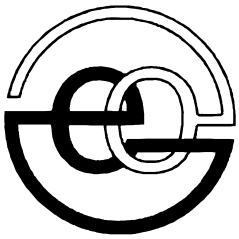

SOUTH AUSTRALIAN
COMMISSIONER FOR EQUAL OPPORTUNITY

SUBMISSION IN RESPONSE

TO THE

PRODUCTIVITY COMMISSION

INQUIRY INTO THE DISABILITY DISCRIMINATION ACT 1992

July 2003

Preamble

The object of the South Australian Equal Opportunity Act 1984 (SA) ("EOA") is to promote equality of opportunity between the citizens of this State; to prevent certain kinds of discrimination based on sex, sexuality, marital status, pregnancy, race, physical or intellectual impairment or age; to facilitate the participation of citizens in the economic and social life of the community; and to deal with other related matters. The Commissioner for Equal Opportunity is a statutory officer whose conditions of appointment enable independent action when dealing with complaints.

Given the narrow definition of impairment in the Equal Opportunity Act 1984 (SA), the provisions of the Disability Discrimination Act 1992 (DDA), mean that a significant number of South Australians are able to seek remedy for acts of discrimination that fall outside the provisions of the EOA.

However the Act does have the advantage of including unpaid workers in its definition of employment. It is recommended that the definition of employment under the DDA be changed to include unpaid work.

1 Disability Discrimination in South Australia

I refer to Appendix 1 outlining particular disability provisions of the EOA.

It is evident from enquiries and complaints received at the Office of the Commissioner for Equal Opportunity ("the Commission") that there are a significant number of complaints of discrimination on the ground of impairment. Thirty percent of complaints were on the ground of impairment during 2001-2002, and 14% of enquiries made to the Commission related to discrimination on the ground of impairment.
Between 2001 – 2002, for the second year in a row, most complaints received by the Commission were on the ground of impairment, despite a drop in numbers of 9%.

From the enquiries and complaints received by the Commission, major issues in the area of discrimination on the ground of impairment appear to be in the area of employment – particularly in return to work following an injury, when seeking new employment, or because of a WorkCover claim or injury/health record.

The Commission is also receiving an increasing number of impairment based complaints from job applicants who allege that they have been refused work due to a detection, at a pre-employment medical test, of a pre-existing injury or illness that may not be relevant to the requirements of the job.

2 What have been the effects of the DDA's broad definition of disability?

Because of the broad definition of disability under the DDA, many complainants who are unable to utilize the South Australian legislation, are able to use the DDA as an effective

instrument in order to address individual complaints of discrimination. We support this broad definition of disability and consider that this definition needs to be reviewed periodically to ensure currency with advances in scientific knowledge and development of technology.

3 Competition and economic effects/social benefit

The Commission agrees with submissions made by our interstate counterparts that there are significant moral and social arguments for the DDA. There are also economic arguments outlined in the abovementioned submissions with which we are in broad agreement.

It is our further submission that while the message about fairness in not excluding people with disabilities from participation in employment and other social benefits has community support, there is still considerable disagreement about how these issues become reality. For example some in the business community do not believe that their individual business should have to pay costs associated with supporting people with disabilities.

Our experience is that larger businesses/organizations have generally taken on board the principles of the DDA, but that many small businesses are resistant.

Larger organisations that wish to become "employers of choice" generally offer flexible working conditions which can accommodate family responsibilities and people with disabilities who may need greater flexibility. These are organisations concerned with their public image wishing to be seen as responsive to customer needs and taking Occupational Health Safety and Welfare requirements seriously. They see such measures as good human resource management practice. Policies are undertaken voluntarily with the view that such approaches are good business practice which impact positively on their organisation's profitability and effectiveness.

Small business is a different category. Many small business industry organisations and individual small businesses remained unconvinced.

Significant work is still needed to answer claims that discrimination laws are an unreasonable cost to business.

Some businesses claim that they are expected to take on trust that disability friendly measures are good for business without evidence available to support such contentions:

Suggestions for addressing this issue include:

- facts about percentage of people with disabilities who need adjustments in the workplace. Many do not and misconceptions remain about what employers have to do for people with disabilities.

- factual information about loss of productivity when problems arising from dealing with complaints and conflict at work, eg costs of staff turnover, other costs of dealing with complaints, eg compensation, lost time from productive work

- cost/benefit analysis of employing people with disabilities, by industry type, category of disability, relationship to workers' compensation, absenteeism, etc

- debunking of stereotypes is an ongoing need, eg people with disabilities will be a "problem", similar for ageing workers, eg they will get sick or will be "too slow," when the reality is that there are as many differences between people of particular age groups, or with a disability, as there are among the general population

4. HREOC's education, public policy and inquiry roles

The Commission views HREOC's enquiry role as extremely important. The South Australian Commissioner for Equal Opportunity does not have the authority to conduct public enquiries resulting from complaints which may involve systemic discrimination issues. This limits the focus to individual complaints with all the disadvantages that apply to individual complaint processes.

