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12 May 2008

Julian Gardner
Reviewer
Department of Justice
Victorian Equal Opportunity Review
Level 24, 121 Exhibition Street
MELBOURNE 3000

Re: Equal Opportunity Review - Final Consultation Phase

AHRI is pleased make a submission to the Victorian Department of Justice on the Options Paper relating to a Review of the *Equal Opportunity Act 1995*.

AHRI members have a vital stake in the implementation of government policy and legislation in areas such as workplace relations, occupational health and safety, workplace training, and the creation of a workforce environment that is sufficiently flexible to accommodate imperatives such as boosting the participation in employment of those who are ready and able to work but who remain outside the workforce, often allegedly as a result of direct or indirect discrimination.

As the professionals within business who execute human resource and people management solutions in the workplace, AHRI members are at the pointy end of business decision-making and their involvement is mission-critical to the competitiveness of Australian business. The field of human resources has been undergoing a rapid evolution in recent years as it strives to meet the expectations of business. Government policies and laws that enable the profession to provide solutions based on transparent equity and fair play are critical in the building of trust between employers and employees. It is in that spirit that AHRI makes this submission.

The survey

In order to provide an evidence-based submission to the Review, AHRI conducted an online survey distributed to part of its Victorian member database during the first week of May 2008. This submission is largely informed by those responses. The survey was sent to 2641 Victorian members - 71 responses were received, including a submission already made by an AHRI member from Maddocks lawyers that AHRI commends to the Reviewer. The survey was structured under the four headings set out in the Options Paper and this submission is based on those headings.

Respondents were provided with a background to the Review and summary outlines to each question. They were invited to view the Options Paper via a web link. The questions were put in the form of statements and sought responses by way of an 'agree' or 'disagree' answer.

In addition, respondents were invited to set out in writing their responses to two questions: (1) What would you like to see come out of the review of the Act? and (2) What concerns do you have about the review of the Act?

QUESTIONS

1. A New Framework for the Act

Questions 1-3 relate to a proposed new framework for the Act.

Question 1

The first question relates to ‘substantive’ compared with ‘formal’ equality.

“The Act should set as a goal the achievement of ‘substantive’ equality.”

76 per cent of respondents agreed with that proposition and 24 per cent disagreed.

Question 2

The second question relates to reversing the onus of proof so that complainants are not required to prove discrimination in cases where adjustments had not been made to accommodate difference.

“The Act should reverse the onus of proof in cases of discrimination that involve a requirement for reasonable adjustments.”

57 per cent of respondents agreed with that proposition and 43 per cent disagreed.

Question 3

The third question relates to creating a positive duty not to discriminate. For an employer, it might mean, for example, having policies, procedures and action plans that indicate a proactive intent not to discriminate.

“The Act should create a positive duty not to discriminate.”

83 per cent of respondents agreed with that proposition and 17 per cent disagreed.

Related written comments

Comments called for a national unified framework because many organisations work in various jurisdictions.

Concerns expressed include the following:

- That those who break the law will continue to do so because legislation alone is not enough to change attitudes
- That lip service will continue to be paid to equal opportunity and diversity, including ‘glass ceiling’ issues at points of selection and promotion
- That the Act won’t consist of measures that ensure compliance.

2. Powers and Functions of the VEOHRC

Questions 4-9 relate to the proposed changes to the powers and functions of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

Question 4

“The Commission should limit its role to facilitating compliance through information, guidance and advice.”

43 per cent of respondents agreed with that proposition and 57 per cent disagreed.

Question 5

“In addition to its role as a facilitator, the Commission should retain limited enforcement powers and increase its role investigating breaches and monitoring compliance without waiting for complaints.”

71 per cent of respondents agreed with that proposition and 29 per cent disagreed.

Question 6

“The Commission should, in addition to its role as facilitator and investigator, make EO action plans mandatory for public authorities and optional for the private sector. The duty would require authorities not to discriminate and also to promote and achieve equality as a broader duty.”

67 per cent of respondents agreed with that proposition and 23 per cent disagreed.

Question 7

“The Commission should be given powers of entry, search and seizure in conducting investigations without waiting for complaints, and also to apply for court orders to enforce VCAT orders in public interest cases.”

41 per cent of respondents agreed with that proposition and 59 per cent disagreed.

Question 8

“As a non-judicial body, the Commission should not have a role in the resolution of disputes.”

39 per cent of respondents agreed with that proposition and 61 per cent disagreed.

Question 9

“The Commission should report every three years to government on the ‘state of equality’ in Victoria.”

94 per cent of respondents agreed with that proposition and 6 per cent disagreed.

