



## SUBMISSION

### **Productivity Commission Inquiry into the *Disabilty Discrimination Act 1992 (Cth)***

By Jen Anderson and Andrew McCarthy

© Job Watch Inc. May 2003

**Job Watch Inc**  
**Level 10, 21 Victoria Street, Melbourne 3000**  
**Ph (03) 9662 9458**  
**Fax (03) 9663 2024**  
**[www.job-watch.org.au](http://www.job-watch.org.au)**

## **Job Watch is ...**

Job Watch is the employment rights legal centre of Victoria. Amongst other things, Job Watch provides information to Victorians about the *Disability Discrimination Act 1992* (Cth) (DDA) in the context of employment.

The Productivity Commission is interested in the experience of individuals. The Job Watch telephone advice service provides individuals with advice about their options with regard to disability discrimination. In addition, Job Watch participates and assists other community organisations in the disability sector including the Community Alliance For Employment Equity (CAFEE) group which advocates for better wages and terms and conditions of employment for workers in business services.

Our experience in advising individuals and our participation in the CAFEE group is the source of much of the information provided in this submission. The submission will include typical enquiries from individuals in the form of case studies.

## **Objectives**

The objectives of the *Disability Discrimination Act 1992* are:

- a) to eliminate discrimination ...
- b) for people with disability to be offered the same rights to equality before the law as the rest of the community, and
- c) promote recognition and acceptance of disability within the community.

If statistics are used to assess how well the DDA is achieving the objective of eliminating discrimination for people with disability then a grim picture is depicted.

In Australia, over 400,000 people aged between 16 and 65 have a significant disability. They have been isolated from mainstream employment and its benefits. This is no longer acceptable.

While Job Watch supports the objectives of the DDA, we recommend that the government provide more resources for community education about disability, with a particular emphasis on education of employers with less than twenty staff. Individuals from workplaces with less than twenty staff feature predominantly on our data base, 43.5% of callers to the advice service for the year ended 30<sup>th</sup> June, 2002<sup>1</sup>.

## **Job Watch Data Base – typical Disability Discrimination enquiries**

Many callers to the Job Watch telephone advice service believe that their employment, or lack thereof, is affected by the underlying discriminatory attitudes of the employer. However, they are often unable to provide evidence of discrimination. Several case studies illustrate how employers disguise their discriminatory attitudes towards people with disability.

Our statistics since December 2001, show that the Disability Discrimination problem category on the Job Watch data base has been selected 650 times. The total number

---

<sup>1</sup> Job Watch Annual Report 2002

of enquiries at this time is 28,792, so 2.3% can be attributed to possible action under the *Disability Discrimination Act 1992* (Cth). There are 57 different problem categories on the Job Watch data base.

Many enquiries are from callers experiencing harassment for being temporarily ill. Callers are enquiring about their rights when dismissed for an unlawful reason, in particular, dismissal for a temporary illness or injury – see Case study 1. Many callers are dismissed in the first three months of their employment or during their probationary period for revealing a disability or for minor temporary illnesses like the flu. Their status as probationary employees excludes them from the termination of employment provisions of the *Workplace Relations Act 1996* (Cth) - see Case study 2.

Other enquiries deal with injured workers who are dismissed within twelve months of the date of a workplace accident or injury. The DDA provides options for these individuals in terms of potential discrimination – see Case Study 3.

Harassment of individuals by managers and employers is a regular feature on our data base – see Case study 4. In response to enquiries about discrimination, potential discrimination and harassment, Job Watch advises individuals:

- (i) to document discussions and conversations and to obtain the names and contact details of witnesses, and
- (ii) to formalise their experiences by writing memos and emails and keeping copies as evidence in the event that a complaint is made.

Job Watch advisers regularly refer callers who have been harassed about their disability to the Human Rights and Equal Opportunity Commission (HREOC) because it is not possible to complain of harassment on the ground of disability under the *Equal Opportunity Act 1995* (Vic).

### **Case study 1      Cancellation of employment offer**

Selena was thrilled with her letter of appointment. After several years battling a mental illness, she had finally achieved her goal of an administration job in a workplace with about twenty staff. She was due to start work the following Monday. The employer discovered that she had been suffering from severe depression and that she was on medication. The employer rang her, apologised and said they no longer “needed her – the business could cope without an extra staff person”. Selena was bewildered at first and then shattered. Job Watch advised her of the possibility of pursuing a discrimination claim.

The Job Watch adviser was sympathetic towards Selena’s position and agreed that often employers disguise their discriminatory attitudes with excuses about the viability of the business. Job Watch explained the complaint process in the state and federal commissions and that it could be difficult for her to prove her “hunch” that the true reason she was not employed was the employer’s fear of a person with a disability – in this instance a recent depressive state.

