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RECRUITMENT AND CONSULTING SERVICES ASSOCIATION LTD (RCSA)

Submission Equal Opportunity Act 1995 Review

To: Equal Opportunity Review
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Email: equalopportunityreview@justice.vic.gov.au

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Introduction

1. The Victorian Government is conducting a review of the *Equal Opportunity Act* 1995 (the "Act"). The focus of the review is to consider what is meant by discrimination, whether the Act needs to be reformed and how best to prevent and resolve discrimination.
2. The following submission is made to the review on behalf of the Recruitment and Consulting Services Association Ltd (RCSA) in relation to the impact of the Act in its current form on the recruitment and on-hire industry.

Background

3. The RCSA is the peak body for the recruitment and on-hired employee services industry for Australia and New Zealand. It is a not-for-profit organisation that is managed by a Board of Directors. The RCSA has more than 3,200 members comprising of multi-national companies, single consultancies and individual practitioners operating a recruitment consultancy. The association represents a \$10 billion dollar industry and is collectively one of Australia's largest employers. The Victorian membership is a major contributor to the economy of the State.
4. Every year the industry places millions of individuals in on-hired employment in an increasingly broad range of sectors from nursing, hospitality and engineering to secretarial placements. Each of our member client's workplaces is vastly different and presents a range of equal opportunity challenges and opportunities.
5. The nature of the relationship between on-hired employee service providers, their clients (host organisations) and on-hired employees requires special consideration when assessing the impact and suitability of equal opportunity law for the State of Victoria.

6. RCSA seeks to assist the Victorian government to establish equal opportunity law where employer, client employee and others in control of workplaces work in cooperation to ensure a fair and productive working experience. Legislative proposals and administrative frameworks that may impact adversely on employment opportunities, skill development, employment flexibility and ultimately the competitiveness of Victoria are to be avoided where possible.

7. RCSA looks forward to participating in the second round of consultation later in the year.

Submission – Response to Select Key Questions

1. Does the law need to be changed to improve equality of opportunity and the elimination of discrimination in Victoria?

RCSA submits that, without extending its scope and application, the existing legislation needs to be more clearly drafted in relation to the obligations of all parties in circumstances where recruitment is being undertaken by an agent on behalf of a client.

RCSA submits that, without extending its scope and application, the existing legislation needs to be more clearly drafted in relation to the obligations and rights of all parties in circumstances where employees are employed by an employer and then on-hired to perform work on assignment for a client.

2. What are the social and economic costs and benefits involved in reforming the EOA to eliminate discrimination to the greatest possible extent?

RCSA submits that it is particularly important to consider the real costs associated with comprehensive compliance for small to medium sized employers especially in employment dominated by short term engagements where the workplace culture is not under the effective control of the employer. This is especially the case in on-hired employment.

2.2.1 What factors should be taken into account when considering whether there is a case for reform of the laws to improve the complaints system and the system's capacity to address systemic discrimination?

RCSA submits that the current complaints system should allow for greater flexibility to meet the timeliness needs of both claimants and respondents. The current process whereby an employer is required to respond to a Statement of Complaint often adds significant cost to the parties in terms of time and representation. Capacity should be made for a conciliation conference to occur without the need for a written response, where appropriate. Such conciliation or mediation conferences should be conducted on a without prejudice basis with a view to clarification and resolution.

2.3.1 Are there good practices in relation to other issues (for example, occupational health and safety) that could be modified so they effectively prevent or resolve discrimination?

Within the on-hired employment sector employers complete pre-placement assessments of client OHS management systems. This approach to assessing the compliance systems of clients may be a suitable way of aiding compliance amongst RCSA members. The existence of limited control over workplace systems and culture amongst clients limits the effective capacity of our members to prevent breaches of legislation. Such a system is worth exploring by way of a pilot program for the benefit of all stakeholders.

RCSA maintains a Code of Professional Conduct authorised by the Australian Competition and Consumer Commission (ACCC) under which discrimination complaints can and have been made and resolved. This approach to self governance is one that has worked effectively as an alternative dispute resolution procedure and significant sanctions can be placed upon non-compliant members. RCSA would be happy to share this information with the review.

3. Are the current ways of preventing discrimination working well or could they be improved?

RCSA submits that the current ways of preventing discrimination appear to be working relatively well. The awareness amongst our members employing persons is high, however greater clarity as to obligations of our members when acting as agents and when engaged in third party employment services would further improve the existing system.

