Our Ref:LR:SVT:2015

Your Ref:

4 December 2015

Willing to Work

Australian Human Rights Commission

GPO Box 5218

Sydney NSW 2001

**Email:** **ageanddisabilityinquiry@humanrights.gov.au**

**SUBMISSION TO**

**WILLING TO WORK:**

**NATIONAL INQUIRY INTO EMPLOYMENT DISCRIMINATION AGAIST OLDER AUSTRALIANS**

 **AND AUSTRALIANS WITH DISABILITY**

**Introduction**

**Background to the Cairns Community Legal Centre Inc (CCLC)**

The CCLC is a not for profit, government funded community organisation that provides legal services for the benefit of members of the community experiencing disadvantage.

The CCLC operates a General Legal Service, which provides free legal services across a broad range of areas of law including employment and discrimination work.

In addition to its General Legal Service, the CCLC also operates the following specialist services:

* Disability Discrimination Legal Service which provides legal advice and case work relating to disability discrimination complaints under the Federal *Disability Discrimination Act 1992* (DDA) and the Queensland *Anti-Discrimination Act 1991* (Queensland Act).
* Seniors Legal and Support Service which provides legal and support services for the benefit of seniors affected by elder abuse or financial exploitation.
* Family Law Service which provides legal services in relation to family law matters which involve children’s issues.
* Consumer Law Service which provides legal services for consumers in relation to a range of consumer law matters including credit and debt matters, disputes about consumer products and services, bankruptcy matters and other consumer law matters.

Community education and awareness-raising activities as well as law reform work are important aspect of the work of the CCLC.

**Our interest in the consultation**

Statistics show that one in five Australians have a disability. Various Government programs and schemes are funded to ensure the inclusion of people with disabilities in community life, including employment. That good work can be undone if legislated rights are inadequately protected. Our client base is also amongst the most vulnerable and we make submissions to protect and expand the protections of their human rights.

Australians with disability are particularly vulnerable in the workplace when their rights are breached. This can be even more distressing when breaches are performed by large companies, Government Departments, Local Governments, and other government agencies, all of which are well resourced and should be informed and strive to be model corporate and government citizens.

Because we are providing services to people who have been unfairly treated, it makes us well placed to suggest practical measures that would make things better for the client/individual, employer and community both on the short term as well as the longer term.

We will restrict our submission to answering just three questions in the Issues Paper which relate most closely to problems encountered by people with disabilities in the area of employment.

**Common workplace situations**

Legislation and well written policies and procedure documents promoting and protecting human rights will be ineffective if they are not implemented at the relevant level, and the workplace culture does not reflect the ideals aspired to.

Following are some examples of the situations our clients have found themselves in:

* An employee working in a remote locality suffered a workplace injury which required surgical intervention. All medical treatment and time off work was covered by the employer’s workers’ compensation scheme. Due to that remoteness and lack of nearby specialists, his injury could not be treated in a timely manner. His condition was further complicated by associated health concerns, requiring rescheduling of planned surgery. This extended the time off work to more than 12 months. Immediately following the expiration of the legislative period during which termination would have been an offence under workers’ compensation legislation, the employer terminated his employment, shortly before the rescheduled surgery was performed.
* An employee was stood down and transferred to another designated position when she requested a reasonable adjustment to accommodate her mental health condition which was stable and well managed for many years. The adjustment related to only a very minor duty which was only required to be performed briefly about three times a year. Suitable alternatives were available and had been provided previously.
* An employee on a fixed term contract (which was expected to be renewed) contracted a virus just when she was due to start her training. After a brief time off work, temporary reasonable adjustments were refused and her employment was terminated.
* A female employee in a traditionally male industry performed seasonal work for several years without any work performance issues being raised. When she requested a reasonable adjustment to accommodate a health condition, further seasonal work was refused.
* An employee suffered a workplace injury which was covered by the employer’s workers’ compensation scheme. A duties plan was arranged for his return to work but was not implemented. The employer stood him down and escorted him from the site, claiming that the Principal of the mining venture refused him access for health reasons.
* An employee suffered an injury at home, requiring a short time off work for surgical intervention. Following rehabilitation, he was cleared as fit to return to normal duties. Instead, the employer refused to accept the medical clearance and asked for further clearance which they also refused to accept.

**5. How adequately do existing laws protect Australians with disability from employment discrimination? How effective are the legal remedies for Australians with disability who have experienced employment discrimination? How could existing laws be amended or supplemented?**

We note that the Issues Paper deals specifically with the *Disability Discrimination Act 1992* (Cth) (DDA) and the *Fair Work Act 2009* (Cth) (FWA). It only refers to the State anti-discrimination agencies in the ‘remedies’ subsection. Nevertheless we have included examples drawn from State laws where we consider they may be helpful to this inquiry.

