CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINSATION LAWS

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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Shop, Distributive and Allied Employees' Association (SDAEA)

Submission to the Attorney-General's Discussion Paper on

Consolidation of Commonwealth Anti-Discrimination Laws

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.

Given that discrimination, harassment and sexual harassment are predominantly found in employment, especially in the service industries, the SDAEA has great concerns with the current system and is very interested in improving the effectiveness of anti-discrimination legislation in promoting equality, and making real progress towards eliminating the incidence of these behaviours. We are particularly interested in preventative measures being required in workplaces, and where breaches occur, having mechanisms which provide just, low cost and speedy resolutions to complaints.

The SDAEA believe this is an important opportunity to address the inherent failings of the current anti-discrimination legislation. This jurisdiction must be afforded greater powers with the ability to issue much higher penalties and be granted increased funding in order to address the widespread discrimination which is occurring.

We welcome this opportunity to respond to the Attorney-General's discussion paper on the Consolidation of Commonwealth Anti-Discrimination Laws.

We congratulate the government on its statement that this exercise will not lead to a reduction in existing protections in federal anti-discrimination legislation, and on its aims to:

- Reduce complexity and inconsistency in regulation, making it easier for individuals and business to understand rights and obligations under the legislation
- Ensure simple, cost effective mechanisms for resolving complaints of discrimination
- Clarify and enhance protections where appropriate

Summary

SDAEA RECOMMENDATIONS

1. **A unified test to define discrimination, incorporating both 'direct' and 'indirect' discrimination.**

2. **If a separate definition of 'direct' and 'indirect' discrimination remains, the need for a comparator should be removed from the definition of 'direct' discrimination.**

3. **The phrase 'so far as possible' should be removed from and not be incorporated into the Consolidated Act.**

4. **The burden of proof should shift to the respondent once the complainant has established a prime facie case of discrimination, as is the case in the *Fair Work Act 2009*.**

5. **There needs to be a clear framework of rights and responsibilities which is consistent between jurisdictions.**

6. **The requirement on employers to make reasonable adjustments in their workplaces should be extended to include employees with family or caring responsibilities. It should be clear that these reasonable adjustments should be made unless those adjustments will cause unjustifiable hardship to the employer, and the employer should be required to demonstrate the existence of these unjustifiable hardships.**

7. **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 they provide a discrimination free workplace.**

8. **The Consolidated Act should prohibit harassment for all protected attributes. The Consolidated Act should state this as the over-arching principle, which is subsequently supported by specific definitions of sexual harassment and harassment.**

9. **The SDAEA recommends that the issue of intersectional (or compounded) discrimination be specifically addressed in the Consolidated Act.**

10. **The Consolidated Act should prohibit discriminatory requests for information.**

11. **The SDAEA supports the inclusion of a general limitations clause with a test that looks at whether the conduct is a 'proportionate means of achieving a legitimate end or purpose' as per the *Equality Act 2010* (UK). The Objects clause of the Consolidated Act must fully support and promote the elimination of discrimination and as such limit the use of exceptions and exemptions.**

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

13. **A variety of measures need to be adopted to ensure that the conciliation process is more effective. It must be more transparent, more timely, less costly and provide greater support and certainty for claimants.**

14. **A variety of measures need to be adopted to ensure that the court process in anti-discrimination cases is more accessible, less costly and provides greater remedies and outcomes for claimants.**

15. **The role and functions of the AHRC must be greatly enhanced to provide for inquisitorial powers, investigative powers and determinative powers. The AHRC must be sufficiently funded to operate as an effective research, education and enforcement body.**

16. **The FWA must be compliant with Commonwealth anti-discrimination legislation in order to meet Australia's international obligations under ILO Convention 111 and prevent the creation of a sub-standard discrimination jurisdiction which encourages widespread discrimination in employment.**

Please see our detailed response to the Discussion Paper questions below:

Q 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

Definition of discrimination

The Consolidated Act should have a unified test for discrimination which does not draw a distinction between 'direct' and 'indirect' discrimination. The requirement in the *Sex Discrimination Act 1984* to have a 'comparator' and demonstrate 'causation' makes a finding of direct discrimination very difficult to establish, and as a result many worthy claims have not been made, or have not succeeded. Also, as the Discussion paper notes, the requirements for finding of indirect discrimination are not clear.

