Australian Council of Trade Unions (ACTU)

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry

into the

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

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1. INTRODUCTION

The Australian Council of Trade Unions (ACTU) is the peak body representing 47 unions and almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation designed to protect these rights. Given the vast majority of instances of discrimination, harassment and victimisation occur in workplaces, the ACTU has a keen interest to advocate for effective and efficient anti-discrimination laws.

As we have outlined during the consultative process for this draft Bill, in our view, key shortfalls in the current anti-discrimination legal framework which need reform include:

- A lack of clear, positive objectives to prevent and eliminate discrimination and promote substantive equality;
- The reliance on individual complainants is biased in favour of large, well-resourced organisations and does not facilitate resolving systemic discrimination;
- Insufficient provision for the Australian Human Rights Commission (AHRC) and other representative organisations to initiate investigations and claims of systemic discrimination on behalf of complainants;
- Insufficient advocacy support and representation of vulnerable and disempowered complainants;
- Time consuming, overly legalistic and costly complaints process;
- Legal, technical and cost barriers which discourage complainants from pursuing cases;
- Insufficient regulatory tools to encourage and assist organisations to prevent and eliminate discrimination; and
- Insufficient enforcement provisions, both in terms of regulation and the level of punitive damages, particularly when compared to similar jurisdictions such as occupational health and safety and consumer protection legislation.

We believe anti-discrimination legal framework requires significant reform and we welcome the release of the Exposure Draft of the Human Rights and Anti- Discrimination Bill 2012.

In particular, we are pleased to note the following proposed significant amendments to the legislation:

- Introduction of a shared burden of proof;
- No cost jurisdiction; and
- A simplified definition of discrimination.

These amendments address some of the key deficiencies of the current legislation by improving access to justice for many workers for whom cost or technical legal barriers has curtailed their decisions to pursue cases to rectify discrimination.

Unions regard access to justice as a fundamentally important area of reform of discrimination law. No matter how many improvements are made to the legislation, if victims of discrimination are restricted from accessing the benefits of those improvements because costs or unrealistic burdens of proof discourage them from bringing forth their case, the improvements are meaningless.

In particular, low paid workers, workers from non-English speaking backgrounds and workers in insecure employment circumstances are more vulnerable to discrimination and most likely to be discouraged from accessing remedies because of costs or unrealistic burdens of proof.

We support the single definition of discrimination which will assist employers, employees and community members to develop a better understanding of their rights and obligations under discrimination law.

We commend the government for proposing these reforms and believe they will set a fairer and more just foundation upon which discrimination law is based in this country.

Having said that, however, there are also a number of aspects of the Bill we believe have not been amended sufficiently to meet the objectives of the project or where we believe amendments will have a negative effect on workers.

These include:

1. A missed opportunity to improve the efficacy of the anti-discrimination legal framework;
2. Limited and inconsistent scope of protected attributes;
3. Inappropriate exemptions and exceptions (in particular the 'inherent requirements of the job');
4. Inadequate capacity to address systemic discrimination;
5. Inadequate capacity to support and advocate on behalf of complainants;
6. Lack of detail regarding development, scope, implementation and enforcement of the proposed Code of Compliance; and
7. Inadequate regulation and level of punitive damages.

The ACTU and Unions support the passage of the Bill, subject to some key amendments detailed in the submission. In particular, we identify the need to limit the scope of the exception on the grounds of 'inherent requirements of the job' and the need to codify the consultation and review mechanisms in relation to the proposed Code of compliance as critical to our full support.

The ACTU has worked closely with members of the Equality Rights Alliance ('ERA') to develop a collaborative response amongst the community sector, NGOs, legal experts, human rights and public interest lawyers to the Exposure Draft and supports the ERA submission.

In addition, the ACTU has participated in the consultation processes to develop the draft Bill and has made submissions in relation to the review of the 2008 Sex Discrimination Act (SDA), and the *Sex and Age Discrimination Bill 2010* and in relation to the consolidation of discrimination legislation project.

In the interests of brevity we do not intend to replicate the detail of those submissions, but will, however, take this opportunity to comment specifically on key aspects of the draft Bill, in particular employment related matters which relate to our area of expertise and focus.

The ACTU submission represents a comprehensive response on behalf of unions to the exposure draft Bill, other than for the area of legislation relating to exceptions on religious grounds. These issues are dealt with individually by unions in their separate and / or complementary submissions.

Given the very short timeframe organisations have been provided to fully analyse such a complex piece of draft legislation, the ACTU and unions reserve the right to make further supplementary comments should it be required.

2. REFORM OF ANTI-DISCRIMINATION LEGAL FRAMEWORK

The ACTU has consistently advocated that the referral of the recommendations arising from the 2008 Review of the Sex Discrimination Act (Cth) 1984 to the consolidation process would limit the capacity to recognise and implement the structural and systemic reforms needed to the discrimination law framework.

The terms of reference for the consolidation project are narrower than that of the Review and the consolidated Human Rights and Anti- Discrimination Bill 2012 'does not propose significant changes to existing laws or protections but is intended to simplify and clarify the existing anti-discrimination legislative framework'. We are of the view that these terms of reference have resulted in a missed opportunity to strengthen and make meaningful improvements to the anti-discrimination legislation for the most vulnerable members of our society.