**How adequately do existing laws protect Australians with disability from employment discrimination?**

**Workplace injuries**

If it is alleged that a worker has been dismissed because of their disability, the only option under the FWA is to lodge a General Protections Application Involving Dismissal (Form 8) within 21 calendar days after the dismissal took effect.

This time frame is too short, and applying for an extension of time in which to lodge the application can create further distress and is often unsuccessful. If an employee is outside the time limit for any action in FWC, the only recourse then is the conciliation process in the DDA or State equivalent to which a 12 month limitation period applies. The previous 60 day time limit provided better protection from unjust termination for discriminatory reasons, and should be reinstated.

Under the FWA there also is no special consideration given in relation to workplace injuries which are compensable under the employers’ schemes.

Under Queensland workers’ compensation legislation it is an offence to dismiss a worker within 12 months of sustaining an injury, solely or mainly because the worker is unfit for employment in the designated position because of the injury. Continuing unfitness for employment beyond 12 months is seen as a valid reason for a dismissal. For State and Local Government employees, an application for reinstatement must therefore prove that the dismissal was unfair. Workers in the Federal jurisdiction would need to prove lack of procedural fairness.

Most State and Territory workers’ compensation legislation places an obligation on the employer to take all reasonable steps to assist or provide the worker with rehabilitation for the period for which the worker is entitled to compensation.

In serious injuries a worker may be in receipt of weekly compensation payments for up to five years, time which may be required for the condition to stabilise and permanent impairment to be assessed. Only once an injury has stabilised can the ability of the worker to perform the inherent requirements of their role be properly assessed.

It is therefore incongruous that workers whose injuries take longer than 12 months to stabilise and recover from, can continue to receive compensation during that extended period but have no guarantee of a return to work in their designated role, and can be ‘lawfully’ dismissed. In this era of greater casualisation of the workforce and greater use of contract labour, a replacement worker could be sourced to replace the permanent worker for the period of their recovery and rehabilitation.

An additional concern arises when reasonable adjustments or a suitable duties plan can be developed and implemented but the employer refuses, creating further barriers to a successful return to work. It is more difficult for the worker to prove that the employer’s claim of no suitable duties being available is unfounded.

**Non-workplace injury or illness**

The situation for workers who suffer an illness or injury which is not work-related is even more precarious.

If they are absent for a period of more than 3 months (or their total absence within 12 months is more than 3 months) they have to rely solely on proving discrimination (as opposed to dismissal for a temporary absences).

Shorter absences or requesting reasonable adjustments to accommodate a temporary condition can still result in dismissal.

When the employer claims that the dismissal was for operational reasons, or that the worker could not perform the inherent requirements of the job, it may be difficult for the worker to prove otherwise.

There is little in the FWA to deter such employers from taking adverse action against sick or injured workers since they are unlikely to pursue the employer through to a final hearing in the Federal Circuit Court of Australia (FCCA) where they risk a costs order if they are unsuccessful.

Arbitration as an alternative to a claim in FCCA, can only proceed where both parties agree. An employer can therefore refuse and effectively challenges the worker to risk taking the matter to FCCA.

**Anti-discrimination legislation**

Where alleged discrimination in the workplace arises out of employers’ ignorance of their obligations not to discriminate, the formal Complaints mechanism provided for by the DDA may assist aggrieved workers to assert their rights and to resolve their dispute.

However, employers determined to end the employment relationship regardless of their obligations are unlikely to resolve complaints. The only option then for the worker to pursue the matter is to take action in the FCCA, a costs jurisdiction.

The time taken to progress the original Complaint in the Australian Human Rights Commission (AHRC), the lack of formal requirement for a written response from the employer, and the often adversarial stance taken by the employer at the conciliation conference, makes achieving reinstatement far less likely through that process.

Often, the dire financial state of the worker, the uncertainty of a fair outcome, the limited remedy and the costs risk makes the worker reluctant to proceed through to the FCCA in employment matters, when the conciliation process fails to deliver a satisfactory outcome.

It would therefore be our suggestion again that in the FCCA it was such that each party bear their own costs, where it is necessary to pursue a matter to the FCCA.

**How effective are the legal remedies for Australians with disability who have experienced employment discrimination?**

Even where a worker has filed their general protections application to FWC within the 21 days of dismissal, and they are successful in that matter, the usual remedy of compensation is limited.

For example a worker who cannot be reinstated due to it not being practical in the circumstances is currently limited to a maximum 26 weeks salary. This is particularly insufficient where disability is an additional barrier to securing alternate employment. The legislative cap should therefore be increased to 52 weeks for dismissals based on disability, so that discretion to make an award up to this limit can be exercised where appropriate.