RECOMMENDATION

The SDAEA supports a unified test to define discrimination, incorporating both 'direct' and 'indirect' discrimination.

Due to the difficulty in finding a suitable comparator in many cases, the SDAEA supports the view that the 'comparator test' be removed and the simpler 'detriment test' be adopted instead. The use of a 'comparator' has resulted in less protection for some attributes than others, which is an inequitable outcome.

The Consolidated Act should use the definition of discrimination in the same terms as that of ILO Convention 111.

RECOMMENDATION

If a separate definition of 'direct' and 'indirect' discrimination remains, the need for a comparator should be removed from the definition of 'direct discrimination'.

It is imperative that the Objects clause of the Consolidated Act reflect the importance of the right to equality for all. It should also clearly spell out the rights and obligations under international law.

Equality for all should not be qualified with 'so far as possible'. This undermines the fundamental principle of equality for all and is inconsistent with the purpose of Anti-Discrimination legislation.

RECOMMENDATION

The phrase 'so far as possible' should be removed and not be incorporated into the Consolidated Act.

Q 2. How should the burden of proving discrimination be allocated?

Burden of Proof

The Consolidated Act should adopt a reverse onus of proof on the respondent once a prime facie case has been established. The onus of proof must be on the party with the knowledge. The respondent knows the reason for their decision and as such must bear the burden of proof. The SDAEA supports the approach of the *Fair Work Act 2009* in s361, where once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason unless the respondent proves otherwise.

A reverse onus of proof is imperative to the success of this legislation because it seeks to redress the obvious and inherent power imbalance which exists between the parties.

RECOMMENDATION

The SDAEA recommends that the burden of proof should shift to the respondent once the complainant has established a prime facie case of discrimination, as is the case in the *Fair Work Act 2009*.

Q 4. Should the duty to make reasonable adjustments in the DDA be clarified and if so, how? Should it apply to other attributes?

Reasonable adjustments

Disability discrimination in employment is a significant issue for members of the SDAEA in relation to both work-related and non-work injuries. It is of great concern that many employers have little regard for their legal obligations in this area. They regularly fail to make accommodations of any kind, even where the disability is not of a permanent nature.

It is important that there be a positive and explicit standalone duty on duty holders to make 'reasonable adjustments' under the Consolidated Act. This positive duty should be clearly expressed and include a reference to the fact that an assessment regarding 'reasonable adjustments' must be made on an individual / case by case basis, which takes into consideration the circumstances and needs of that individual. It is our experience that employers like to make generic policy decisions about job descriptions and task analysis. This then becomes a problem when an individual needs reasonable adjustments to be made in order to function in that workplace, yet the employer is wedded to a tasks' analysis which is inflexible and discriminatory.

This positive duty should be a separate type of discrimination and have specific remedies attached to a breach of this duty. This should help to remove any uncertainty regarding the obligations of duty holders.

The 'reasonable adjustments' duty should remain balanced with the concept of 'reasonableness' and 'unjustifiable hardship'. It is of great concern that the Fair Work Act (FWA) (2009) does not adequately reflect both State and Federal discrimination legislation and has deviated so dramatically to the detriment of those employees with a disability in the workplace. The FWA allows disability discrimination to occur where the inherent

requirements of a position cannot be met. However under disability discrimination 'inherent requirements' are but one part of the test in determining discriminatory conduct. The second and third parts of the test are whether 'reasonable adjustments' could have been made by the employer without causing 'unjustifiable hardship'. However the FWA does not allow for these considerations when determining discriminatory conduct.

S351(2)(a) of the FWA does not meet Australia's international obligations under ILO Convention 111. The disability discrimination provisions in the FWA have the effect of creating a sub-standard discrimination jurisdiction which allows for widespread disability discrimination to occur in employment. This parallel, sub-standard discrimination jurisdiction only creates greater confusion for duty holders and for those with disabilities. It is most disappointing that at a time when the positive duty to make reasonable adjustments was being inserted into the Federal Disability Discrimination Act, the Federal employment legislation was drastically eroding the rights of people with disabilities in employment. FWA is creating a body of case law which has greatly diminished the rights of those with a disability in the workplace.

