Shop, Distributive and Allied Employees' Association
ALRC - Barriers to Work for Mature Aged Workers

The Shop, Distributive and Allied Employees' Association (SDAEA) would like to preface these remarks with the observation that there is lack of understanding in the community of what "disability" means. For clarification, "disability" can mean:

- Permanent impairment
- Temporary impairment
- Work and non-work related illness or injury
- Physical characteristics which may or may not affect a person's ability to do their job eg. a limp, arthritis
- It can include illness which may or may not affect a person's ability to do their job eg. mental illness, diabetes, epilepsy, cancer

This is of particular relevance to mature aged workers, for whom there is a greater prevalence of disability.

Disability discrimination in employment is a significant issue for members of the SDAEA. 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.
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]

Misuse of the 'Duty of Care' under OHS legislation

The SDAEA has seen a disturbing trend emerge over the past decade with the use of OHS legislation to undermine and exclude workers with disabilities. OHS legislation encourages a basic and generic response to disability discrimination which is drastically failing those with disabilities. In fact, the use of OHS legislation to override other legal obligations, such as the *Disability Discrimination Act* has become common place. It has come to the situation where workers are being sent home because they have a broken finger, sustained out of work hours, 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

[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

s351 has further added to this exclusion and has allowed Australia to fail to meet its international legal responsibilities in regard to people with disabilities in the workplace.

Employers regularly fail to consider their obligations under disability discrimination and in particular the positive duty on them to make reasonable accommodations. In the case of the employee with the broken finger, all that was required was for the employee to be given work on the express checkout where the employee would not be required to lift heavier items as often. Instead, the employer insisted on sending the employee home because they supposedly could not meet the inherent requirements of the job.

Reasonable accommodations/ adjustments

It is important that there be a positive and explicit stand-alone duty on duty holders to make 'reasonable adjustments' for those with disabilities in the workplace. This duty should be replicated in the *Fair Work Act 2009* in order to provide a fast and efficient remedy for disability discrimination cases in the workplace.

Employers should have a positive duty to make reasonable accommodations and this duty should be accompanied by a clearly expressed 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 the individual. It is the Associations' experience that employers like to make generic policy decisions about job descriptions, safe work practices and task analysis which fail to adapt to the needs of individuals with disabilities. This becomes a problem when an individual needs reasonable adjustments made in order to function in the workplace, yet the employer is wedded to a tasks' analysis which is inflexible and discriminatory. Employers simply send workers home or terminate their employment when they are ill or injured, rather than make reasonable accommodations in the workplace in order to facilitate the continuance of work.

Fair Work Act

Disability discrimination should remain balanced with the concept of 'reasonableness' and 'unjustifiable hardship'. It is of great concern that the *Fair Work Act 2009* (FWA) 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.

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 is particularly concerning considering that disability discrimination is most prevalent 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 *Disability Discrimination Act* (Cth) 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.

Privacy and health 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, and is being 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 without the employees consent or knowledge. They are physically attending an employee's medical consultation, without full and informed 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 the *Privacy Act 1988 (Cth*) which sets out the National Privacy Principles affords no protection to the health information of employees, due to the Employee Records Exemption under s6(1). The employee records exemption relates to a record of personal information relating to the employment of the employee. It includes health information about an employee and personal information relating to things such as conditions of employment, training, disciplinary action, membership of a professional trade or association, and an employee's taxation, superannuation and banking details. The exemption is a glaring gap in privacy protection which affects both public and private employees. The exemption allows employers to use information, which would otherwise be considered to impact significantly on the privacy of employees. Employers are keeping employee records which contain some very sensitive health information by way of drug and alcohol testing results, DNA testing, psychometric testing and ongoing surveillance. This exemption has been the subject of both state and federal enquiries.[2]

Pre-employment records are not subject to the employee records exemption. Therefore any pre-employment tests results or health information will be subject to the privacy principles so long as that person is not employed by that employer. As soon as they become an employee then their information falls into 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

[2] See the Victorian Law Reform Commission, Workplace Privacy Report, September 2005. See also the Australian Government Discussion Paper on Information Privacy and Employee Records, 2004, and also the Standing Committee of Attorney Generals, Workplace Privacy – Options For Reform Consultation Paper April 2007.

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.

Workers need to have rights and remedies in relation to privacy in the workplace.