Related written comments

Comments include calls for the following:

- Greater enforcement of equal opportunity and harsher penalties for failure to comply
- Greater penalties taken against vexatious claimants
- Clear guidelines on diversity
- The Commission should act as a judicial body
- The Commission should be impartial rather than be seen as favouring complainants
- The Commission needs to be a vocal advocate
- The Commission should be a centre for expertise and advice
- The Commission should have investigative, not judicial, powers

- The Commission should act as a mediator
- While maintaining an emphasis on resolution and prevention, the Commission needs teeth to bite
- Parties need to be educated in their responsibilities as well as their rights
- The Commission should be given more rights of entry without relying on a complaint where there is reason to believe the Act is being breached
- There should be stricter penalties for lodging false claims and time limits on lodging claims
- The powers of the Act and the Commission should be increased.

Concerns expressed include the following:

- That there will be a continued difficulty for HR managers in implementing best practice and exercising internal enforcement in the absence of strong external legal consequences
- That the public sector will be a ready target for monitoring and reporting, and the private sector will escape the net again
- That an increase in compliance costs won't be matched by clear improvement measurements
- That a reformed Act will be tainted by the past and the conceptual models within the legal system
- That the Commission will not be given sufficient teeth to deal with substantive inequality
- That while applauding the philosophy, small business will be subject to increased burdens that enable vindictive practices despite reasonable management practices.

3. Dispute Resolution

Questions 10-15 relate to the proposed changes to the costs, formalities and costs of the process, fear of victimisation and the unequal access to resources of complainants and respondents.

Question 10

“Parties to a discrimination dispute should be offered early alternative dispute resolution at no cost by the Commission, though the Commission should conduct no investigation and makes no decision because there is the option of direct access to VCAT.”

90 per cent of respondents agreed with that proposition and 10 per cent disagreed.

Question 11

“All parties to a dispute should be offered direct access to VCAT with no offer of alternative dispute resolution.”

19 per cent of respondents agreed with that proposition and 81 per cent disagreed

Question 12

“As at present, parties should make complaints to the Commission which continues its role of investigating and conciliating complaints.”

83 per cent of respondents agreed with that proposition and 17 per cent disagreed.

Question 13

“As there is nowhere to get early strategic legal advice and representation on discrimination, the Commission should provide it.”

61 per cent of respondents agreed with that proposition and 27 per cent disagreed.

Question 14

“To preserve its impartiality, the Commission should offer no legal advice but more funding should be made available to existing legal service providers.”

57 per cent of respondents agreed with that proposition and 43 per cent disagreed.

Question 15

“An independent statutory office of equal opportunity proceedings should be created.”

57 per cent of respondents agreed with that proposition and 43 per cent disagreed.

Related written comments

Comments include calls for the following:

- Free legal advice
- Less bureaucracy
- Less pain in dispute resolution for both parties
- Simplicity and clarity, and less complexity
- Protection for complainants who could be viewed as whistleblowers
- Low cost advice
- Protection from visibility if a complaint is not pursued
- Private enterprises be made to comply
- Parties should be required to show they have tried to resolve complaints internally before complaints are lodged.

Concerns expressed include the following:

- That employees will by-pass their own organisation’s internal complaints procedures if the process is opened up
- That the party with access to the best resources will win on technicality alone
- That the Review will create more layers, complexity and compliance costs, especially ‘tick-box’ exercises that don’t lead to lasting change
- That the Review will result in an overcorrection in favour of rights given to the disadvantaged.

4. Governance

Questions 16-19 relate to a proposed restructure of the Commission on the basis that it has broader functions than equal opportunity and discrimination.

Question 16

“A single Commissioner model should be created.”

41 per cent of respondents agreed with that proposition and 59 per cent disagreed.

Question 17

“A single Commissioner supported by a Board of the Commission with a strategic management function, should be established.”

52 per cent of respondents agreed with that proposition and 48 per cent disagreed.

Question 18

“A single Commissioner supported by a Board of the Commission with an advisory role, should be established.”

44 per cent of respondents agreed with that proposition and 56 per cent disagreed.

Question 19

“A single Commissioner supported by a representative Board or part-time portfolio Commissioners, should be established.”

44 per cent of respondents agreed with that proposition and 56 per cent disagreed.

Related written comments

Comments include calls for the following:

- Separate office from the Commission to work as a prosecution service
- An independent investigation service.

A concern was expressed that more quangos will be formed.