The ACTU has consistently expressed the view that, in order to improve the effectiveness of the anti-discrimination legal framework, reform was required to:

1. Introduce a positive objective to achieve *substantive* equality and include an obligation to take reasonable and appropriate measures to eliminate discrimination as far as possible;
2. Provide for the Australian Human Rights Commission (AHRC) and other representative organisations to initiate investigations and claims of systemic discrimination on behalf of complainants;
3. Provide for advocacy support and representation of vulnerable and disempowered complainants;
4. Establish new regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination, prevent its recurrence, and enforce non-compliance;
5. Strive for greater synergy between complaints- based anti-discrimination law and complementary preventative legislation such as, for example, the Workplace Gender Equality Act 2012 (WGEA); and
6. Improve the level of punitive damages.

Unfortunately, of the 41 Recommendations arising from the review of the Sex Discrimination Act 1984, the 11 that are not adopted through the consolidated Human Rights and Anti-discrimination Bill are those which relate to these important points of structural reform outlined above.

In our view, without addressing these broad reform areas, the need to genuinely improve the efficacy of the anti-discrimination laws to eliminate discrimination and promote equality will remain unfinished business.

3. SCOPE AND OBJECTS

We welcome the introduction of an objects clause which recognises the importance of promoting equality and that it may be necessary to take special measures to achieve substantive equality. The objects clause is fundamental to the Act because of its use in interpreting the Act, in setting the parameters of the Australian Human Rights Commission's role and functions, and in determining the goals of the new law.

However, we think that the reference to formal equality (the idea that likes should be treated alike) should be deleted from the Objects as it undermines, and is often contrary to, the object of achieving

substantive equality which can require people to be treated differently to achieve equality (such as making reasonable adjustments).

We are also cognisant of the extension of the scope of some aspects the Bill to include all areas of public life, where others are restricted to the employment sphere. This appears to be a result of a commitment not to expand certain areas of discrimination law beyond the existing scope, particularly in the employment arena, but ultimately has the contrary effect of promoting further inconsistency in the legislation. In addition, we note that in the definition of employers, the Crown in the Right of any State should be included.

Recommendation
The reference to 'formal equality' should be deleted from clause 3(1)(d)(i) so that it states that the Act's objects are 'the principle of substantive equality'. The objects should be re-ordered to show that the concept of substantive equality is fundamental to the Bill.

Recommendation
The definition of employer should include The Crown in the Right of any State.

4. PROTECTED ATTRIBUTES

ACTU welcomes the addition of protections against discrimination on the grounds of sexual orientation, gender identity and same sex relationship status as well as the simplified process for those claiming intersectional or multiple grounds of discrimination. We also welcome the extension of anti-discrimination legislation to those 'associated' with a person with a protected attribute and in circumstances where a person is discriminated against because of an assumed protected attribute. In addition, we support the Bill's extension of protection against sexual harassment to any area of public life. The expansion of protection to these groups is fair and just, will promote greater workforce and social participation.

However, we are also cognisant of the inconsistent extension of some protected attributes to include all areas of public life, where others are restricted to the employment sphere.

Recommendation
The legislation should be simplified so that discrimination against any protected attribute is unlawful in all areas of workplace and public life.

In addition, we would have liked to have seen further expansion of the protections against discrimination to other worthy groups, and make specific comments in relation to those groups below.

Persons with family and caring responsibilities

We support the use of the term 'family and carer's responsibility' rather than the more limited definition of 'family responsibilities' in the Bill which provides that:

Family responsibilities of a person means responsibilities of the person to care for or support:
(a) a child of the person who is wholly or substantially dependent on the person; or
(b) any other member of the person's immediate family who is in need of care and support.

'Immediate family' is further defined as:

a person's immediate family includes:
(a) a spouse, former spouse, de facto partner or former de facto partner of the person; and
(b) a child, parent, grandparent, grandchild or sibling of the person, or of a spouse, former spouse, de facto partner or former de facto partner of the person.

This is a narrow definition because it excludes the network of relationships and care obligations of specific groups including, but not limited to, Aboriginal and Torres Strait Islander communities. It is essential that the definition of family responsibilities in the Bill is an inclusive one, capable of recognising the variety of different family and kinship relationships of all those groups specifically protected by the Act.

Adding the term 'caring' to the phrase takes the emphasis off the family relationship between the two parties and focuses it on the level of obligation and the act of caring for someone, which more accurately reflects the needs of the carer and the intention of the Bill.

It is also important that the term 'carer' is defined appropriately and takes into account the various caring relationships that may exist. We note that the *Fair Work Act* Review Panel recommended that the scope of caring arrangements protected under the Act should be expanded to encompass a wider range of caring responsibilities.[1]

There is inconsistency across Federal, State and Territory anti-discrimination legislation, each protecting variously those with 'family and caring responsibilities', 'family responsibilities' or 'caring responsibilities. The Exposure Draft of the Discrimination and Human Rights Bill should at least be drafted consistently with other recent federal legislation including the Workplace Gender Equality Act 2012 *and in section 351(1) of the* Fair Work Act 2009 which refer to "family and caring responsibilities" with a view to ultimately achieving consistency across both state and federal legislation.

