seeks to make a short submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012 in support of and to elaborate on the submission made by the ACTU.

The AEU made a submission to the anti-discrimination legislation consolidation project earlier in 2012 that expanded on our key concerns regarding:

- the meaning of and definitions (“direct” and “indirect”) for discrimination;
- the protected attributes;
- intersectional discrimination;
- the burden of proof;
- special measures;
- exceptions and exemptions;
- protected areas of public life, and
- complaints and compliance.

We would again direct the Senate Committee to these views.

The AEU broadly supports the intention behind the consolidation of anti-discrimination legislation, however we wish to make our views clear about the context with which the consolidation project occurred and the reasons for our disappointment in some areas of the resulting exposure draft.

In 2008, one of the first inquiries the then Rudd Labor Government embarked upon was the long overdue review of the 1984 Sex Discrimination Act. The AEU made a substantial submission to this review and seized the opportunity to advocate an expanded act to reinstate or reform the roles of the Australian Human Rights Commission, the Sex Discrimination Commissioner specifically and to redress the inertia in regard to gender equality from the previous 11 years.

The Sex Discrimination Act was amended in 2010, incorporating 8 of the review’s recommendations. A further 22 recommendations are being implemented through the consolidated Human Rights and Anti-Discrimination Bill.

In the Government’s own words on the Inquiry’s website, 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.”

But nevertheless, 11 of the original recommendations from the 2008 SDA review were rejected. The majority of those rejected recommendations related to the powers of the Commission, of the Sex Discrimination Commissioner and expanded investigatory measures that would have enabled better intervention into system discrimination rather than placing that burden on individuals to bring forth a complaint.

The AEU was supportive of the 2010 amendments to the Sex Discrimination Act, though we continue to reject the permitted discrimination by religious education institutions. We note that this exemption regrettably remains part of the exposure draft of this Bill.

The AEU nevertheless supports many of the major reforms proposed in this Bill, but is disappointed that advances to the prevention of sex discrimination have been constrained by being included in a consolidation process intentionally set out to not be expansive.

This submission should be considered supplementary to that of the Australian Council of Trade Unions, which the AEU wholly supports.

Main themes

The AEU is particularly supportive of provisions to enhance individuals' access to justice through the new burden of proof requirements, the removal of significant cost barriers, and the single definition of discrimination.

Protected Attributes

We also welcome the additional protected attributes, including protections against sexual orientation and gender identity discrimination and extension of protections against relationship discrimination to same-sex couples in any area of public life; the extended protection to 'associates of a person' with a protected attribute and to an assumption that a person or associate has the attribute; the coverage of discrimination and sexual harassment in any area of public life; and recognition of discrimination on the basis of a combination of attributes (or multiple discrimination).

We are however disappointed to not see 'survivor of family and domestic violence' included as a protected attribute, (which would have allowed a greater consistency between anti-discrimination laws and the industrial effort to eliminate family violence). Similarly while 'family responsibilities and caring responsibilities' are a protected attribute in terms of employment, we believe this protection should cover all areas of public life.

The AEU has already argued that the definition of 'carer' and 'family responsibilities' be broadened to include domestic relationships and cultural understandings of family, including kinship groups.

Finally, regarding protected attributes, the exposure draft does not include a clear process for reviewing protected attributes within any defined period of time, and should do so.

Compliance

In supporting the ACTU submission, the AEU does so particularly noting their concern for the meaningfulness of Codes of Compliance being developed without real consultation and regarding the likelihood for the "inherent requirements" of a job being exploited as an avenue for employers to discriminate.

The ACTU details well the current manner with which 'inherent requirements' clauses are being manipulated in workplaces and the lack of employees' understanding that discrimination can still be challenged.

The AEU holds similar reservations that the Codes of Compliance, even when developed with adequate consultation, could pose a significantly increased workload for both employers and representative bodies without the guarantee of significant behavioural change.

When considering compliance, the AEU understands that the consolidation process sought to minimise vexatious claims, but in doing so we believe the weight of anti-discrimination law is still being unduly placed on individuals and fails to appropriately facilitate an avenue for intervention at a systemic level.

As said earlier, the SDA review recommended a number of ways for the commission, commissioners and other representative bodies to advocate, intervene or investigate when systemic discrimination is evident/suspected in a workplace, industry, area of public life.

The Regulatory Impact Statement (2012, p.33) describes this option for reform of the role of the Human Rights Commission to “change to that of a formal regulator, similar to the Fair Work Ombudsman, promoting and monitoring compliance with Commonwealth anti-discrimination law by:

- formally requesting and approving an anti-discrimination plan from an organisation
- conducting compliance audits
- assessment of annual reports from organisations on compliance against the anti-discrimination plan, with the Commission directing further action if considered appropriate, enforceable through civil penalty provisions
- power to enter and audit premises where concerns about discriminatory behaviour have been reported
- power to commence an action for non-compliance itself, without having to wait for a complainant to formally commence action, and
- increased use of co-regulatory mechanisms to assist business to comply with their obligations”.