5. Looking to the Future

What changes are likely to affect people with disabilities and the role of the DDA in future?

5.1 Australia's Ageing Population

Within the next ten years the Australian Bureau of Statistics predicts that the population aged over 65 years will be growing at an annual rate of 4%, considerably faster than the total population growth. As a result, by 2021 over 20 % of the population will be older than 65.

A significant proportion of our workforce in the foreseeable future will come from older workers. It will come less from younger workers, due to the declining birth rate, and less from immigration. Much work has been done on future projections, including from Australia's Federal Treasury.

Enquiries and complaints received at the Commission over the past three years show an increasing trend in age discrimination in the area of employment. In particular older people allege that they have missed out on employment at the recruitment phase due to their age. This finding has been supported by research undertaken jointly by the South Australian, Western Australian and Victorian Equal Opportunity Commissions in 2001.[1]

[1] Age Limits: *Age Related Discrimination In Employment Affecting Workers Over 45*. Victorian, Western Australian and South Australian Equal Opportunity Commissions March 2001

This research has found that "older workers commonly report that recruitment agents screen applicants according to age criteria at the initial stage of application".[2]

As previously mentioned, one of the reasons for screening out of older job applicants is because of concerns by employers that older employees could be a potential Work Cover risk due to age related disability and illness. Older workers give reports of such experiences, particularly people over 45 years of age.

Not only is there an increasingly ageing workforce but also current Federal Government policy is aimed at encouraging older people to work longer. Until now there has been a trend towards early retirement through either voluntary or forced redundancy. However the Federal *National Strategy for an Ageing Australia (2001)*[3] indicates that people will be expected to extend their period of employment so that they are increasingly self-funding and less reliant on the age pension as a means of income. The report highlights 'Ongoing engagement of mature age workers will be important to achieve sustained economic growth as Australia workforce ages.

Management of older workers injuries will increase in importance as the population ages. There is an urgent need to have a better understanding about the relationship between age, injury and work. An examination of measures to enable employers to employ older people in the future and not to discriminate against them on the basis of their age or presumed future ill health is required. A key challenge is how to adapt some occupational settings to the requirements of a growing older workforce.

5.2 Technology

An emerging issue is the possibility of genetic testing to screen out employees for potential future disease or illness. The Centre for Law and Genetics released an Occasional Paper in 2001 on this issue.[4] The paper discusses the potential for genetic discrimination in employment and the limitations on the operation of anti-discrimination legislation as well as the employer's duty to protect workers from harm. Genetic screening technology can be used to identify workers who have a genetic susceptibility to certain conditions which may be exacerbated or triggered by particular workplaces. The extent to which genetic testing should be used (if at all) by employers to identify workers who may be at risk needs careful analysis and possible amendment to the DDA.

5.3 Changing Labour Market

The Commission receives a number of complaints against recruitment agencies and labour hire companies. It is not uncommon for labour hire firms and host employers to

[2] Ibid p3

[3] The Hon Kevin Andrews *National Strategy for an Ageing Australia: An Older Australia Challenges and Opportunities for all.* Commonwealth of Australia 2001. Reprinted with amendments February 2002. Executive Summary p X.

[4] Dr Margaret Otlowski, *Implications of Genetic Testing for Australian Employment Law and Practice,* Centre for Law and Genetics, Occasional Paper No 2, 2001

be unclear about their respective employment responsibilities. The provisions of the EO Act make it unlawful for a host agency to discriminate against a contract worker who is placed with the agency through an arrangement with a labour hire company.

This problem is well described in recent research by Dr Richard Hall *Labour Hire in Australia*: *Motivation, Dynamics and Prospects* (2001). "The complicated legal character of labour hire arrangements in practice is therefore problematic for ascertaining liability in a number of instances - where there has been a breach of OH&S regulations, where a labour hire worker is injured and neither client company nor labour hire company is prepared to assume responsibility for rehabilitation and return to work and, in unfair dismissal cases where both client and labour hire firm might seek to deny that the aggrieved worker is their employee"[5].

This research further highlights difficulties for people employed through labour hire firms.

- Labour hire workers tend to be engaged as either casual employees or contractors. The employment conditions tend to be characterized by insecurity, precariousness, the absence of career paths, low or below award payment and substandard conditions.
- Labour hire employment tends to be associated with limited training and skills development.
- Labour hire employment is often associated with limited industrial protection afforded by awards, enterprise bargaining arrangements and union coverage.[6]

6. Access to Public Transport

The following comments relating to access to public transport have been made following consultations with a representative from the South Australian Passenger Transport Board.

Has accessibility of public transport improved since the DDA was introduced? What more remains to be done?

- Access to public transport in South Australia has improved significantly since 1994 when a complaint was lodged against the State Government on the grounds that it was discriminating against people with disabilities in the provision of transport services. The conciliated agreement entered into has subsequently provided the emphasis for all public transport services and infrastructure to be developed with due regard for the needs of people with disabilities.