- Employers should not be able to make discriminatory requests for information, or medical histories of prospective employees.
- Employers, insurers and employer representatives should not be able to attend medical consultations/appointments with ill and injured workers;
- Employers should not be able to force ill and injured workers to attend company doctors (this includes collecting them from the home and driving them to the consultation);
- ill and Injured workers should not be subjected to constant medical assessments and functional capacity assessments especially when their treating doctor has cleared them to return to work.
- Medical information should not be used by third parties without the full and informed consent of workers (e.g. superannuation funds, Insurers, government departments etc.);

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Lawful and reasonable direction

Employers believe their duty of care under OHS laws is to ensure the health of workers and it is therefore a reasonable and lawful direction to require a medical assessment to prove the worker is healthy. This is not just about those injured workers in compensation and rehabilitation schemes. In fact, the issue is more likely to occur when a worker has had their compensation claim closed or denied. The reality is, that anyone who may have been, or is

currently ill or injured, whether work related or not, is now somehow ‘a risk’. And the increased penalties and fines under OHS legislation mean that employers do not and will not employ or keep employed - the ill or injured worker.

The SDA regularly deals with members who have received letters from their employer instructing them that:

- they must attend a medical assessment.
- they must provide detailed medical information to their employer,
- they will not be able to return to the workplace until they have provided this information;
- the request for such information is a lawful and reasonable direction; and
- a failure to comply will result in the termination of their employment.

Some employers have recently moved away from terminating a worker because they cannot meet the inherent requirements of the job to instead terminating their employment for failing to follow a reasonable and lawful direction; the direction to get detailed medical information.

(see Attached letters from employers)

Current practices

Employers are refusing to accept ill and injured employees back to the workplace, even when a doctor has cleared them, even when their workers compensation claim has been closed, even when they are fully recovered and ready to return to their jobs. These injured workers, are considered by the employer to be a health and safety risk and medical assessments are used to help prove this.

These practices are occurring nationally and across all industries and they include:

- Employers, insurers and employer representatives attending medical consultations/ appointments with ill and injured workers;
- Employers challenging doctors’ certificates and not accepting medical information from GP’s, unless they are a company GP.
- Employers forcing ill and injured workers to attend company doctors. (Including arranging the appointment, even changing the appointment, collecting them from their home and driving them to the consultation)
- Injured workers being subjected to constant medical assessments and functional capacity assessments even though their treating doctor has cleared them to return to work;
- Workers being required to undergo regular medical assessments with company doctors as part of their ongoing employment.
- Medical information being used by third parties and without the consent of workers (e.g Superannuation funds, Insurers, government departments etc)

- The growth and use of Doctor Networks; paid for by the employer and providing a substandard level of care, such as forcing injured workers back to work too soon.
- The lack of consultation and engagement with injured workers in the Return To Work process
- Injured workers being told false and misleading information about their right to claim workers compensation, the right to attend their own doctor and the use of their personal medical information
- Full access is being sought to **all** health information, rather than pertaining to the injured workers compensation claim;
- The use of the 'lawful and reasonable' direction to force workers to reveal medical information and attend unnecessary 'independent" medical assessments
- Medical certificates and suitable duties/ return to work plans not being adhered to and workers are being forced to return to work too soon;
- Injured workers being refused work because they are deemed not 'fit for work'.
- Injured workers being told that by being injured, whether presently or in the past, they now pose a 'risk ' to the business or organisation and as such face the termination of their employment.
- The use of 'inherent requirements' to justify terminations of employment;
- The "duty of care" is being used by employers to remove ill and injured workers from the workplace; the very same workplace that injured them.
- The "duty of care" is being used by employers to punish workers, not protect workers
- Categories of workers - targeting of groups of employees, such as older workers
- Employees being pressured to sign up to and use income protection schemes instead of making a worker's compensation claim.

CASES

(Major Department store) Safe Work Practice

A Department store was using what they referred to as Safe Work Practices (SWP) as a way of testing the physical capacity of their employees. These SWPs involved 11 tests, 3 of which are physical. Older, and in all reported cases, Part 1 employees, are often unable to complete the physical components of these tests, especially the squatting test. Upon failure of the SWP, an employee is put on restricted duties and instructed to consult their doctor. When they return to work they are re-tested. If they fail again they are sent home until they can complete a "functional assessment test" conducted by a company specialist. Whilst at home they are using annual leave or sick leave. Where an employee failed the "functional assessment test" they are sent home and are on an indeterminate form of leave.