This option would have implemented some of the recommendations from the SDA review but to fully address systemic discrimination, recommendations 20, 29, 32, 33, 37 and 38 are also necessary. These would:

- 20. To give the Human Rights Commission the power to lodge applications in the Federal Court;
- 29. To give the Human Rights Commission powers to conduct formal inquiries;
- 32. To give the Human Rights Commission powers to intervene, without the leave of the Court, in cases;
- 33. To allow the Sex Discrimination Commissioner to monitor progress and report to Parliament every 4 years;
- 37. To allow the Sex Discrimination Commissioner to investigate breaches without a complaint;
- 38. To give the Human Rights Commission the power to commence action in Court against a breach of the Act without a formal complaint.

The AEU recognises that the Government is not committed to expansive reform through this process, however we believe that there is still room and indeed a need, for the consolidated Human Rights and Anti-Discrimination Bill to recognise the role of the Commission, or other

representative bodies like trade unions to represent individuals (or groups of individuals) where more widespread discrimination is evident.

In this regard the AEU is in favour of the courts granting standing to Commissioners, representatives of the Commission and trade unions particularly if the bill retains the ‘inherent requirements’ provision in its current form, because we believe this concept is being grossly misused by employers and that employees are unaware of their rights to challenge this defence.

The ACTU’s submission highlights this concern more fully.

Aside from an aversion to vexatious claims where an employer is indeed misusing the ‘inherent requirements’ excuse for discriminatory treatment, it is likely that this would not be done in isolated incidents but as a broader workforce strategy and hence requires the intervention of representative bodies to provide for better advocacy support and representation of vulnerable and disempowered complainants.

Recommendation:

Clauses 120 and 121 of the draft bill should be amended to include a capacity for organisations to engage in strategic litigation by lodging complaints on behalf of affected persons in court. The amendment should grant standing to organisations in similar terms to clause 89, but only where leave has been granted by the court following the application of a public interest test.

Recommendation:

The Australian Human Rights Commission should be provided with additional funding to permit the Commission to appear as amicus curiae in matters relating to the consolidated Act before the Federal Court.

The AEU supports the ACTU’s view and recommendations around the “inherent requirements’ and also that the Bill should re-order the sections addressing employer’s obligations to make reasonable adjustments so that it precedes the exception and is clearly a process which employers must consider before availing use of the exception for inherent requirements of work.

Public life

The AEU welcomes the decision to acknowledge intersectional (or multiple) discrimination, at clause 19, in that a complainant ‘doesn’t have to prove which attribute (of multiple) was the basis of the discrimination’.

The AEU understands that clause 19, does not extended beyond employment to all areas of public life.

In education, a protection against the possibility that students would experience intersectional discrimination remains valid and the consolidated bill should be expended to ensure this protection. The exemption for religious educational institutions would remain (despite the AEU’s rejection) but students in all other schools, universities and VET providers require adequate protections being offered to employees.

Notwithstanding a desire to see clause 19 apply to all areas of public life, the AEU notes that the proposed clause 50, which was to retain the extended coverage (clause 28F 2A and 2B of 2010 SDA amendment act) to students and employees at cross-school events (such as sporting carnivals) is now drafted in a less annotated way and simply refers to coverage to ‘any area of public life.’

In all circumstances where coverage of the bill is extended, but particularly when it involves the human rights of students, the AEU is of the view that institutions, organisations, employers, and the Commission more broadly do have a responsibility to engage in awareness campaigns and active promotion of the protections in the new legislation.

Prevention

It for the reasons above that the AEU believes that a ‘positive duty’ to actively promote equality and a ‘general provision’ (like that in the Race Discrimination Act, in order for us to comply with CEDAW), is required in the consolidated bill.

The inclusion of a “positive duty” on employers (and educational institutions) to actively promote gender equality, (recommendation 40 from the SDA review) was claimed to produce an unreasonable burden on Government departments, but should be seriously considered for review in 3 years’ time.

It is contradictory for Government to require such activities of employers with 100 employees through the Workplace Gender Equality Act but not for large government bureaucracies, and particularly to not require educational institutions to seek to eliminate sex discrimination, sexual harassment and promote gender equality when this intervention with a younger generation seems to be an imperative aspect of all the Government’s policies to reduce the gender pay equity gap, to encourage a greater share of domestic labor and care and to reduce violence against women.

Recommendation:

The Bill should contain a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote equality which clearly defines the equality goals it seeks to achieve and include effective monitoring and enforcement mechanisms. This ensures that protection against discrimination in Australia will continue to rely for effectiveness on the capacity of often vulnerable individuals to make complaints and otherwise assert their rights in public life.

To further provide for advocacy support and representation of vulnerable and disempowered complainants we support recommendations calling for increased funding for the collection of complaint data and to extend the educational roles of the Human Rights Commission (as well as to support working women’s centres and community legal centres to provide low cost legal advice) and believe this needs to be reconsidered by Government.

References:

Attorney General's Office, (2012), Consolidation Of Commonwealth Anti-Discrimination Laws Regulation Impact Statement
<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws%20-0Statement.pdf>*ed to make any kind of difference.*¹