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Friday, 21 December 2012

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
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Parliament House
CANBERRA ACT 2600

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National Secretary
David Smith

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Dear Ms Dennett,

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

The Australian Municipal, Administrative, Clerical and Services Union (ASU) is one of Australia's largest unions, representing approximately 120,000 members. Our members work in public services and private sector industries and occupations. Our public service coverage extends to local government employees and employees of State Owned Corporations in energy and water industries (and some higher education coverage in Queensland and South Australia); also, passenger rail transport. Our private sector coverage extends to all clerical and administrative employees generally, as well as passenger air transport, road and air freight transport employees; also, employees of social and community services organisations and contact call-centres.

The ASU refers to the Senate Legal and Constitutional Affairs Committee Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, and welcomes the opportunity for comment. The ASU is aware of the Australian Council for Trade Unions (ACTU) submission; dated 21st December 2012, and agrees with the view that current anti-discrimination legal frameworks need reform.

In particular, the ASU would like to draw attention to the following recommendations in the ACTU submission:

- Part 4. Protected Attributes: Remove clause 43 of the Bill (pg. 6) & Include persons experiencing family or domestic violence as a protected attribute which applies in all areas of public life (pg. 7).
- Part 5. Exceptions, Exemptions & Defences: Unions recommend that Clause 24 be removed, or in the alternative, at very least, reflect what is currently provided in the Sex, Age, Race and Disability anti-discrimination legislation (pg. 9).
- Part 8. Proposed Code of Compliance: Genuine consultation should be a precondition of the certifying of a valid Code by a workplace; the consultation should require notification to employees and their union that certification is sought, consultation with a minimum consultation period through which employee and union views can be expressed to the AHRC as part of the assessment for certification; the AHRC should be required to perform a 'better off overall test' to ensure that no existing rights or entitlements of employees or members of the community are undermined by the certification of the Code; adequate resources must be provided to the AHRC in order to consult with stakeholders in developing the Code and in assessing and monitoring the certification of Codes effectively; a person or representative organisation affected by a compliance code must have a right to seek a review, amendment or revocation of all or any terms of the Code; an employer's compliance with a Code should not be 'complete'; rather the extent to which the compliance constitutes defence should be a matter for the court to determining on the basis of the particular facts at hand (pg. 16).

The above mentioned areas of legislation are of particular concern to the ASU. We submit the following comments in support of the ACTU recommendations:

1. The ASU is confused that the Commonwealth intends to exempt domestic workers from a legal framework for actualising anti-discrimination rights. Domestic and informal work arrangements are a consequence of the insecure work crisis in Australia. The proposal to overlook the opportunity to support the working conditions of domestic workers could be viewed as a decision that is discriminatory in of itself. The ASU; also requests clarification of the exemption and further opportunity to respond. Furthermore, the ASU contends that it is entirely appropriate to introduce domestic violence as a new protected attribute.

2. The ASU has been at the forefront of debating workforce issues of work health safety. Our research supports the ACTU concerns raised about the need for legal recourse for employees in the case of allegations that an employee can no longer meet inherent requirements of the job. It is our recommendation and it has been made strongly before, that a claim of not meeting the inherent requirements of a job needs to be a substantive claim, as opposed to the subjective opinion of individual managers. Too often employers place procedural fairness at a disadvantage to business needs and the employee is left with the burden to respond whilst trying to retain their employment. The draft legislation provides no amelioration for the clear bias in favour of employers.

   The onus of proof must rest with the employer. The ASU recommends greater scrutiny of the legislation, supports further and broad consultation with the Australian community and that reform be guided by clear objectives that balance effective legislation with community expectations.

3. The ASU supports taking issue with the Code of compliance for employers. Adherence to the code is voluntary whereas it should be mandatory. Employers must be required to divulge their rationale for exempting themselves from application of the Acts. A mechanism for exemptions rather than general rules would provide necessary balance for workers and strengthen the enforceability of regulations.

   3.1 Further to the problem of allowing selective choice in application of fundamental human rights, is the broad exemption for employers in the Code so that it does not cover employment issues. The oversight strikes us as curious. The ASU seeks deeper clarification of the proposal and further opportunity to respond.

The key issues have been provided to support the broader and more in depth arguments of the ACTU submission. We welcome any opportunity to facilitate further consultation. I trust that you will contact us.

Yours faithfully,

David Smith
NATIONAL SECRETARY