RECOMMENDATION

There needs to be a clear framework of rights and responsibilities which should be consistent between jurisdictions.

The SDAEA has seen a disturbing trend emerge over the past decade; the use of OHS legislation to undermine and exclude workers with disabilities. OHS legislation encourages a generic response to disability discrimination which is drastically failing those with disabilities. In fact, the use of OHS legislation to override other legal obligations has become common place. It has come to the situation where workers are being sent home because they have a broken finger, sustained in a netball match, having been told that they cannot return to work until they are 'fully fit " due to OHS obligations. However OHS legislation provides that the primary duty holder (employer) provide a workplace which is safe for employees. It does not mandate that an employer cannot have an injured worker on site, whether work-related or non work-related, because they pose a danger to the workplace. Surely it is not the intention of OHS legislation that injured employees equate to dangerous or unsafe employees, yet this is exactly how OHS legislation is being manipulated in workplaces across Australia. It is this shift in basic understanding of the OHS Act which is causing workers with disabilities to be continually excluded and ostracised from workplaces. The FWA disability discrimination provision in s351 has further added to this exclusion and has allowed Australia to fail to meet its international legal responsibilities in regards to people with disabilities in the workplace.

The misunderstandings of OHS legislation and failure of employers to fully understand their legal obligations is greatly affecting the opportunity for meaningful and engaging work for people with disabilities. This comes at not only a great personal cost to employees but also has a substantial social and economic cost to the community at large. [1]

[1] For a detailed analysis of the economic impact of excluding people with disabilities from the workplace, see: International Labour Organization (ILO) *' The price of exclusion : the economic consequences of excluding people with disabilities from the world of work.'* Employment Working Paper No. 43. December 2009

The extension of 'reasonable adjustments' beyond disability.

The obligation on employers to 'reasonable adjustments' to accommodate the needs of people with a disability is well known and accepted. We believe that this concept should be extended to women and men with family or caring responsibilities. The House of Representatives Report "Who cares?...The report on the Inquiry into better support for Carers" (May 2009) identified the significant detrimental effect that inflexible work practices have on carers' participation in work. The current provisions in the *Fair Work Act 2009* (FWA) are insufficient. The FWA contains a limited right for employees to request flexible working arrangements only if they have children under school age or a child with a disability under 18 years of age. The employer can refuse the request on reasonable business grounds, but is not required to demonstrate the existence of these grounds, furthermore the employee has no right of appeal.

In the interests of increased participation in the workforce of parents and carers, and the consequent opportunity for increased emotional, psychological and physical well being of carers and their dependents, there should be a requirement on employers to make reasonable adjustments in their workplaces to accommodate the needs of parents and carers, unless to do so would cause them unjustifiable hardship.

RECOMMENDATION

The requirement on employers to make reasonable adjustments in their workplaces should be extended to include employees with family or caring responsibilities. It should be clear that these reasonable adjustments should be made unless those adjustments will cause unjustifiable hardship to the employer, and the employer should be required to demonstrate the existence of these unjustifiable hardships.

Positive Duty

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 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 AHRC 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.

A concerning number of companies choose not to devote sufficient resources to taking "all reasonable steps" to prevent sexual harassment and discrimination, particularly failing to make 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 characteristic of poor management and would not be acceptable in other operational areas of the business. At worst, it is a callous and dismissive mentality to the severe impact on individuals who experience discrimination and harassment and at best, 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 AHRC and the Equal Opportunity for Women in the Workplace Agency, which is readily available.

The creation of a positive duty would, if enforced, have a positive effect in many areas of employment. It would, undoubtedly have a positive impact on workforce participation and on the productivity and economic prosperity of the nation.

RECOMMENDATION

The SDAEA recommends 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 they provide a discrimination free workplace.

Q 6. Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

The SDAEA supports the prohibition against harassment covering all attributes. However it is important that the Consolidated Act still defines sexual harassment and harassment in specific terms. This could be achieved through the use of a over-arching definition which states that a prohibition against harassment covers all protected attributes, which is then followed by further definitions for the possible types of harassment.