Limiting the scope of the protection of persons with family responsibilities to employees only is inconsistent with the extension of scope of other protections which apply to all areas of public life.

Recommendation
The definition of 'family responsibilities' should be defined to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer's household.

Recommendation
The ACTU advocates for a broad definition of a person with caring responsibilities as simply a person who cares, or expecting to care for, a dependent who reasonably relies on the person for care or support. Alternatively, the definition used in s.4(1) of the Equal Opportunity Act 1984 (WA) could be used as a preferred model for the Bill.

Recommendation
The term 'family responsibilities' should be changed to 'family and caring responsibilities' throughout the Bill so that it is consistent with the terminology used throughout the *Workplace Gender Equality Act 2012* (Cth) and s 351(1) of the *Fair Work Act 2009* (Cth).

Recommendation
The protection of unlawful behaviour on the ground of 'family responsibilities' should be extended beyond employment to cover all areas of public life.

Domestic workers

The ACTU urges the Government to remove clause 43 of the Bill, which states that that it shall not be unlawful for a person to discriminate against another person if the discrimination is connected with determining who should be offered employment to perform domestic duties on premises in which the first person resides. The effect of this clause is to deny the protections afforded by the Bill to the thousands of workers in Australia who clean, cook and care for children and the elderly in private households.[2]

There are two principal reasons why this exclusion is inappropriate. First, it runs counter to international trends in this area, which are towards recognising and affirming the rights of domestic workers to decent work and to equal protections under labour laws. In 2011, the International Labor Organisation (ILO) adopted the *Domestic Workers' Convention, 2011* (No. 189) and its supplementing

[1] Fair Work Act Review, *Towards More Productive and Equitable Workplaces*, (2012), Recommendation 5.
[2] The number of domestic workers in Australia is not known with any precision. Australian Bureau of Statistics (ABS) data indicates that around 9% of households (over 700,000) in Australia paid for domestic cleaning services in 2006. This figure does not include the thousands of households engaging workers to perform childcare duties. ABS, *Australia Social Trends,* March 2009, Cat. 4102.0.

Recommendation (No. 201). These instruments affirm that domestic workers, like other workers, are entitled to respect of their fundamental rights at work[3] and to minimum standards on wages and working conditions. The rights to which domestic workers are entitled include the right to protection against discrimination in respect to employment and occupation. Indeed, protection against discrimination has been emphasised by the ILO as a particularly important right for domestic workers, given that these workers are predominately women, migrant workers or persons belonging to disadvantaged social groups and communities, whom are very vulnerable to discrimination and harassment in respect of employment.[4]

Not having yet ratified Convention No. 189, the Australian Government is not legally bound to respect its provisions. However even for states that have not ratified the instrument, the Convention and its accompanying recommendation constitute authoritative guidance as to international standards on law and policy regarding domestic workers. In continuing to exclude domestic workers from the protections against unlawful discrimination, the Australian Government risks perpetuating what is increasingly being viewed by the international community as an inappropriate and unacceptable injustice against a particularly vulnerable group of workers.

The second reason the Government should remove clause 43 from the Bill is that it contravenes Australia's existing obligations as a signatory to the ILO's *Discrimination (Employment and Occupation) Convention, 1958* (No. 111) and the *International Covenant on Economic, Social and Cultural Rights.* With respect to Convention 111, the ILO's Committee of Experts on the Application of Conventions and Recommendations (the CEACR) has emphasised that anti-discrimination laws should be extended to domestic workers, and that compliance with Convention No. 111 requires any legislative gaps in this regard to be closed.[5] The ACTU notes that the ILO has already explicitly noted Australia's failure to adequately protect domestic workers against discrimination.[6]

Finally, the UN Committee on Economic, Social and Cultural Rights has observed that exclusion of domestic workers from national legislative and policy frameworks is inconsistent with the International Covenant on Economic, Social and Cultural Rights.[7] Australia has been a signatory to this Convention since 1975 and the ACTU has recommended the *Domestic Workers' Convention, 2011* (No. 189) via the International Labour Advisory Committee.

Recommendation
Remove clause 43 of the Bill.

Status as a person experiencing family or domestic violence

We are disappointed that the Exposure Draft does not include domestic violence as a new protected attribute. Despite acknowledging that there is currently 'no specific protection for persons experiencing family or domestic violence in either Commonwealth or state or territory anti-discrimination law' the Bill's Explanatory Note clearly rules the proposed amendment out.[8]

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[3] These fundamental rights at work are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. See further Convention 189, article 3(2).
[4] See further ILO, *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws* (Geneva: ILO, 2012).
[5] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* Report III (Part IB), International Labour Conference, 98th Session, Geneva, 2009, Para [110]. Note also that in some jurisdictions, the exclusion of domestic workers has been found to constitute indirect discrimination based on sex: see, e.g. the Direct Request to Canada from the CEACR at the 73rd Session, 2004, Para [9].
[6] ILO, *Decent Work for Domestic Workers,* ILC, Report IV(1), ILO, Geneva, 99th session, 2010, p. 51.
[7] UN Committee on Economic, Social and Cultural Rights: *The Right to Work: General Comment No. 18 regarding Article 6 of the International Covenant on Economic, Social and Cultural Rights,* E/C.12/GC/18, 6 February 2006, Para [10].
[8] Ex Mem, 1.4e, 1.5a, 4.1, 5a, 5.6

ACTU Congress 2012 policy recognises the significant role that workplaces play with respect to employees breaking a cycle of family and domestic violence. Unions have enthusiastically bargained for the introduction of family violence entitlements through workplace Bargaining process and there is at this stage in the vicinity of one million employees with access to some form of domestic violence leave. It is imperative that discrimination law develops alongside these achievements to ensure employees needing to reveal their status as a victim of domestic violence in order to avail their workplace entitlements are not exposed to a discriminatory response by employers, colleagues or other contact people who become aware of their status. Until the discrimination law is integrated with their workplace rights, employees experiencing domestic violence will remain exposed to discrimination and will remain discouraged from speaking out and disclose their status as a person experiencing family or domestic violence.