## **The relationship between the DDA and other Commonwealth legislation**

### **(i) The *Workplace Relations Act 1996***

In Victoria, the Commonwealth DDA and the Victorian *Equal Opportunity Act 1995*, provide a potential remedy for those employees whose employment is terminated unfairly, but who have no access to the termination of employment remedies under the *Workplace Relations Act 1996* (Cth) because they fall within an excluded category of employee such as those on a probation period, short-term casuals (less than 12 months), and trainees, etc.<sup>2</sup> Many employees fall within these categories, however this does not mean that they are less likely to be harshly treated. Indeed the precarious nature of their employment may make discrimination more likely.

#### **Case study 2                      Dismissed – ineligible for remedy under *Workplace Relations Act 1996* (Cth)**

Tony is a person with epilepsy. He obtained work through a temporary agency as a casual in the textiles industry. He told his employer he was an epileptic. About three months later he had two seizures at work and provided medical certificates. On returning from the doctor the agency rang to say the employer had terminated his employment due to too many sick days.

The Job Watch adviser told Tony he had a potential disability discrimination claim and referred him to the EOCV (Equal Opportunity Commission of Victoria). It was also explained that Tony was not eligible to lodge an unlawful dismissal claim because he was a short term casual employee. If he had been hired as a permanent employee, rather than short term casual, he would have been eligible to lodge an unlawful dismissal claim.

Whilst the employment agency in question would be an agent under Section 123, therefore making the employer liable for their actions, establishing the true reason for the decision to terminate the employment could prove to be difficult.

Using the Job Watch data base as a source, there are numerous examples where the DDA provides a safety net for employees who might otherwise have no remedy for unjust conduct.

A common situation that is reported to Job Watch's advice line is one where a casual employee of 11 months employment, with regular shifts, or a trainee, has been terminated because they have been injured in an accident, at work or outside work, and as a result have taken time off work to recover. In other situations, the employee might be able to return on light duties, but the employer refuses to accommodate them and they are instead terminated.

In situations such as these, advice is provided that the employee has no recourse under Commonwealth unlawful termination laws, but may be able to make a claim under federal or state anti-discrimination law, including the DDA.

Serious financial and psychological consequences can flow from any termination of employment and especially one which is unfair. The termination will lead to a cessation or reduction of income, which may be compounded by the fact that the person now finds it more difficult to get new work because of the injury itself. The employee also often has to pay for the treatment for the injury.

---

<sup>2</sup> WRA s170CC, WR Regs Part 5A, Division 1.

## **The relationship between state legislation and the DDA**

### **Case study 3      Injured workers, occupational health and safety and disability discrimination**

Margo worked for a large construction firm. She acquired carpal tunnel syndrome - an overuse injury due to inappropriate workstation equipment, unachievable targets and an impossible work load. She filed a WorkCover complaint under the *Accident Compensation Act 1985* (Vic) which was rejected by her employer. A WorkCover Conciliation provided no resolution so on advice from employment law practitioners the matter was referred to the Magistrates Court.

Margo recovered and obtained medical evidence from her doctor and physiotherapist allowing her to return to work. On her return her employer refused to modify her workstation and continually harassed her about her injury.

Job Watch advised Margo that the WorkCover laws require reasonable adjustments to be made to accommodate an injured worker. Job Watch also advised that her employer was potentially in breach of the DDA and to document all incidents of harassment and requests for work station adjustments.

### **Harassment and unfair treatment**

Under the DDA (s35 and s36), employers have an obligation not to harass or allow a person with a disability to be harassed.

Employees (without disability) that are temporarily ill are often harassed about their illnesses by their employers. The following comments from callers to our advice service illustrate the harassment:

"My employer asked me about the veracity of my illness ... this was humiliating and inappropriate."

"A colleague disclosed details of my illness to my employer." This person experienced distress because sensitive personal information had been discussed without his presence.

### **Case study 4 - Harassment case studies**

A parent called on behalf of his daughter who was on probation in a real estate business. She was instructed to do dicta-phone work although this was not part of her duties. She explained that she had a hearing problem and could not do that work. After the explanation she was ignored and bogus telephone calls were made to her.

Job Watch advised that treating someone differently due to their disability is unlawful and that his daughter could apply for a remedy at either the EOCV or HREOC. In addition, repeated exclusion or isolation of employees and psychological harassment were considered bullying behaviour under the *Occupational Health and Safety Act 1985* (Vic).

A mother called on behalf of her son who had a mild intellectual disability. He worked in an industrial laundry and complained that the boss often abused him.