The Sex Discrimination Act (C'W) greatly benefited from the separate and distinct inclusions and definitions of sexual harassment. Once the distinction and the definitions were included in the Act, its prohibition was clearer, leading to more claims and accumulated case law. This in turn led to a clearer picture and greater understanding of the prevalence and nature of sexual harassment, thereby allowing for a targeted and strategic approach to education and research.

It is the SDAEA's experience that sexual harassment has had a much better focus when it was specifically prohibited rather than being just another form of discrimination.

RECOMMENDATION

The Consolidated Act should prohibit harassment for all protected attributes. The Consolidated Act should state this as the over-arching principle which is subsequently supported by specific definitions of sexual harassment and harassment.

Q 10. Should the Consolidation Bill protect against intersectional discrimination? If so, how should this be covered?

Discrimination based on more than one protected attribute is common, and all aspects of the discrimination suffered by an individual, together with its combined impact should be able to be claimed and assessed. We prefer the term 'compounded discrimination' as a more accurate and easily understood term to describe this experience.

RECOMMENDATION

The SDAEA recommends that the issue of intersectional (or compounded discrimination) be specifically addressed in the Consolidated Act.

Q 18. How should the consolidation bill prohibit discriminatory requests for information?

In recent years it would seem that employers believe they have an unequivocal right to know anything and everything about a prospective or current employee. It would appear that the line between a work life and a private life is becoming increasingly blurred. It is our experience that employers are demanding, and getting access to, a whole range of personal information which can be and is used for, discriminatory purposes. This is particularly true in regard to disability, with requests for personal health information and testing. The request for such information is often made under the guise of (misunderstood) OHS obligations.

Employers have been given unfettered access to the health records of employees and are subjecting employees to pre-employment medical testing, drug and alcohol testing, and even DNA testing in some instances, to determine pre-dispositions to medical conditions and diseases. They are engaging in private discussions with employees' treating doctors when the employee is not present. They are physically attending an employee's medical consultation, without consent. They are requesting and receiving an employee's ***full*** medical history which goes well beyond the information needed to effectively deal with a workplace injury or disability.

It is disappointing that the *Privacy Amendment (Private Sector) Act 2000* (C'W) which sets out the National Privacy Principles affords no protection to the health information of employees, due to the employee records exemption. This exemption has allowed employers to obtain personal and sensitive health information which goes far beyond the bounds of the employment relationship. An employee is also prevented under NPP6 from accessing their personal information in an employee record. Therefore it would be difficult, if not impossible, for an employee to ascertain the extent and nature of the information known about them by their employer and whether that information was the basis of discriminatory action against them.

Employers have increasingly focused their 'safety' initiatives on health and wellbeing programs which look more at lifestyle choices than workplace factors. While these programs

may be with the consent of the employee and sound like a positive workplace initiative, the reality is that a whole range of health and other lifestyle information is being collected in these programs. It has become commonplace for employers to 'screen' workers for unhealthy lifestyle choices in the workplace. But how is this information relevant to the employment relationship? What influence and control can an employer have over the lifestyle choices of their workers? The only real control they can have is over the hiring of those people (pre-employment screening) and the termination of employment of these people (discrimination). The question must be asked as to the relevance of and purpose for the collection of this information. It is our experience that this information is collected and used for the sole purpose of determining who to hire and who to fire. Is the smoker with diabetes going to be managed out of the business because they are a perceived OHS risk? While these programs may appear to benefit employee wellbeing, it would appear their primary purpose is to weed out those employees with perceived weaknesses. This greatly impacts on people with disabilities as they become actively and covertly excluded from the workplace.

The Consolidated Act should prohibit discriminatory requests for information. Employers should not be able to ask for medical histories of prospective employees, including pregnancy testing. It would be nearly impossible to prove that a prospective employee was not subsequently employed because of their pregnancy. Employers can only be expected to comply with OHS standards if they know of an employee's pregnancy or disability. It should be up to the employer to identify the tasks the employee will be required to do, including the possible risks, and to ask if the prospective employee will have or would expect to have, any difficulties in doing those tasks.

RECOMMENDATION

The Consolidated Act should prohibit discriminatory requests for information.

Q 19. Can the vicarious liability provisions be clarified in the consolidation bill?

Please see the response to Question 4 in regard to employers having a positive duty and being required to take mandatory actions to provide a discrimination free workplace.