In addition, it is our view that the inclusion of 'status as a person experiencing family or domestic violence' in the list of attributes protected from discrimination is necessary to give effect to our international obligations to uphold human rights including the Convention of the Elimination of All Forms of Discrimination Against Women (CEADAW) and the International Labour Organisation Convention 111, Discrimination (Employment and Occupation) Convention, 1958 (ILO C111) as gender based violence[9] is recognised as discrimination[10].

The inclusion of persons experiencing domestic violence as a protected attribute should apply to all areas of public life in order to address the multiple forms of discrimination women in this position experience such as discrimination by landlords and other accommodation providers.[11]

Recommendation
Include persons experiencing family or domestic violence as a protected attribute which applies in all areas of public life.

Industrial activity

Recommendation
"Industrial history" should be replaced with "Industrial history or activity" to be consistent with well-established and well understood terminology across other legislation, including the FWA 2009.

Residency or visa status

The Bill will repeal the Australian Human Rights Commission (AHRC) Equal Opportunity in Employment provisions which allow the Commission to hear and conciliate discrimination complaints, including in relation to 'nationality and citizenship', but the outcomes are unenforceable and non-binding. The Bill picks up the repealed AHRC provision by introducing 'nationality and citizenship' as a protected attribute in relation to employment only.

It is our understanding that the government does not intend for the scope of the 'nationality and citizenship' as a protected attribute to include issues related to visa status. The intended effect of the 'nationality and citizenship' attribute is to ensure individuals are not discriminated against on the basis of their nationality or citizenship status (as reflected in existing State and territory anti-discrimination legislation).

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[8] Donna Chung, Rosemary Kennedy, Bev O'Brien and Sarah Wendt, *Home Safe Home: the Link Between Domestic and Family Violence and Women's Homelessness* (Partnerships Against Domestic Violence, Commonwealth of Australia, November 2000).

Recommendation
It must be made clear in the legislation that 'nationality and citizenship' does not cover discrimination on the basis of permanent residency or visa status; and further, that discrimination in employment in favour of Australian permanent residents over temporary residents is permissible.

Criminal Record

We are disappointed that the Bill has not included criminal record as a protected attribute.

Recommendation
The Bill should prohibit discrimination on the grounds of a persons' criminal record in all areas of public life.

General Equality provision

The right to equality before the law in clause 60 should not be limited to the attribute of race and should be extended to all protected attributes. This would be consistent with the Bill's objects, as listed in clause 3, which states that the Act is intended to *inter alia* give effect to Australia's obligations under the human rights instruments. We note that the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the SDA recommended the inclusion of a general equality before the law provision, modelled on s 10 of the *Racial Discrimination Act 1975* (Cth).[12] This would meet Australia's international obligations.[13]

Recommendation
The consolidated Act should include a general provision requiring equality before the law across all protected attributes

Review mechanism

Recommendation
If the above attributes are not included in this Bill, or where they do not apply to all areas of public life, the 3 year review should include a provision to consider the additional protected attributes.

5. EXCEPTIONS, EXEMPTIONS and DEFENCES

Inherent requirement of the job

The current drafting of Clause 24 *Exception for inherent requirements of work* is a priority area of concern for unions. The clause has the ability to seriously undermine the effectiveness of the Act, and as such unions object 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. Union'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, allows employers to discriminate against employees, including in regard to offering or terminating employment, and determining or applying terms or

[12] Recommendation 9.
[13] Article 2.

conditions of employment, unless employees are able to dispute the employer's assertion that the discrimination is in fact a genuine requirement of the job.

Unions have consistently reported that employers frequently assert a ground of discrimination is an inherent requirement of the job, including the following examples cited at the recent at the consultation forum on the Bill:

- employees with family responsibilities employed in a 24 hour business are told it is an inherent requirement of the job to be available to work whenever the store is open for business;
- employees with family responsibilities and no child care after 6pm or on weekends, told that the 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;
- pregnant employees told 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;
- mature age workers told that it is an inherent requirement of the job to be able to squat, and that they need to pass a 'squat test'; and
- employees needing to breast feed or express milk during a shift, told 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.

Current legislation provides an exception allowing employers to discriminate on the grounds of the inherent requirements of the job only in the areas of Disability, Age and Sex Discrimination in more restrictive terms than the provisions in the exposure draft. Expanding the exception to all areas of discrimination and expanding the terms of the exception will mean that it will be easier for employers to discriminate on the basis of any of the protected attributes by claiming the employee is unable to meet an 'inherent requirement' of the job.