- South Australia has been actively involved in the development of the National Disability standards for Accessible Transport under the DDA, which was passed into legislation by Federal Parliament in October 2002.

[5] Hall R *Labour Hire In Australia: Motivation, Dynamics and Prospects* Working Paper 76, April 2002,p5
[6] Ibid, p5-6

- The proactive role taken by South Australia has resulted in 42% of the bus fleet being fully accessible by people in wheelchairs and 100% of rail cars. The Government recently announced its commitment to purchase a further 170 accessible buses over the next 5 years at a cost of $81.8 million.

- South Australia is committed to complying with the implementation time frames contained within the National Disability Standards for Accessible Transport.

- The Passenger Transport Board is in the process of releasing a tender for an audit of the public transport system to evaluate the level of compliance with the National Disability Standards for Accessible Transport.

SUMMARY

The DDA has provided a useful remedy for South Australians subjected to disability discrimination and harassment.

It is clear that further research about the economic and social consequences of not dealing with disability discrimination is required. Many stereotypes remain about the capacity of people with disabilities.

There have been uneven outcomes in the implementation of improvements for people with disabilities, and significant differences in the way organisations have responded to the challenges of complying with the DDA.

While the broad case for disability discrimination remedies has been accepted, more work is needed with particular sections of the community before the reality for people with disabilities to participate in all aspects of community life is achieved.

Inquiry into the *Disability Discrimination Act 1992*
Productivity Commission

Key Issues for disability discrimination in South Australia

1. Complaint handling role of the Commission:

Impairment accounts for: **14% of enquiries** and **29% of complaints**

Major issues are:

- Discrimination in employment - ie
  - returning to work from injury
  - when seeking new employment
  - because of a previous WorkCover Claim
  - because of a previous injury or health record
- Pre-employment medicals ie
  - not employed due to pre-existing injury or illness, even if it is not relevant to the job description
  - rejections are alleged to follow the disclosure of previous WorkCover claims
  - people who do not currently have an injury but who are perceived to be at risk of developing an injury or illness in the future

Anecdotal reports suggest that injury or illness is a particular concern for employers of mature workers.

2. South Australian Legislation

- Narrow definition of impairment

Definition is as follows:

"*physical impairment*" means -
(a) the total or partial loss of any function of the body; or
(b) the total or partial loss of any part of the body; or
(c) the malfunctioning of any part of the body; or
(d) the malformation or disfigurement of any part of the body,
whether permanent or temporary, but does not include intellectual impairment or mental illness;

"intellectual impairment" means permanent or temporary loss or imperfect development of mental faculties (except where attributable to mental illness) resulting in reduced intellectual capacity;

Because the definition is so narrow, all complaints related to disease, mental illness, learning disorders, HIV and illness must be referred to HREOC for action under the federal legislation.

The SA legislation is under review; the current proposal is that the definition of impairment in the SA Act be amended to reflect that in the DDA

- Section 84 and Access Issues

Section 84 states:

84. This Part does not render unlawful discrimination against a person on the ground of physical impairment where the discrimination arises out of the fact -

(a) that premises, or a part of premises, is so constructed as to be inaccessible to that person;

or

(b) that the owner or occupier of premises fails to ensure that every part, or a particular part, of the premises is accessible to that person.

This is a general exemption and a complete defence with respect to allegations of discrimination on the basis of lack of access, as there is no requirement related to reasonableness, unjustifiable hardship, or any other issue.

Due to the existence of this section, complainants with allegations concerning access issues are generally advised to pursue their complaint under federal legislation.

It has been recommended that this section be repealed. At this stage, repeal is proposed as part of the review of the SA Act.

- Section 76(3) and Provision of Services

Section 76(3) states:

(3) This section does not apply to discrimination against a person on the ground of impairment in relation to the performance of a service where, in consequence of the impairment, that person requires the service to be performed in a special manner and the person performing the service -

(a) cannot reasonably be expected to perform the service in that manner;

or

(b) cannot reasonably be expected to perform the service in that manner except on more onerous terms than would otherwise apply.

Unlike the unjustifiable hardship criteria set out in s11 of the DDA, this section is very narrow. The section also contains no useful guidelines on assessing the concepts therein, namely, what should be considered in determining “cannot reasonably be expected” and “more onerous terms”. Unlike the DDA, the focus of this section is the respondent and the impact on him/her, in contrast to the requirement in s11 of the DDA that all relevant circumstances be considered, such as the effect of the disability of the person concerned.

- South Australian Act does not cover associates

As the South Australian legislation does not make discrimination against the associates of persons with a disability unlawful, parents, friends, families or carers cannot lodge complaints under the SA Act. This also has implications with respect to family responsibility-type discrimination related to the care of persons with a disability.

As a result, all matters in which these issues arise are generally referred to HREOC. In the review of the SA Act, the question as to whether there should be protection for associates has not been resolved. It has been proposed, however, that family responsibilities be included, which would give some protection to the parents and families of people with a disability.