Australian Federation of Disability Organisations submission to the Inquiry into the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006

Introduction

The Australian Federation of Disability Organisations (AFDO) understands that the purpose of the above named Bill is to reduce the cost pressures on the Commonwealth Government insurance scheme, Comcare.

The Explanatory Memorandum to the Bill argues that the initial intent of the *Safety, Rehabilitation and Compensation Act 2004* has been undermined by court decisions that have expanded its coverage and scope.

AFDO is concerned that the attempt to tighten and restrict access to Comcare may leave people with disability unintentionally disadvantaged and leave people with existing conditions particularly vulnerable.

1) The Definition of Disease

The *Safety, Rehabilitation and Compensation Act 2004* currently applies to cases in which employment is found to have a causal impact on a person developing a condition or aggravating an existing condition. There is no minimum level of impact that the employment must have on the condition, it must only be demonstrated that it has contributed to, or aggravated it.

The Bill would change this by requiring that a person demonstrate that their employment has contributed to a condition developing or being aggravated to a degree that is "substantially more than material".

AFDO does not support the proposed amendment for two reasons.

First, we can see no justification for the change. The Explanatory Memorandum argues that Court decisions have expanded the original intent of the Act. However, it then goes on to acknowledge that a recent decision of the Full Federal Court found that “material” should be read more narrowly, writing:

> In the recent Full Federal Court decision, *Canute and Commonwealth of Australia* [2005] FCA 299, the judges discussed the meaning of material in terms that employment should be more than a mere contribution and the requirement to demonstrate a close connection between employment and the disease consistent with the intention of the SRC Act when introduced.
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> (Explanatory Memorandum, page iv)

It is arguable that the proposed amendment would result in a stricter test of causality than was proposed in the original Act.

Not withstanding this, the Federal Court clarification suggests there is no need for the amendment, particularly as it is estimated to affect as few as 2.5 % of claims at a value of only five million dollars.

Of greater concern to AFDO is the risk that the change may severely disadvantage people with existing conditions.

Workers compensation schemes not only compensate workers who are injured, they also act as an incentive for employers to maintain safe and healthy workplaces. Employers should be liable for unsafe work practices that have lead to a person experiencing an aggravation of their condition, even if other factors also contributed to the aggravation, to maintain the onus on employers to maintain a safe workplace.

AFDO is concerned that the proposed tightening of the definition of disease would reduce the incentive for employers to make reasonable workplace accommodations for employees with disabilities, particularly in situations where that person was experiencing a change or worsening of their condition. Employers would still be liable under the *Disability Discrimination Act* in these circumstances, but experience shows that this Act is not sufficient to persuade employers to make positive adjustments for employees.

On balance, AFDO considers that the current test is a fair measure of liability. We recommend that the Committee not support this amendment.

2) The Definition of Injury

The Act does not allow people to claim an injury as a result of reasonable disciplinary action. In the Explanatory Memorandum the Government argues that courts have interpreted 'disciplinary action' narrowly, excluding from it such actions as counselling sessions and meetings that precede formal disciplinary action. The Bill seeks to address this by extending the list of exclusions in the definition of injury to include all "reasonable management activities", which would include, but not be limited to:

- performance appraisal;
- informal and formal counselling;
- suspension;
- informal and formal disciplinary action; and,
- failing to give an employee a promotion, reclassification, transfer or benefit, or to retain a benefit.

AFDO is concerned that this list may allow for victimisation and/or indirect discrimination of employees with disability. For example, when an employee has an existing condition that is aggravated by the stress of a manager refusing to

allow them to undertake opportunities for higher duties, overtime etc, that they might otherwise expect to be given if not for their disability.

The amendment can operate equitably only if managers never indirectly discriminate against people with disability. To address this, the amendment should be revised to require employers to provide reasonable adjustments.

We recommend that the definition of "reasonable disciplinary action" be expanded to refer to actions taken after an employer has made any reasonable adjustments that are necessary for an employee.

3) Definition of Suitable Work

The Bill proposes to change the definition of suitable employment for the purposes of determining compensation levels. Currently, the level of weekly incapacity payments is calculated taking into account an individual's capacity to obtain suitable work within the Commonwealth public sector. It is proposed that the definition of 'suitable work' be changed to "actual and potential earnings" from employment "with the Commonwealth or any other type of employment".

The justness of the proposed change is dependent on how "potential earnings" are to be determined.

People with disability face substantial direct and indirect discrimination in the workforce, which severely restricts their opportunities to find employment. The employment rate of people with disability is 49%, compared to 77% for the general population.[i] The employment of people with disability in the public service has declined from 5.4% in 1996 to only 3.8% in 2005.[ii]

People with disability are also more vulnerable to retrenchment. In 2005, the Australian Public Service Commission found that employees with disability were 60% more likely than other staff to be retrenched.[iii]

Evidence shows that people who leave a position due to disability are extremely unlikely to re-enter the workforce.

"Potential earnings" must be realistically assessed, taking into account the systemic disadvantage experienced by people with disability.

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[i] Australian Bureau of Statistics (2003), *Disability, Ageing and Carers Survey*, Catalogue No. 4430.0, Table 8

[ii] Australian Public Service Commission (2005), *State of the Service Report 2004-05*, Chapter 9, http://www.apsc.gov.au/stateoftheservice/0405/

[iii] Management Advisory Committee (2006), *Employment of People with Disability in the APS*, Commonwealth of Australia, page 54.