National Supermarket

X has been diagnosed with Fibromyalgia and currently does some shifts on what's called the big registers, her doctor has requested for her to work on the smaller register which would be no hardship at all to the company. Her manager cancelled all her shifts, and wanted a full clearance from the doctor.
The SDA became involved and called HR. HR are now requesting a full task list be completed by X's doctor before X can return. X has worked for this supermarket for 5 years, and is a casual. Her manager suggested she would probably be better off at the new store that has just opened down the road.

National Supermarket

A national retailer provided a confidential counseling service to employees.
The insurance arm of the business (The business is self insured.) requested and received, a report from the confidential counseling service regarding an employee who had used the 'confidential' service and had later made a Worker's compensation claim for a psychological injury.

When Employee A told her employer that she was going to see her Doctor, her manager insisted on going to the medical appointment with her. When Employee A queried this, she was told bluntly that she had to agree, as this *was "Company Policy"*.

Mother of Employee B made a complaint to the union that a manager had accompanied her mildly disabled son into his consultation with his doctor without his consent, or her consent.

Employee C lodged a formal complaint with Q Comp (QLD workers compensation regulator), alleging that her Manager had contacted her treating doctor without her knowledge or involvement and got her "total incapacity" Medical Certification changed to "partial incapacity".

A manager insisted Employee D not lodge a workers compensation claim because it would affect store bonuses and also impact the stores' social club funds. Employee D was told 'she would be the cause of them not having a Christmas function' because of the effect of a worker's compensation claim on the store's bonus system."

Employee E was on Workcover. The company informed E that she was not recovering quickly enough for the type of injury she had. They (the company) have devised a plan for her to recover faster, in their opinion,

1. E could have surgery
2. E should have a cortisone injection, along with reducing her hours for six weeks then maybe increasing as they see fit.

They then gave her a revised plan for her doctor to sign off on. Her doctor did not agree to reduce her hours and saw fit for her to have some modified duties.

Employee F has a current work capacity certificate by a qualified medical practitioner. The company HR did not agree with the doctor's opinion. The HR manager did not have a medical degree. F returned the company form her GP had completed, as requested. (This was a work capacity checklist.) However, the company still refused to accept the doctor's opinion and current capacity certificate. The SDA was unable to get the company to change their position and proceeded to file a complaint with the Equal Opportunity Commission (Victoria).

Employee G worked in a department store and had been employed with the company for 38 years. G was constantly asked when he was going to retire. He loved his job as a door greeter and wanted to stay on as long as he could. He was 72. The company decided they were going to get rid of door greeters. G had always walked with a limp, however the company decided after 38 years that they needed a medical certificate from him stating that he was fit for work. He refused to provide this because no one else was asked to provide it and he had been performing his work without issue. The company HR manager told him that if he did not provide the medical certificate by the set date then she would make sure he would be required to work in the heaviest job in the store; moving and unpacking cages. The HR manager kept putting him under constant and undue pressure to take a redundancy.

With great sadness he left the company.

Epilepsy case

At a Distribution Centre, a long term member/employee had rung her workplace and stated that she recently had an unexpected seizure. Initially her employer accepted this, and on the employee's return to work, accommodated her return to her normal duties. Another seizure occurred, this time at work, and this time the employer was not as accommodating with her work duties. The employer then was making moves to dismiss our member based on the "duty of care" argument, that is, to ensure the health of the employee.

The SDA Secretary suggested that we make contact with the Epilepsy Association who supported our view that it was discriminatory to dismiss someone based on a disability. A representative of the Epilepsy Association attended a meeting with the Employer and the organiser, and stated it was discriminatory to place our member in job roles where she was highly likely to fail based on the epilepsy disability, and a resolution was made to place the member purely in an administration role.

The member is successfully working in her administration role with no known further incidents.

Diabetes case

A member working in a supermarket was denied his break entitlement because the area manager and some company executives were going to visit the store and the store manager was keen to have the store neatly presented for the visit.
The member was denied breaks, even after explaining to the store manager his need to take food, water and medication. The member had a diabetic seizure as a result of missing his food, water and medication intake.