This caller was advised that employers have an obligation not to harass or allow a person with a disability to be harassed.

## **Factors affecting the choice of jurisdiction**

The Job Watch Legal Practice has had some experience with disability discrimination matters, however this has mainly been via the EOCV under the Victorian Equal Opportunity Act. It has had experience with HREOC and the Federal Court under other Federal Acts (eg Sex Discrimination Act).

When callers are advised of options between Commonwealth and State jurisdictions, the following factors are considered:

- perceptions of differences in time to process complaints,
- definitions in different jurisdictions may be wider or narrower in scope and/or they may be interpreted differently,
- the potential legal costs for clients, eg barrister's fees (although a client may also require a barrister in VCAT)
- the Federal Court's accrued jurisdiction, unlike VCAT under the Equal Opportunity Act, enables other legal issues relating to employment to be resolved, including federal award breaches, wrongful dismissal under common law and contractual breaches,
- there are cost orders implications in the Federal Court. This means that the complainant in losing the case may have to pay the costs of the respondent.
- If the complaint fits the selection criteria of the Job Watch legal practice, Job Watch might represent the client in a matter after the complainant has already lodged a complaint in either federal or state jurisdiction.

## **Community Education and Awareness of Rights – *Disability Discrimination Act 1992 (DDA)***

For most individuals, work is essential to the development of self esteem, to earning an income and to achieving valued status as contributors to society. People with disability are also, if not more dependent on employment to achieve these goals.

People with disability have been marginalised and discriminated against by society. They are excluded from fully participating in the economic and social life of the community and are denied opportunities to demonstrate their individual capacity. They face serious obstacles in obtaining and holding employment, and in securing opportunities to lead a full life through access to education and training.

Exclusion has created a negative community image of people with disability as being unable to work which devalues them and their potential. For too long, the potential of people with disability has not been adequately recognised. As a result, the community as a whole is impoverished because we do not get the benefit of the richness that diversity brings to our community. We do not get to grow up with, work with, study with or socialise with a diversity of Australians.

## **Striving for better conditions for workers with disability - CAFEE**

Job Watch is a member of the Community Alliance for Employment Equity (CAFEE). The alliance was formed in 1999 to provide industrial advocacy and support for Victorians with a disability who work in Business Services.

The community alliance includes:

Villamanta Legal Service,  
Action on Community Living,  
Disability Employment Action Centre (DEAC),  
Disability Justice Advocacy,  
Job Watch,  
Victorian Trades Hall Council,  
National Council on Intellectual Disability,  
Disability Discrimination Legal Service,  
Victorian Regional Advocacy Network,  
Westernport Speaking Out,  
Bear in Mind.

CAFEE's aim is to advance the employment rights and conditions of Victorian workers with disability who work in business services and are grossly underpaid.

### **Government Statement on Business Services**

The Commonwealth Government's vision for supporting people with disabilities is to:

"Ensure [people with disabilities] have the opportunity to participate economically and socially in community life"<sup>3</sup>

Fair wages and working conditions enable people with disability to participate more fully in the social and economic activity of their community.<sup>4</sup>

Many people with disability are employed in Business Services (or sheltered workshops) which are funded to provide meaningful paid employment for people who, due to their disability, find it difficult to obtain mainstream employment.

There are 118 Business Services in Victoria with more than half located in rural regions. Approximately 3,500 workers with disability are employees of Business Services. The majority of these workers have an intellectual disability.

While the intention of Business Services was to provide meaningful paid work, employees continue to be underpaid and exploited with 87% earning less than \$80 per week<sup>5</sup>.

### **Supported Wages System**

The Supported Wages System (SWS) was introduced in 1994. The SWS has been found to be the only current wage assessment tool that provides award based wages linked to a person's productive capacity. It also gives effect to the principles of the Disability Discrimination Act and the protections it provides. The SWS is acknowledged as the most fair, reasonable and transparent workplace relations

---

<sup>3</sup> Dept of Family and Community Services – Government statement on Business Services

<sup>4</sup> Employment Justice – Advancing Employment Rights of Victorian Workers in Business Services (CAFEE) 2002.

<sup>5</sup> Employment Justice – Advancing the Rights of Victorian Workers in Business Services, CAFEE

mechanism that enables exemption from minimum rates of pay and the establishment of productivity based wages.

Business Services do not have an agreed wage setting system at industry level. Unfortunately for Victorian workers with an intellectual disability, Business Services management personnel are reluctant to use the SWS assessment process. They have opted for workplace agreements which have been negotiated on behalf of their employees with disability<sup>6</sup>.