In our experience, very few complaints originating in the AHRC are pursued through to a final hearing in the FCCA. One of main reasons for this is that workers are often legally unrepresented and are concerned about the risk of costs being awarded against them.

**How could existing laws be amended or supplemented?**

Just as a temporary absence due to illness has its own provision, the FWA could be amended to protect workers, who suffered a workplace injury, from dismissal or other adverse treatment, while they are in receipt of compensation payments and undergoing treatment or rehabilitation. The legislation could also make it an offence to dismiss the worker in those circumstances.

The FWA could also oblige the employer to return the injured worker to their pre-injury position once cleared as fit to return, even if a reasonable adjustment is required for them to continue in that role.

The time for filing a Form 8 in situations where dismissal is based on disability should be amended back to the 60 day time limit to assist ill or injured workers to take sufficient control of their lives, and to have sufficient time to seek legal advice and assistance.

Since the continuing decline in Union membership makes fewer workers entitled to representation by their delegate, workers dismissed because of their disability could be allowed to be legally represented without first having to seek leave.

Arbitration by the FWC as an alternative to a proceeding in the FCCA could be available at the request of the worker, even where the employer does not agree. This could serve to have the matter dealt with quickly and efficiently, without substantial costs risk. We are conscious however that triggering arbitration at the request of one party only, can be problematic as a party who does not wish to engage in such a process, can effectively thwart it rendering it not only in effective but also cause delay and added distress for those concerned.

The legislative cap could be increased to 52 weeks for dismissals based on disability discrimination, with additional penalties imposed where the worker was receiving workers’ compensation payments at the time of the dismissal.

We also recommend that the *Australian Human Rights Commission Act 1986* be amended to include that for proceedings in the FCCA commenced as a result of a terminated complaint alleging disability discrimination in the area of employment, each party to that proceeding must bear the party’s own costs for the proceeding. A costs order can be made if the Court considers the interests of justice require it to make the order or if the Court determines that the application was vexatious.

**6. What difficulties are there for employers in understanding and complying with legal obligations?**

For some small employers without a dedicated Human Resources section, they may be deficient in knowledge of all their employment obligations. While there is a large amount of freely available public information, for example on the Fair Work Ombudsman (FWO), FWC and AHRC websites, the complexity of workplace relations laws can mean that it is difficult, especially for small business employers (who may themselves come from non-English speaking backgrounds) to navigate and interpret how those laws apply to them despite their best efforts.

Also while there are the various enquiry lines available and accessible for employers, these need to be manned by properly trained and skilled workers who are able to provide clear and accurate information in a timely way. This would then serve to better assist well-meaning employers to comply with their obligations.

Some larger companies and Government departments and agencies, who should be fully informed, may also still take adverse action in breach of their obligations. Sometimes such action is deliberate, and the occurrence of breaches may lessen if officers were held personally liable for damages arising from breaches that are found to be deliberate.

**7. What are the distinct challenges faced by certain groups of Australians with disability (e.g. women, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, or LGBTI people) in relation to employment discrimination?**

**English as a Second Language (ESL)**

Workers under 457 Visas are given the same protection by the FWA. However, language difficulties and fears of retaliation work against the holders exercising their workplace rights.

Although several government sites (such as the Fair Entitlements Guarantee site in Department of Employment) provide information throughout their site and fact sheets on the Translating and Interpreting Service for workers who experience difficulty speaking or understanding English, the FWC site offers limited information through the Assistance link in the toolbar at the very end of the page.

We have found that workers with ESL are less likely to take up union membership and are less likely to have sufficient knowledge of their rights or how to exercise them. They are also more likely to be presented with operating as contractors with ABNs as the only option to securing paid employment.

**Women**

Women in male dominated workplaces face additional resistance to continuing their employment if an adjustment to accommodate a disability, whether temporary or permanent, is requested. The claim of inability to perform essential requirements is used to justify termination of the employment relationship.

We have also found that more women from culturally diverse backgrounds are being exploited by employers from their own culture. They often start work on a verbal contract. They are expected to put up with lower working conditions, have to work as contractors instead of employees, have their hours varied unilaterally, accept irregular payments for work performed, and then being dismissed if they question the decisions or try to exercise their rights.

In such situations, lack of documentary evidence makes their situation even more difficult, in addition to which they may not even qualify for protection of the FWA because of their shorter periods of employment.

# Conclusion

We thank you for this opportunity to make a submission to your inquiry. If you have any queries regarding this submission, please direct your enquiries to our office.