The only protection available to employees will be becoming 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.

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" and gives a commitment that the Bill will not adversely affect employees or reduce entitlements or protection.

In our view, 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.

Unions recommend that Clause 24 be removed. In the alternative, at the very least, the clause should be amended so that it includes what is currently provided in separate legislation, which while not simplifying, does not 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.

Recommendation

Unions recommend that Clause 24 be removed, or in the alternative, at the very least, reflect what is currently provided in the Sex, Age, Race and Disability anti- discrimination legislation (see appendix 1).

Reasonable Adjustment and Justifiable defence

The exception on the grounds of an inherent requirement of the job places the burden on an employee to dispute whether the discrimination is genuinely an 'inherent requirement'. This is inequitable and unfair, particularly in light of the unreasonable expectation that employees will have access to the legal information, resources and confidence to pursue redress.

The purpose of reasonable adjustments is to place an obligation on an employer, educator or service provider to make reasonable adjustments in order to accommodate a particular attribute. An obligation to make reasonable adjustments is fundamental to ensuring substantive equality and is consistent with the aims of the Bill.

Unless the legislation clearly states that employers are expected to make reasonable adjustments to accommodate the needs of employees, the exemption will continue to be detrimental to employees.

The obligation to make reasonable adjustments is contained in the definition of discrimination in the current Disability Discrimination Act. The consolidated Bill moves the obligation to the section dealing with exceptions; the result is that it is no longer clear that the making of reasonable adjustments is relevant to determining whether discrimination has occurred. The need to make clear that a duty-holder has an obligation to make reasonable adjustments to accommodate the needs of a person with a protected attribute to avert discrimination is particularly important given the draft Bill does not include a positive duty on all duty holders to take steps to eliminate discrimination.

The Bill should place the duty to provide reasonable adjustments in the definition of discrimination. Alternatively, the Bill should re-order the sections so that provisions requiring employers to make reasonable adjustments directly precedes the exception on the grounds of the inherent requirements of job. Together the provisions should establish a process which is clear to both employers and employees that efforts should be made to make reasonable adjustments for employees before availing any exception for inherent requirements of work.

The obligation to make reasonable adjustments has most commonly been used to require organisations to change their practices and policies to accommodate people with a disability. There is no reason for limiting substantive equality to the area of disability; reasonable adjustments could easily, and should be, extended to other attributes.

Employers who do not engage in a process of considering reasonable adjustments face a high risk of failing to meet the 'justifiable' defence in clause 23, regardless of the protected attribute. In this light, the extension of the reasonable adjustments exception is unnecessary because the general justification defence provides duty holders with sufficient scope to defend discriminatory conduct if it is justifiable under clause 23. Extending the reasonable adjustment to other attributes will not add an additional burden to employers and it has the advantage of making clear to employers the best course of action to avoid discrimination.

The *Victorian Equal Opportunity Act* contains provisions for employers to make reasonable adjustments for employees with family or caring responsibilities. The clause sets out the criteria which can be used to assist in determining what would constitute reasonable adjustments. To the best of our knowledge, this obligation has assisted both employers and employees balance work and caring commitments.

We note that extending the reasonable adjustments provisions to people with family and caring responsibilities was recommended by the Senate Standing Committee on Legal and Constitutional Affairs' in its 2008 inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) ('SDA').[14] We also note that the ALRC recommended extending the right to request flexible work arrangements to include older workers to assist with increased caring responsibilities, health issues and transition to retirement.

Extending the obligation to make reasonable adjustments to all protected attributes will promote increased workforce participation and address discriminatory policies and practices proactively, rather than relying on someone to experience discrimination and make a complaint. This type of provision would also assist in promoting dialogue between employers and employees regarding flexible work practices, which is consistent with the general approach taken in the *Fair Work Act* and the *Workplace Gender Equality Act 2012* (Cth) particularly in relation to family and caring responsibilities.

[14] Recommendation 14.

Recommendation
The obligation to explore the availability and feasibility of less discriminatory options and make reasonable adjustments should be extended to all protected attributes.

Recommendation
The Bill should re-order the sections so that provisions requiring employers to make reasonable adjustments precedes the exception on the grounds of inherent requirements of the job.

Religious exceptions

As noted in the introduction to this submission, issues relating to religious exemptions are dealt with individually by unions in their separate and / or complementary submissions.

However, we are unable to see the relevance of clauses 33(c) 'potential pregnancy' and 33(d) 'pregnancy' with respect to religious exemptions.

Recommendation
Delete clauses 33(c) and (d) or replace 'pregnancy' and 'potential pregnancy' in clause 33(c) and (d) with attributes which are justified by religious needs.

Other exceptions

Recommendation
Wages or salary rates paid to people with disabilities should not be included in any special measure exemption.

Exceptions should not allow discrimination in insurance for age, disability and sex and in superannuation for age, disability, family responsibilities, marital or relationship status and sex, or 'any other relevant factors'.

Multiple reasons

Each of the discrimination acts requires that for an action to be discriminatory, the prohibited ground need only be one of the reasons for the conduct, not necessarily the dominant or substantial reason. The Consolidated Bill alters the wording without any obvious justification. We do not support the amended wording.

Recommendation
Clause 8 should be reworded so that it is clear that conduct is prohibited even if it is not the dominant or substantial reason.