During the recent Safety Net Review 2003 proceedings at the Australian Industrial Relations Commission, the Disability Employment Action Centre (DEAC) and the National Council on Intellectual Disability (NCID) made submissions in relation to enterprise bargaining in the disability sector, in particular in relation to:

- the legal capacity of some of the employees concerned to consent to agreements; and
- the fact that a significant number of the most commonly used federal awards do not include the model supported wage clause.

It submitted that because of this, workers with a disability were being discriminated against because of the failure to provide minimum standards.

The AIRC noted that the issues raised were 'significant and ought to be addressed'. In particular it was concerned that there appeared to be a 'significant number of federal awards which do not include the supported wage model clause'. Further, although expressing no concluded view on the issue, it noted that 'it may be that enterprise bargaining is not appropriate in this sector'<sup>7</sup>.

Exploitation of workers with disability continues because they have been excluded from the same rights, protections and responsibilities as other people in the workforce<sup>8</sup>.

In March, 2003 the Disability Employment Action Centre and the National Council on Intellectual Disability intervened in the certification of an agreement because the underpinning award did not include supported wage test case provisions. The certification was refused because the fixed common wage rate (\$1.71 per hour) gave rise to serious disadvantage compared to the award.

A significant achievement of CAFEE in 2002 was the ACTU Workers with Disabilities Conference in Melbourne – July 11<sup>th</sup> and 12<sup>th</sup>, 2002.

The alliance of unions, workers with disabilities and their representatives is committed to working together to improve working conditions, ensuring workers with disabilities enjoy equal rights, identifying problems confronting workers, developing campaigns to overcome those problems, and empowering workers with disability,

---

<sup>6</sup> see *Voices from the Workplace*, Submissions to the Victorian Industrial Relations Task force for exploration of the difficulties workers experience in negotiating employment agreements.

<sup>7</sup> Australian Industrial Relations Commission, Safety Net Review – Wages, May 2003, PR002003, paragraphs 231-40

<sup>8</sup> See Appendix 2 - media articles where people with disabilities demonstrate outside the AIRC in support of the DEAC and NICD intervention.



through information, organisation and training to resolve their own issues wherever practicable<sup>9</sup>.

## **Recommendation**

Fund the Innovation of Advocacy project to develop an award and a model certified agreement for people with disability employed in Business Services. The model agreement would include a SWS model clause as the basis of pro rata productivity based wage determination.

Apart from low wages, workers with disability experience several other disadvantages including –

- A huge amount of ignorance and discrimination in the workplace
- Inadequate government support
- Unfair working conditions
- Lack of opportunity to utilise their talents to the full
- Lack of secure employment
- Inadequate training opportunities
- Inadequate Occupational Health and Safety standards in some workplaces<sup>10</sup>.

Workers with disability need:

- support to find suitable training and/or employment;
- a government funded job induction scheme;
- access to independent worker mentors;
- 100% of approved costs to help with support workers for people with high support needs;
- fares to work, specialist equipment to suit the needs of the person and adaptation to premises;
- fair minimum rates of pay;
- a simple system cutting out layers of management, brokers, team leaders and project officers;
- increased community awareness and the understanding that disability is not an issue for the individual alone, but an issue for society and that there is something wrong with a society which creates barriers for the members of our community who want to work; and,
- continued community support through the social security system and the Disability Support Pension.

## **Recommendation**

“Access to work” programs are set up to fund 100% additional costs needed to employ a worker with a disability.

---

<sup>9</sup> *The Union Charter for People with Disability* from the ACTU Conference – July 2002 is attached as Appendix 1.

<sup>10</sup> See Appendix 2 – Various media reports – for detail about the wages and terms and conditions of employment for workers in Business Services.

In Britain, Access to Work helps 9,000 people with disabilities to get or keep jobs every year and saves 23,500 pounds in benefits ...<sup>11</sup>. The Australian model should strive for an even better outcome - provide the right support for people and promote positive attitudes and equal treatment. As a consequence, there will be fewer people stuck at home trying to survive on the pension with little hope for the future.

## **Recommendation**

Large corporations should be obliged to employ people with disability because they have the capacity to make reasonable adjustments.

Promote:

- Disability Action Plans for community organisations, government agencies and the private sector;
- the application of resources to the needs of workers with disabilities to assist in improving their individual and collective rights and working conditions – especially for workers in business services;
- links with relevant disability advocacy groups and funding for more advocacy groups;
- disability awareness training for all organisations;
- good practices in the workplace for workers with disability;
- participation in public education to raise awareness of the needs and rights of workers with disability;
- funding for more advocacy services to support people with disability to achieve justice.

