Shop, Distributive & Allied Employees Association

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7th August 2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Committee Secretary,

**Re: Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equity**

The Shop, Distributive and Allied Employees' Association welcomes the opportunity to make this submission to the Inquiry.

Yours sincerely,

Ian Blandthorn
National Assistant Secretary

# Submission to the Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating and promoting gender equality

**August 2008**

**Shop, Distributive & Allied Employees' Association**

## Introduction

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.

Data released by the HREOC reveals that most complaints of breaches of the *Sex Discrimination Act 1984* are employment related. As such, and because the nature of our organisation is primarily concerned with the well being of our members within their workplaces, this submission will focus primarily on the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality in workplaces.

## Summary

The current arrangements are not working effectively.
They don't operate as an effective deterrent to companies discriminating against their employees.

The complaints handling process is too long, too legalistic and cumbersome, and too costly.

The outcomes do not deliver justice for the complainant.

The payments awarded are paltry.

The Act is individual complaints based and does not provide an effective means for addressing systemic discrimination.

Remedies address individual compensation but do nothing to address the workplace situation to prevent further discrimination occurring in that workplace and others.

The SDAEA supports the creation of a positive duty for equal treatment of people 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, as far as reasonably practicable, they provide a discrimination free workplace.

The creation of this duty would, if enforced, have a positive effect in many areas of employment. Especially considering the numbers of people experiencing discrimination and sexual harassment, it would, no doubt, have a positive impact on workforce participation and on the productivity and economic prosperity of the nation.

Legal advocacy and advice should be made available to complainants to assist them through the complaints process.

We support compulsory conciliation before a hearing of complaints but it would be more productive if the conciliator was of a senior standing and was able to be proactive in the process, giving the parties some direction on the basis of the law.

A new framework for dealing with employment related discrimination and sexual harassment

The SDAEA would support the referral or shared jurisdiction of employment related complaints of discrimination and sexual harassment with Fair Work Australia.

A specialist panel of highly trained Commissioners within Fair Work Australia, should be established.

The process of formal complaints handling should include compulsory conciliation. The conciliation should be listed, using the name of the company and only the initials of the complainant, to protect the privacy of the individual especially in cases of sexual assault.

If the conciliation fails then there should be the capacity to schedule a hearing within a reasonably quick period.

As part of the 'one-stop-shop' concept, ideally failed conciliations would be referred to the judicial arm of Fair Work Australia, if the Government decides to create such an arm.

Aspects of the Occupational Health and Safety jurisdictions are worthy of replication in this area. For example, inspection and investigative powers, workplace representatives, education and advice, and enforcement powers.

The SDAEA recommends research is commissioned to assess the costs of sexual harassment and discrimination to individuals, employers and the community, and that such research is widely publicised.

The SDAEA recommends that data (non identifying, where necessary) be collected of all discrimination and sexual harassment enquiries, complaints, conciliations, confidential settlements, and hearing outcomes, and that such data be analysed, according to key demographic groups, industry sectors and types of complaints, and is also widely publicised.

The grounds on which discrimination is prohibited need to be expanded. They should also include "family responsibilities", "breast feeding" and "Work Cover status" as attributes where direct and indirect discrimination are prohibited.

Moves towards harmonisation of the *Sex Discrimination Act* with other Commonwealth and State and Territory anti-discrimination legislation should protect existing rights afforded by that legislation. Increased co-operation and sharing of information by the responsible agencies is recommended.

The principal concern of the SDAEA is that the legislation is effective in promoting gender equality and making real progress towards eliminating, the incidence of discrimination and sexual harassment. We are particularly interested in preventative measures being required in work places, and where breaches occur, having mechanisms which provide just, low cost and speedy resolutions to complaints.

The Current Situation

The current arrangements are not working effectively to eliminate discrimination from our workplaces or to effectively redress instances when they occur.

The current system does not operate as an effective deterrent to companies, such that they all are sufficiently motivated to ensure, as much as is possible, a discrimination free environment for their employees.

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

This "hope for the best" approach is a characterisitic of poor management and would not be acceptable in other operational areas of the business. At worst, it is a callous and dismissive approach to the severe impact on individuals who experience discrimination and harassment and 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 HREOC, which is readily available.