Q 20. Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

The SDAEA supports the inclusion of a general limitations clause and believes any concerns about uncertainty and renewed judicial interpretation can be supported by an Objects clause which clearly sets out and defines the parameters of the legislature's intention and commitment to the elimination of discrimination.

RECOMMENDATION

The SDAEA supports the inclusion of a general limitations clause with a test that looks at whether the conduct is a 'proportionate means of achieving a legitimate end

or purpose' as per the *Equality Act 2010* (UK). The Objects clause of the Consolidated Act must fully support and promote the elimination of discrimination and as such limit the use of exceptions and exemptions.

Q 24 Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

Legal advocacy

The complaints process in anti-discrimination jurisdictions is too legalistic. The discussion paper states that the complaint process for Australia's anti-discrimination laws is intended to be efficient, informal and low cost for both complainants and respondents. This is not our experience.

It is common for companies to attend conciliations with a solicitor and/or barrister to represent them and the complainant can be faced with a 'wall of suits' on the other side of the table. The individual may have union representation, but equally may just have their mother or husband to support them. Needless to say this is a very intimidating situation 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 an unsuccessful conciliation, and 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.

RECOMMENDATION

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

Action Plans

The discussion paper raises the approach used in Victoria where the Victorian Equal Opportunity and Human Rights Commission can register action plans and provide advice to service providers and employers on developing Action Plans that meet their obligations under the Victorian Act. The SDAEA believes that this service provided by the VEOHRC should be available at the Federal level.

Standards

The SDAEA is particularly supportive of the Senate recommendation and the similar Australian Law Reform Commission recommendation that the Commission be able to formulate legally binding standards under the Act.

We would envisage such standards would provide detailed guidance and minimum requirements on how to make a complaint and how to investigate a complaint. Minimum standards would need to encompass obligations under other relevant legislation such as OHS and FWA.

Technical regulations may well be necessary in some instances such as in regard to pregnancy, where direction could be provided in regard to the considerations of balancing OHS requirements with those of the workplace.

Q 25 Are any changes needed to the conciliation process to make it more effective in resolving disputes?

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 transparent
- 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.

RECOMMENDATION

A variety of measures need to be adopted to ensure that the conciliation process is more effective. It must be more transparent, more timely, less costly and provide greater support and certainty for claimants.

Q 26. Are any improvements needed to the court process for anti-discrimination complaints?

- The discrimination jurisdiction should be a no-costs jurisdiction, recognizing the obvious power imbalance which exists between the parties and also recognizing that this jurisdiction is often dealing with vulnerable complainants. The cost of taking a complaint through the current discrimination jurisdiction and especially in the Federal Court is a substantial deterrent for complainants

- The consolidated Act should contain civil penalty provisions similar to those in the FWA which can assist a complainant with mitigating their costs.
- The Act must give the court the powers to;
    - Provide appropriate remedies to reflect the seriousness of a complaint which properly values the loss suffered in discrimination cases, including future loss of pay and career advancement
    - Provide significantly higher penalties, especially when 99% of claimants lose their employment as a result of making a claim
    - Ensure that sufficient remedies are available to not only compensate a complainant but also to act as a deterrent against discriminatory practices
    - Allow representative complaints provisions which will enable organisations to engage in strategic litigation on behalf of complainants

RECOMMENDATION

A variety of measures need to be adopted to ensure that the court process in anti-discrimination cases is more accessible, less costly and provides greater remedies and outcomes for claimants.

Q 27 Is it necessary to change the role and functions of the Commission to provide more effective compliance regime? What, if any, improvements should be made?

The complaints process for discrimination claims is too costly, timely and does not provide adequate remedies for breaches of the law. The current process greatly discourages an individual from making a formal complaint to the AHRC or state based equivalent.

The AHRC should be given investigative powers and determination powers in order to investigate, hear and determine claims of discrimination. Matters would still be appealable to the Federal Court but only after the AHRC has determined them. It should operate in a very similar manner to that of the FWA. The FWA offers a quick, relatively informal, cost effective and transparent complaints' resolution model. This model should be adopted in the discrimination jurisdiction.