Job Watch thanks the Productivity Commission for the opportunity to comment on its review of the *Disability Discrimination Act 1992*.

## **Summary of Recommendations**

1. Job Watch recommends the Federal Government increase disability awareness in the community by providing more resources for community education about disability, with a particular emphasis towards education of employers with less than twenty staff.
2. Large corporations should be obliged to employ people with disability because they have the capacity to make reasonable adjustments.
3. “Access to work” programs to be set up to fund 100% additional costs needed to employ a worker with a disability.
4. Projects like the Innovation of Advocacy to be funded to develop an award and a model certified agreement for people with disability employed in Business Services. The model agreement would include a SWS model clause as the basis of a pro rata productivity based wage determination.

---

<sup>11</sup> *Access to Work* – A TUC Report, November 1996 – briefing document.

## APPENDIX 1

### ACTU Workers with a Disability Conference

July 11 - 12 2002

#### *A UNION CHARTER*

This Charter is a statement of commitment by the ACTU and its affiliated unions in regard to assisting workers with disabilities meet their needs.

- (i) We recognise that people with disabilities have been marginalized and discriminated against by society. They face serious obstacles in obtaining and holding employment, and in securing opportunities to lead a full life through access to education and training. Workers with disabilities are entitled to fully participate in the labour market. We will stand together with workers and their advocacy groups to achieve justice.
- (ii) We accept that employment plus access to Social Security payments are important to individuals with a disability and that our actions should enhance, not reduce, these entitlements.
- (iii) Workers with disabilities are entitled to:
  - Jobs which offer fair wages, security and prospects for advancement,
  - Safe and healthy workplaces,
  - Training and skill development to maximise individual potential,
  - Employment which is free from exploitation, harassment and discrimination,
  - A community and workplace environment which offers access and facilities to people with a disability,
  - The right to join a union and have the union assist in representing their interests.We will work with the Disability Movement to achieve these objectives.
- (iv) Workers with disabilities are entitled to ongoing government support to ensure that they achieve full participation in community life. Support for people with disabilities is a statement of the community's clear social responsibilities - it must not be seen simply in terms of budget outlays. We will work with relevant organisations to achieve that end.
- (v) Unions and employers should work together to generate more employment opportunities for people with disabilities. As a first step, the ACTU and unions will approach twenty large corporations and major employer organisations to develop an agreed approach to provide greater access and opportunity for people with disabilities.
- (vi) In consultation with the workers with disabilities coalition, the ACTU, Labor Councils and Unions will develop specific policies and action plans to improve outcomes for people with disabilities.
- (vii) The ACTU and Unions will collate and disseminate information from the ILO, national trade union federations and the International Confederation of Free Trade Unions on the progressive positions being taken towards

delivering positive programs of assistance to workers with disabilities in other countries.

In seeking to satisfy these commitments, the ACTU will undertake work to achieve, amongst other things:

- (i) Interchange and circulation of information between disability advocacy groups and unions;
- (ii) Encouragement for unions to develop disability action plans;
- (iii) Application of resources and participation in national campaigns for enhanced individual and collective rights, and improved working conditions for workers with disabilities;
- (iv) Participation in public education to raise awareness of the needs and rights of workers with disabilities, including a "fair wages" campaign to alert business and the wider community to unethical contracting practices;
- (v) Consideration of the issue of policies and programs of assistance to workers with disabilities for inclusion in the agenda as an item for the 2003 ACTU Congress;
- (vi) Encouragement of Unions to establish affordable membership fees for workers with disabilities in recognition of the lower levels of remuneration which may apply;
- (vii) Encouragement and coordination of Trades and Labor Councils and Unions to be involved in organising and representing the interests of workers with disabilities. The organising role to utilise the talents of workers with disabilities wherever practicable;
- (viii) Further exploration of possible industrial relations solutions to wage injustice and exploitation in Business Services and Supported Employment enterprises, ranging from respondency to generic awards to the development of a single National Award and a model Enterprise Bargaining Agreement; major employer organisations to develop an agreed approach to provide greater access and opportunity for people with disabilities.
- (ix) Ongoing examination of the overall approach to wage fixing for workers with disabilities to ensure it is non-discriminatory and fair to the workers concerned.
- (x) The ACTU supports the current process to develop a United Nations Convention on the Rights of People with Disabilities and will support the Convention and it's application to workers with disabilities in Australia.
- (xi) The ACTU will support the development and implementation of Standards under the Disability Discrimination Act, and will encourage discussion and negotiation between Unions and the Disability Movement regarding the development of these Standards.

## **APPENDIX 2 – Media**

Not available on electronic documents