Sexual harassment, harassment and discrimination:

- Affect morale
- Undermine productivity
- Provide unnecessary distraction
- Can create an intimidating, hostile, offensive or distressing work environment

For the individual, sexual harassment, harassment and discrimination can result in:

- the person feeling embarrassed, humiliated, intimidated, uncomfortable, irritated, angry and/or anxious
- low self esteem
- loss of confidence
- stress and stress-related health problems such as depression, insomnia, headaches, skin disorders, digestive problems etc
- self blame, feelings of guilt
- reduced job satisfaction
- poor work performance
- increased likelihood of having a workplace or other accident
- career damage
- damaged reputation
- risks to job security
- job loss
- financial hardship
- a negative impact on family life
- ostracisation,
- family hardship and even break up.
- Victimisation

- If the victim leaves or is sacked, future job opportunities may be jeopardised. In a demoralised, stressed state, the victim will probably face a significant time of unemployment and long term disadvantage.

In 2005, the SDAEA, commissioned independent research of our membership, which included questions about their experiences of discrimination and harassment at their workplace.

The incidence of discrimination and harassment was as follows:

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| - | Sexual harassment | 2% (approximately 4,200 members) |
| - | Sex discrimination | 2% |
| - | Work Cover claim | 2% |
| - | Injury | 2% |
| - | Pregnancy discrimination | 1% (approximately 2,100 members) |
| - | Family responsibilities | 1% |
| - | Illness | 1% |
| - | Marital status | <1% |

This represents approximately 25,000 union members, in our industry sectors alone, who have experienced discrimination or sexual harassment in their workplace.

HREOC research on the incidence of sexual harassment in Australian workplaces, indicates that our figures represent a fraction of the numbers who have experienced sexual harassment in our industry sectors more broadly, ie those who are not union members. (*HREOC Report:20 Years on: The Challenges Continue: Sexual Harassment in the Australian Workplace 2004)*

In the SDAEA research, of those who had experienced sexual harassment, over half (57%) had experienced it more than once.

59% of SDAEA members said that their company had a written sexual harassment policy which they had seen.
47% of SDAEA members said that their company had a written EEO policy which they had seen.

58% said they had received training regarding sexual harassment in the workplace. Of those who had received training, only half (49%) had received a full discussion on what sexual harassment is and how to prevent it and how to respond to it if it happens.
49% said they had received EEO and discrimination in the workplace training. Of those who had received training, only half (49%) had received a full discussion on these topics.

Over one third (35%) did not report sexual harassment incidents. 61% of discrimination cases went unreported.

A key reason for not reporting the incident is that they thought it would be ignored by management (13%). Other reasons for not reporting incidents are to do with perceived negative repercussions in terms of their job security, victimisation, harassment, being branded a trouble maker, a negative impact

on their reputation, and fear of damaging their relationship with their employer.

When an employee does make a complaint of sexual harassment or discrimination, companies tend to rely on their internal mechanisms to resolve or 'get rid' of the problem. Our observation is that in some companies, there are double standards as to how these complaints are handled if a manager has been the perpetrator, compared to a shop floor employee.

Most complaints are resolved internally. 82% of sexual harassment issues, which were reported, were resolved to the complainant's satisfaction in the end. Depending on the company and the personnel involved, this can be a lengthy and painful process, though. By contrast, 63% of discrimination cases were not resolved to the complainant's satisfaction.

If complaints are not resolved at the workplace (often after a period of several weeks and sometimes months) and a claim is made to an outside agency, common company tactics are to deny any wrong doing, and to delay making a reasonable offer of compensation for as long as possible. This can be after going through the conciliation process (which can take 3 months or more) and even after the mediation process (which can be 2-3 months later again). By this time, most complainants just want the case to be over, and are likely to accept a lesser amount of compensation. This is especially so in cases where the individual is also responsible for legal fees.

When complaints are settled before going to a public hearing, the confidentiality requirements mean there is no damaging exposure for the employer, and no contribution to precedent case law.

The complaints handling process is too long. As a result, the complainant endures a lengthy period of stress, and therefore associated health problems are more likely. The adage "Justice delayed is justice denied" applies here.