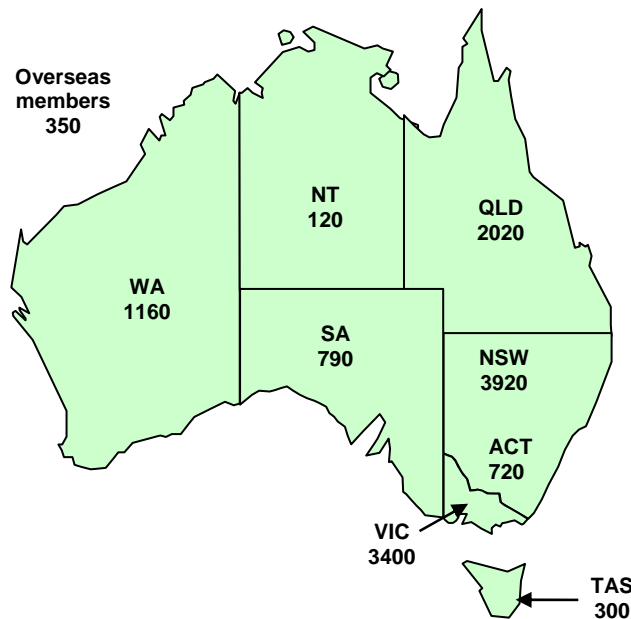
ABOUT AHRI

The Australian Human Resources Institute (AHRI) is the only association dedicated to the representation of human resource and people management professionals in Australia. AHRI has a financial membership of approximately 13,000 and a broader stakeholder base in the order of 25,000.

More than 10,000 AHRI members and professionals across the nation attend seminars and other events conducted by the Institute each year. Topics covered at AHRI events include workplace relations, occupational health & safety, training and development, recruitment and retention, remuneration and benefits, HR information systems, job design and international people management.

AHRI has a presence in each state and territory as shown in the following map:

AHRI members by state and territory (as at February 2008)



Institute members occupy positions as HR and people managers within the top 100 companies and within small-to-medium enterprises. AHRI members also include small and single-person consultancies as well as practitioners from large consulting and law firms, in addition to academics from a range of institutions and related disciplines. AHRI's governance structure is that of a not-for-profit entity owned by a consortium of members. It is an independent organisation overseen by a board with representation from business, government and the elected membership in the states and territories.

AHRI has a strong international presence, being the only Australian organisation recognised by the World Federation of Personnel Management Associations. The AHRI National President sits on the board of the World Federation as an Asia Pacific member. The board includes representatives from our counterparts in the USA and the UK, the two largest HR institutes in the world, in addition to countries such as Singapore, Canada and the Philippines. AHRI has also been successful in winning a major tender for the Dubai Government and is currently training 400 employees using Australian HR best practice frameworks.

The annual AHRI Convention is the peak HR and people management event in Australia. It attracts first-rate international speakers of the order of Jim Collins, Gary Hamel and Kjell Nordstrom, in addition to eminent Australians such as Paul Keating, Geoffrey Blainey, Janet Holmes a Court, Ian Harper and Ita Buttrose. Keynote overseas speakers at the 2008 AHRI National Convention include Lynda Gratton, Lyn Heward, Daniel Pink and Allan Pease, in addition to Australians Mick Keelty, Ian Kiernan, Christine Nixon and Tim Costello. The AHRI Convention attracts in the order of 2500 attendees annually. AHRI also conducts annual awards for excellence in people management which in 2006 and 2007 included an Innovation Award co-sponsored by the Australian Government.

AHRI conducts formal education and, since the establishment of a national HR accreditation system in 2004, AHRI accredits HR-related courses in Australian universities. The institute also runs specialist professional development seminar events in all states and territories that attract in the order of 4000 attendees during the course of a year.

AHRI disseminates information to members through its highly regarded *hrmonthly* magazine, the refereed *Asia Pacific Journal of Human Resources*, and a fortnightly *ENews*.

In recent times, AHRI has conducted research either independently or jointly in a number of areas. In 2007, AHRI commissioned Deakin University to conduct longitudinal research using the AHRI database to better inform members and the general public about the impact of the then Work Choices legislation within

Australian workplaces. Despite some resistance within Government to the commissioning of that research project, AHRI persisted and a report of the first findings of the study was released in August 2007 and received considerable nationwide media attention.

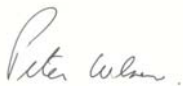
AHRI also participated in an international HR competency study with the University of Michigan in 2007. Approximately 1200 AHRI members contributed to that research conducted by Professors Dave Ulrich and Wayne Brockbank, which resulted in AHRI's model of professional excellence which now guides the development of the institute's education offerings and other intellectual property.

Through undertaking other research, notably AHRI's quarterly *HRpulse* surveys, the Institute is fully conscious that the business expectations being placed on HR practitioners are increasingly demanding. Accordingly, AHRI is continuing its efforts to lift the skill level of the profession and, where gaps emerge, provides seminars and professional development activities to improve the knowledge base and the standing of the profession in business.

As one of the professions central in the delivery of solutions to the economic and workplace relations agenda of the Federal Government, AHRI is pleased to make this submission on the National Employment Standards in the public interest.

AHRI looks forward to the opportunity to further discuss with the Government the Standards as well as other related parts of the legislative program leading towards the implementation of Fair Work Australia.

Please contact in the first instance Paul Begley, the National Manager of Government and Media Relations, Level 10, 601 Bourke Street, Melbourne 3000 by mail, 03 9918 9232 by telephone or email paul.begley@ahri.com.au



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