- **Adequate resources must be given to the AHRC;**
    - to ensure a fair, fast and equitable legal claims process,
    - to educate, support and provide material to duty holders
    - to enforce the Act
    - conduct research to assess the costs of sexual harassment and discrimination to individuals, employers and the community, and that such research is widely publicized
    - 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 Act must equip the AHRC with the ability to;**
    - Provide remedies to reflect the seriousness of the complaint and properly value the loss suffered in discrimination cases, including future loss of pay and career advancement
    - Provide much higher penalties, especially when 99% of claimants lose their employment as a result of making a claim
    - Ensure that sufficient punitive measures are in place to act as a deterrent
    - Ensure that the AHRC has the requisite skill and expertise to resolve, investigate and determine complaints
    - Ensure that the AHRC has the requisite skill and expertise to deal with cross jurisdictional matters. This is particularly an issue in regards to discrimination in employment matters. An understanding of employment law, the FWA, awards, enterprise agreements, OHS legislation and Workers compensation legislation may be relevant and can impact on the outcome of a claim.
    - Initiate inquiries into systemic discrimination. The current arrangements require individuals to have the courage to pursue a complaint, and to take on the risk in a jurisdiction which is completely foreign to them, and where they are disadvantaged against the might of large companies and corporations. Remedies address individual compensation but do nothing to address the workplace situation to prevent further discrimination occurring in that workplace or in others. This is particularly the case where the matter is settled prior to a hearing. The Consolidation Act needs to provide an effective means of addressing systemic discrimination and broad workplace culture and behavior.

RECOMMENDATION

The role and functions of the AHRC must be greatly enhanced to provide for inquisitorial powers, investigative powers and determinative powers. The AHRC must be sufficiently funded to operate as an effective research, education and enforcement body.

Q 28 Should the consolidation bill make any improvements to the existing mechanisms in commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

As discussed in Question 4 of this submission the SDAEA has great concerns about the structure and intent of the disability discriminatory provisions in the *Fair Work Act* (2009). S351 fails to reflect Commonwealth discrimination legislation to the point where it only affords minimal, if any, protection from discrimination for those with a disability in the workplace. The FWA allows disability discrimination to occur where the inherent requirements of a position cannot be met. However under disability discrimination 'inherent requirements' are but one part of the test in determining discriminatory conduct. The second and third parts of the test are whether 'reasonable adjustments' could have been made by the employer without causing 'unjustifiable hardship' to that employer. However the FWA does not provide part two and three of the long standing test which applies in both state and Federal disability discrimination legislation. This is not an acceptable position. The FWA

must be overridden by the provisions of the new Consolidated Act so that the principles of anti-discrimination legislation and Australia's international obligations are met.

There are concerns with the FWA in terms of the protection for women wishing to return to work after maternity leave. These concerns are two-fold. The first is the lack of appeal rights under s 65 ' Right to request' provisions, as discussed previously in Question 4.

The second concern with the FWA is in regards to the misuse of redundancy provisions, with the effect that women are unable to return to the workplace after a period of maternity leave. It is the SDAEA's experience that many women attempting to return to the workplace are being made redundant under the provisions of the FWA, without being bona fide. The redundancy is not bona fide because its true purpose is to remove a woman seeking workplace flexibility due to her new family responsibilities, rather than accommodate her request for flexibility. The redundancy provision is used to discriminate against people with family and caring responsibilities.

Employers frequently respond to requests to accommodate family responsibilities by way of a redundancy. It is commonplace for a woman wanting to return to work after a period of maternity leave to request flexibilities such as part time work. She is often told her position is either no longer available; the job can only be performed full time; if she cannot return full time then casual employment is the only option; or she has to accept a lower status and lower paid position if she wants workplace flexibilities. She will be offered a redundancy, *but* only if her employer employees 15 or more employees (due to the small business redundancy exemption). If she is employed in a small business then she will be left with no job and no redundancy payment. This is a regular experience for women returning to the workplace after parental leave and is another example of the poor protections afforded by the FWA in the area of anti-discrimination.

RECOMMENDATION

The FWA must be compliant with Commonwealth anti-discrimination legislation in order to meet Australia's international obligations under ILO Convention 111 and prevent the creation of a sub-standard anti-discrimination jurisdiction which encourages widespread discrimination in employment.