The process is too legalistic. When it was set up, it is our understanding that this was to be a jurisdiction where ordinary individuals could make a complaint and, particularly at conciliation, represent themselves in a conversation with the company in an attempt to resolve the situation. It is now common for companies to attend conciliations with a barrister and/or solicitor to represent them and the individual can be faced with a 'wall of suits' on the other side of the table. The individual may have union representation, but then again, may just have their Mum or husband to support them. Needless to say this is a very intimidating circumstance 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 a failed mediation to have the paperwork properly formatted and to prepare for hearings. 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. Legal advocacy and advice should be made available to complainants to assist them through the process.

The process of investigation, conciliation, mediation, then a directions hearing, then a hearing is cumbersome, and too costly in terms of time and money. We support compulsory conciliation before a hearing of complaints but it would be more productive if the conciliator was of a senior standing and was able to be proactive in the process (rather than just a facilitator of the meeting) giving the parties some direction on the basis of the law.

After all this, the outcomes do not deliver justice for the complainant. The payments awarded are paltry, especially in consideration of the extensive impact discrimination can have. The complainant is usually left without employment and financially disadvantaged. These implications are also felt keenly by the complainant's family.

The system requires an individual to have the courage to pursue a complaint, and to take on the risk in a jurisdiction which is completely foreign to them. For those without union representation, or the means to afford legal representation, the individual is disadvantaged against the might of large companies and corporations and smaller employers who have legal representation. For many the prospect of pursuing a complaint is just too daunting.

The Act does not provide an effective means for addressing systemic discrimination.

Remedies address individual compensation but do nothing to address the workplace situation to prevent further discrimination occurring in that workplace and others. This is particularly the case where the matter is settled prior to a hearing.

The scope of the Act does not sufficiently address discrimination on the basis of "family and caring responsibilities", and "breast feeding", or "Work Cover status".

The SDAEA believes it is now time to move beyond the individual complaint model of anti-discrimination law.

Further, the SDAEA supports the creation of a positive duty for equal treatment of people 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, as far as reasonably practicable, they provide a discrimination free workplace.

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 HREOC 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.

The creation of this duty would, if enforced, have a positive effect in many areas of employment. Especially considering the numbers of people

experiencing discrimination and sexual harassment, it would, no doubt, have a positive impact on workforce participation and on the productivity and economic prosperity of the nation.

## A NEW FRAMEWORK FOR DEALING WITH EMPLOYMENT RELATED DISCRIMINATION AND SEXUAL HARASSMENT

The industrial jurisdiction is experienced in dealing effectively with workplace disputes. The industrial jurisdiction usually provides just, low cost and speedy resolutions, which are the key features required of any efficient system.

The industrial jurisdiction is one that is familiar to employees and their trade unions, and to employers. When orders/recommendations are made the parties usually adhere to them, rather than pursue the legal process further, enabling everyone to move on.

Expeditious resolutions have many benefits. The stress and costs to both parties are kept to a minimum and there is often some chance of the complainant continuing on in employment with that employer.

Costs of complaints under the *Sex Discrimination Act 1984,* can involve costly and protracted legal proceedings, loss of working time for the complainant, respondent, witnesses, supervisors/managers, and other company personnel, damage to employee morale, reduced productivity and efficiency, stress related work cover claims (which are more likely the longer the dispute goes on) and potential loss of talented and valued employees.

The Australian Government has announced its intention to establish Fair Work Australia (FWA) as the new independent umpire for the Government's new workplace relations system, and for FWA to be an accessible 'one-stop-shop' which will provide practical information, advice and assistance on workplace issues and ensure compliance with workplace laws. It will be independent and focused on providing fast and effective assistance. In regard to the issues of workplace discrimination and sexual harassment, it makes sense that these matters are also able to be addressed by Fair Work Australia as part of its 'one-stop-shop' charter, in the same way that unlawful termination can be dealt with there.

The SDAEA would support the referral or shared jurisdiction of employment related complaints of discrimination and sexual harassment, with FWA.