We support the Bill's general exception of justification which replaces a range of inconsistent exceptions currently in the sex, age, race and disability discrimination acts. However, we note that the general defence is wider and could potentially diminish individual's anti-discrimination protections.

Recommendation
The Bill should be amended to provide a tighter definition of general defence and clearly stated object of the legislation on achieving substantive equality across all attributes in all areas of public life.

Minister's Review of exceptions

Clause 47 obliges the Minister to review exceptions without setting out the terms or scope of the review.

Recommendation
Clause 47 should be reworded to clarify that the review is to include the effect of the exceptions on the legislation's ability to meet its objects.

6. ADDRESSING SYSTEMIC DISCRIMINATION

Positive duty

Since its introduction, Australia has relied on an individualised, reactive complaints-based model to address discrimination and promote equality. Under this model, discrimination will only be remedied if the victim takes action. The law as currently drafted is limited and cannot address problems proactively before someone experiences discrimination, nor can it address matters about which complaints have not been made. For this reason, in 2008, the Senate Standing Committee on Legal and Constitutional Affairs' recommended the introduction of a positive duty to eliminate sex discrimination and sexual harassment and promote gender equality following its inquiry into the effectiveness of the SDA.[15]

However, we are disappointed that no positive obligations to promote equality were included in the Bill. This means that the Commonwealth's anti-discrimination laws will continue to rely on an individualised, reactive complaints-based model to address discrimination. Unlike other legislative models such as the UK Equality Act, Australian discrimination law remains limited to addressing problems only once someone experiences discrimination and will continue to have only a limited effect on promoting equality.

Recommendation

The Bill should contain a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, harassment and promote equality.

7. ADVOCACY AND SUPPORT FOR COMPLAINANTS

Burden of proof

The difficulties with proving discrimination are well documented. A person alleging discrimination must establish on the balance of probabilities that they were treated less favourably as a result of a particular attribute, even though the reason for the treatment is able to be masked by a variety of non-discriminatory reasons. This can be an insurmountable hurdle for complainants who may not have access to legal assistance, and who themselves are unlikely to have the technical legal expertise to establish their case.

We strongly support the inclusion of clause 124 in the Bill. Clause 124 brings Australian law in line with the approach taken in international jurisdictions.[16] Under the shared burden of proof model, the complainant is required to allege that the respondent engaged in conduct for a prohibited reason or purpose *and* adduce evidence that is sufficient for the court to decide that the respondent engaged in conduct for a prohibited reason or purpose. Having done so, the complainant will raise a presumption that the reason or purpose they alleged is the reason or purpose the respondent engaged in the conduct. The respondent can then adduce evidence to rebut this presumption or they can rely on an available defence or exception.

We note that enacting clause 124 will implement Recommendation 22 of the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the effectiveness of the SDA. We also note that the introduction of this clause has support from the Australian Human Rights Commission.[17]

In the absence of a positive obligation to avoid discrimination, clause 124 is essential to the proper functioning of the proposed legislation. A purely complaints-based system is essentially unworkable if the complainant (who is often a vulnerable person of limited resources) is required to prove matters which are outside her/his knowledge, such as the respondent's reason for her/his behaviour.

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[15] Recommendations 14 and 40.

[16] For example, the United Kingdom (s 136 of the *Equality Act 2010* (UK)) and Ireland (s 84A of the *Employment Equality Act 1998-2004* (Ireland)). See also European Council Directives - Burden of Proof Directive 97/80/EC, art 4(1); Racial Equality Directive 2000/43/EC, art 8.

[17] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure draft Human Rights and Anti-Discrimination Bill 2012* (December 2012), 5.

Recommendation
ACTU supports the terms of clause 124 (shared burden of proof) as currently set out in the draft bill.

Cost

Individual complainants are less likely to have the necessary resources to pursue a discrimination matter through the courts. As it currently stands, there is a powerful disincentive in the federal jurisdiction for a complainant to take a discrimination matter to court due to the risk of an adverse costs order if the complainant is unsuccessful. For this reason, we support the inclusion of clause 133 in the Bill.

Recommendation
ACTU supports the terms of clause 133 (no cost jurisdiction) as currently set out in the draft bill.

Lodging of complaints

The Bill does not amend the current rules under federal discrimination legislation that preclude an applicant from lodging a complaint under federal law if that person has made a complaint, instituted a proceeding or taken any other action under state or territory anti-discrimination law.

This is unduly harsh in view of the lack of legal aid and support available to applicants to assist in choosing the most appropriate forum to pursue their claim.

Recommendation
Clause 90(2) should be amended to allow an applicant to lodge a complaint under federal law provided that any complaints lodged in State or territory jurisdictions has not reached a substantive stage and has been withdrawn.

Advocacy and support for individual complainants

Whilst the amendments to the burden of proof and costs may mean more victims of discrimination are willing to proceed to hearing in the federal courts, they are nonetheless likely to lack the resources to obtain specialist legal advice about their claim.

Community legal centres and Legal Aid are underfunded and often not able to assist complainants with a discrimination claim. In its 2008 inquiry into the effectiveness of the SDA, the Senate Standing Committee on Legal and Constitutional Affairs recommended that working women's centres, community legal centres, specialist low cost legal services and legal aid receive increased funding so they have the resources to provide advice about discrimination matters. We strongly urge the Committee to reiterate this recommendation.

Recommendation
Working women's centres, community legal centres, specialist low cost legal services and legal aid receive increased funding so they have the resources to provide advice about discrimination matters.

Standing to represent complainants

There is a strong argument for public support of strategic litigation to ensure the development of an effective set of precedents in Australian discrimination law. This would require provision of a litigation fund to an organisation with responsibility and expertise to resource selected cases, the litigation of which would provide clear guidance to all parties on what the law requires. The cost of legal representation combined with the minimal provision of Legal Aid in Australia for discrimination claims and the under-resourcing of community legal centres means that enforcement is restricted.

The ACTU has consistently advocated for the right for the Australian Human Rights Commission, unions and other relevant organisations to represent complainants in Federal Court discrimination cases. We

note this recommendation has not been adopted in the draft Bill and urge that as a minimum the Government consider including a provision in the Bill which would allow the courts to grant standing to organisations to represent either individual or groups in strategic litigation which is in the public interest.

Recommendation
Amend clauses 120 and 121 of the draft bill to allow courts to grant leave to organisations to represent either individual or groups of complainants following the application of a public interest test.

Recommendation
Establish a strategic litigation fund to assist organisations granted standing to represent individuals or groups of litigants.

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.

8. PROPOSED CODE OF COMPLIANCE

Whilst unions are supportive of organisations and Industry bodies developing pre-emptive measures and dedicating resources to the prevention of discrimination, we have very significant concerns about Compliance codes as described in the Exposure Draft, in particular:

(a) The role, scope, application and enforcement of the Code, especially in relation to rights and obligations in the workplace;

(b) The coverage, in particular, 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 propose their own Codes raising significant issues of appropriate, consistent standards and resourcing effective monitoring and compliance of Codes;

(c) Consultation with unions and employees is not required in the development of the proposed Codes 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;

(d) The standards by which the AHRC will judge them to be satisfactory (other than clause 76(2)(b) which requires them to be consistent with the objects of the Act), how those standards will be established and with what consultation are all yet to be determined;

(e) The status of the Code as a defense against claims of discrimination, without it being clear how it will be established that they have been fully implemented and adhered;

(f) The longevity of Compliance codes, despite the requirement for 5 year reviews, particularly given unions and employees are not required to be consulted.

Consultation

Consultation with stakeholders, including employees and unions will be critical to ensuring the integrity of the Code. Effective consultation when developing the terms of the Code is necessary to achieve the support of all stakeholders, particularly employees.

The 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.

Australia is signatory to a number of relevant international obligations regarding consultation with workers representatives. Australia ratified the ILO No 135 Workers' Representative Convention in 1993.

The proposed Code may contain standards that directly affect employees existing rights in the workplace and/ or under discrimination or other law. Similarly the development and certification of a Code may impact more broadly on members the community outside of the workplace. It must be compulsory that a transparent and effective consultation process be legislated to ensure these rights are not undermined by the development or certification of a Code.

Unions cannot support the proposal for the proposed Code, in particular noting their application to work practices and potential usage as a defense to a claim of discrimination, without the requirement for consultation, at both the development and implementation phases, with employees and unions being enshrined in the Bill.

Recommendation
Genuine consultation should be a precondition of the making and certifying of a valid Code.

Recommendation
The consultation should require public notice, consultation with specific groups likely to be affected (including employees and unions) and a minimum public consultation period through which views can be expressed transparently.

Development of appropriate standards

Unions are concerned at the potential for individual Codes to be made in respect of individual employers. This would result in a lack of consistent standards and undermine the object of the legislation. The voluntary nature of the Codes will result in many employers choosing not to participate in the formal certification process. However, the educative role of Codes makes it critical that standards are established which are relevant to a range of workplaces where employers may choose not to participate but who will use the code as guidance tool against which to benchmark their policies and practices.

In addition, administration of multitudes of individual Codes be unwieldy and undermine effective monitoring and quality control in the program, potentially risking a lack of buy in by employees and the community due to no confidence in the integrity of the program.

Unions would prefer to replace the Codes of Compliance model described in the Exposure draft with the model used by Safe Work Australia (SWA), where Standards are developed at a National level, in consultation with all stakeholders, including unions, and all organisations are expected to adhere to them, unless they can demonstrate why that is not appropriate.

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 SWA Codes of Practice, and there is a high level of engagement by employers and unions in the process of their development.

SWA is a tripartite body comprising representatives of the Commonwealth and each State and Territory, unions and employers.

SWA has a legislative function under the *Safe Work Australia Act 2008*, *inter alia*, to '*prepare model codes of practice relating to OHS and, if necessary, revise them.* The work of SWA in this area is also guided by the Council of Australia Governments *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA)*.

This process for the development of Codes of Practice is the ACTUs preferred model whereby:

1. Draft Codes of Practice which may be industry specific (i.e. Facilities for Construction Sites) or risk/hazard specific (i.e. Managing Noise And Preventing Hearing Loss At Work) are initially developed at the national level via genuine tripartite processes;
2. A opportunity is then available for interested parties to comment on the draft Codes of Practice;
3. Public comment is considered via the tripartite processes; and
4. Once agreement is reached at the national level between the tripartite partners, the Codes of Practice are referred to the relevant Ministerial Council for endorsement and implementation.