A specialist panel of highly trained Commissioners within Fair Work Australia, to deal with discrimination and harassment, should be established, with the role of building confidence in the parties to bring these matters to this jurisdiction.

The process of formal complaints handling should include compulsory conciliation. The conciliation should be listed, using the name of the company and only the initials of the complainant, to protect the privacy of the individual especially in cases of sexual assault.

The conciliation process

- should not require legal representation (although this should be available if requested)
- should be conducted by a Commissioner
- should be free
- should be adequately resourced
- should be able to be arranged quickly
- should be an informal, pro-active process which encourages the reaching of agreement, or at least the acceptance of the direction indicated by the Commissioner.

If the conciliation fails then there should be the capacity to schedule a hearing within a reasonably quick period.

As part of the 'one-stop-shop' concept, ideally the matter would be referred to the judicial arm of Fair Work Australia, if the Government decides to create such an arm. Alternatively matters would need to be referred to the Federal Court or the Federal Magistrates Court. The prospect of possible adverse costs orders is currently a deterrent for pursuing action in these courts. The outcomes of a judicial hearing should be in the form of a penalty for the employer and a payment for the complainant for loss of income and also for pain and suffering, as well as enforceable orders regarding future actions required of that employer, to achieve substantive change.

Aspects of the Occupational Health and Safety jurisdictions are worthy of replication in this area, if we are serious about eliminating discrimination and harassment from our workplaces. For example, inspection and investigative powers, workplace representatives, education and advice, and enforcement powers.

FWA should have the ability to investigate workplaces, without the need for a formal complaint. This could be both as a random inspection/audit role as well as rapid inspection after a complaint. Workplace visits could have an educative role, encouraging active compliance with the Act. Respondent organisations to complaints should automatically be investigated. Repeat offenders should be regularly monitored.

This arm of FWA could also take responsibility for prosecution of matters to the judicial arm of FWA, without needing an individual complainant.

This unit within FWA could therefore have the role of workplace inspection and investigation, education and advice to employers and employees, and the ability to refer serious matters directly to the judicial body. They would need to be supported by educational materials and research, and the unit in turn could assist in supplying information to those doing research and developing educational material.

It would be of benefit to decision makers and especially those who are arguing the case for a more effective system for eliminating discrimination, to know what the estimated costs of sexual harassment and discrimination are to individuals, employers and the community. The SDAEA recommends that such research be commissioned and the results widely publicised.

The ability to identify and address systemic discrimination, would be enhanced by the collection, analysis and publication of data from the inspectorate/educative arm, the conciliation arm and the judicial arm of FWA, as well as the matters that go to HREOC and the Federal Court or Federal Magistrates Court. Where these matters are of a confidential nature, the general facts of the complaint and the outcomes could be supplied without identifying the parties. The SDAEA recommends that such data be collected, analysed according to key demographic groups, industry sectors and types of complaints, and widely publicised.

This information would be useful for all parties, but would be of particular benefit to the Sex Discrimination Commissioner in terms of monitoring progress towards equality and as a basis for initiating inquiries into systemic discrimination.

The *Equal Opportunity for Women in the Workplace Act 1999* does not require employers to report on consultation with their employees or their unions, which is a deficiency, because then many do not do it. We believe that consultation with employees is a key component of achieving the aim of successfully eliminating discrimination and harassment from workplaces.

SDAEA research indicates the incidence of discrimination on the basis of Work cover status, is equivalent to that of sexual harassment and sex discrimination amongst our members. This is very concerning and needs to be addressed. The grounds on which discrimination is prohibited need to be expanded. They should also include "family responsibilities", "breast feeding" and "Work Cover status" as attributes where direct and indirect discrimination are prohibited.

Moves towards harmonisation of the *Sex Discrimination Act* with other Commonwealth and State and Territory anti-discrimination legislation should protect existing rights afforded by that legislation. Increased co-operation and sharing of information by the responsible agencies is recommended.

The principal concern of the SDAEA is that the legislation is effective in promoting gender equality and making real progress towards eliminating, the incidence of discrimination and sexual harassment. We are particularly interested in preventative measures being required in work places, and where breaches occur, having mechanisms which provide just, low cost and speedy resolutions to complaints.