Codes of Practice play an important role in assisting duty holders to meet their Workplace Health and Safety duties. Duty holders can discharge their obligations by following a relevant Code of Practice or by other means which provide an equivalent level of protection to health and safety.

Providing explanation of the requirements of WHS legislation and practical examples of ways to meet the required standards through Codes of Practice allows all duty holders and particularly duty holders without the resources to investigate other ways to comply with their obligations, to be appraised of specific evidence of knowledge of risk and risk control.

Enforcement and Monitoring

In order for effective enforcement and compliance with Codes, the community and stakeholders must have confidence in the integrity of the Code and its implementation. The Bill as currently drafted does not indicate what capacity employees have to enforce the standards contained in the Code in the workplace, nor does it provide for a capacity to monitor adherence to the standards in the Code other than at the point where an employer may choose to use the certification of the Code as a defence in litigation. If one of the purposes of the Code is as a preventative measure to avoid litigation, then these issues must be addressed and codified in the legislation.

Recommendation
Genuine consultation should be a precondition of the certifying of a valid Code by a workplace.

Recommendation
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.

Recommendation
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.

Recommendation
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.

Recommendation
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.

Recommendation
An employer's compliance with a Code should not be 'complete'; rather the extent to which the compliance constitutes a defence should be a matter for the court to determining on the basis of the particular facts at hand.

Disability Standards, Special Measures Determinations, Exceptions and Temporary Exemption applications

Clause 2.1.5 of the ILO Code of Practice on managing disability in the workplace 2001 states "The programme should be formulated in cooperation with workers' representatives, in consultation with individual disabled employees, occupational health services, where they exist, and, where possible, with organisations of persons with disabilities."

Recommendation
Genuine consultation should be a precondition of the making of a valid Disability Standard, Special Measures Determination, Exception or Temporary Exemption.

Recommendation
The consultation should require public notice, consultation with specific groups likely to be affected (including employees and unions) and a minimum public consultation period through which views can be expressed transparently.

Recommendation
The powers in clauses 70, 75, 79 and 83 should only be exercised after the above consultation process has been conducted.

Recommendation
Clause 80 should require that the AHRC be satisfied that the above consultation process has been undertaken prior to making, amending or revoking a determination.

9. REGULATION, DAMAGES AND REMEDIES

Current anti-discrimination jurisdictions do not provide adequate punitive damages for breaches of the law compared to other similar jurisdictions in Australia (i.e. consumer and competition law) or to discrimination jurisdictions overseas (i.e. the United States). The Bill should adopt a guide to damages for use by judicial officers in discrimination cases which ensures that the provision of compensation properly values the loss suffered in discrimination cases – including future loss of pay and career advancement. Damages should not be limited to compensation and should include a capacity to award punitive damages which will contribute to the systemic change required to avoid future discrimination.

The Federal Court does not have the power to make systemic corrective orders, such as a change in policy, the introduction of a compliance program that might prevent further discrimination, an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant, training or requiring employers to change their practices and prevent similar discrimination from occurring in the future.

We support the introduction of remedies which will address future behavior as well as address the discriminatory behaviour which has already occurred. We note that in its 2008 inquiry into the effectiveness of the SDA, the Senate Standing Committee on Legal and Constitutional Affairs recommended the introduction of corrective and preventative orders when discrimination is proven.[18] The Bill does not contain systemic remedies either for the court or for the AHRC.

Unlike jurisdictions such as Consumer and Competition or Occupational Health and Safety, the anti-discrimination jurisdiction provides organisations such as the AHRC no capacity to issue performance improvement notices, enforceable undertakings or similar preventative remedies.

[18] Recommendation 23.

Recommendation

Chapter 4 – Compliance and Enforcement of the Fair Work Act 2009 provides penalties for breaches, including for instances of adverse actions taken on the basis of protected attributes in anti-discrimination law. A similar model should be included in the Human Rights and Anti-discrimination Act. This would provide consistency across the jurisdictions and provides all participants with a clear framework.

Recommendation

A guide to damages should be adopted which can be used by judicial officers in discrimination cases. The guide should ensure that the award of compensation properly values the loss suffered by including future loss of pay and career advancement.

Recommendation

The available remedies in clause 125(2) should be amended so that damages are not limited to compensating the complainant. The Bill should provide courts with the capacity to award punitive damages which will deter future unlawful behavior, and corrective and preventative orders which will bring about the systemic change required to avoid future discrimination.

Recommendation

The Bill should provide the AHRC with the capacity to issue performance improvement notices, enforceable undertakings or similar preventative remedies.

APPENDIX 1: RECOMMENDATION

Clause 24 of the Exposure Draft should be replaced with the following:

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.*

(8) For the purposes of this section, the aggrieved person works for another person if:

(a) The other person employs the aggrieved person; or

(b) The other person engages the aggrieved person as a commission agent; or

(c) The aggrieved person works for the other person as a contract worker; or the other person and the aggrieved person are members of a partnership; or

(d) Both of the following apply:

(i) the other person is an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorization or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation;

(ii) the aggrieved person is a member of that profession, carrying on that trade or engaged in that occupation.