Moreover, further information and support to aid employers to better understand the prevention of discrimination in assessing performance and operational capacity of workers would be welcome.

3.2.1.1 Would the provision of legal or strategic advice help to prevent discrimination by empowering people with knowledge?

The empowerment of Recruitment Consultants employed by RCSA members in permanent recruitment and on-hired employment would be a particularly effective way of further eliminating discrimination. Many consultants who work for RCSA members are on the front line of recruitment practices and managing workforce issues. Where they take ownership of the duty to prevent discrimination they feel empowered to enforce the law. This was identified in the consultant working groups developed by RCSA in conjunction with the EOCV during the development of the EOC publication *A Fair Go for Jobseekers – A Best Practice Guide*.

RCSA strongly supports further funding of employer associations to assist members to develop practical tools for the prevention of discrimination within the workplace. Funding of employer associations allows for such funding to be best directed and applied in an often misunderstood industry such as on-hired employee services.

3.2.1.3 Should legal or strategic advice be provided by the Commission or some other agency?

RCSA submits that such advice should be provided by the Commission only.

3.2.1.4 Would specific advice on how to comply with the EOA (for example for businesses and schools, accommodation providers, clubs and local government), improve compliance and prevent discrimination? If so, should this be provided by the Commission or some other agency?

As previously submitted, RCSA strongly supports the provision of further advice on how to achieve compliance, especially in the area of recruitment firms acting as agents and in the assignment of on-hired workers to work for third party clients.

This information should be provided by the Commission in conjunction with relevant member associations. As previously mentioned, RCSA has a Code for

Professional Practice and further compliance advice would assist the RCSA in providing information that underpins this Code; and would also provide further assistance to the RCSA National Ethics Committee in resolving complaints/disputes of an EOA nature referred to it under the Code. Use of the Code for Professional Conduct can be viewed as a supplementary concept for the awareness, reduction and resolution of EOA complaints by way of industry self-regulation.

3.2.4.1 Are the limitations on the Commission’s power to conduct an investigation or inquiry ‘of its own motion’ necessary or would other measures such as a broader power to conduct inquiries and make binding recommendations be better at preventing discrimination?

RCSA submits that it would support consideration of extending the Commissions power to hand down a binding recommendation where agreement is provided by all parties concerned. We believe this would significantly reduce the legal cost imposition upon employers and complainants.

RCSA submits that it would be prepared to explore investigations or inquiries of its own motion. RCSA reserves its position as to whether such an extension of power would be supported.

3.2.5.1 Are the current education powers sufficient or should they be clarified or expanded to enable the Commission to prevent discrimination more effectively?

RCSA submits that it would support greater clarity of current education powers.

3.2.6.3 Should the Commission be empowered to initiate claims at VCAT?

RCSA submits that it does not support such an empowerment.

3.2.6.4 Would the current requirement for the Commission to remain a neutral complaint handling body prevent it from initiating claims at VCAT?

RCSA submits that it believes this would be the case.

3.2.6.5 Should the Commission or any other body have the power to resource litigation?

RCSA submits that it does not support such a proposal.

3.3.2.1 Should there be a specific power for the Commission to develop guidelines?

RCSA submits that it would support the exploration of this concept.

3.3.2.2 Should these guidelines be able to be considered by VCAT or the courts when determining matters under the EOA? Should these guidelines be able to be enforced in any other way?

RCSA submits that this question should be explored at the next stage of the review.

3.4.1.1 Are there any ways in which Victorian law should be harmonised with Federal law to reduce inconsistencies without reducing the current protections offered by State law to Victorians?

RCSA submits that a review of such legislation should be conducted with the aim of achieving complementary legislation.

3.4.3.3 Should a finding of discrimination be possible in circumstances where a complainant establishes a prima facie case of discrimination and the respondent does not provide any evidence of the actual basis for less favourable treatment?

RCSA does not support an amendment to the current legislation.

3.4.5.1 Should the concept of systemic discrimination be expressly recognised in the EOA?

RCSA does not support an amendment to the current legislation.

3.4.7.3 Is clarity required on the scope of the physical features attribute?

RCSA submits that it would support greater clarity in relation to this attribute.

3.4.7.5 Should the EOA also make it unlawful to discriminate against a person because that person has an assistance animal?

RCSA submits that it would support such an amendment if suitably defined.

3.4.7.6 Should the *Equal Opportunity Act 1995* be amended so that it is unlawful to discriminate against someone because of their irrelevant criminal record?

RCSA does not support a variation to the existing legislation in this area.

3.4.8.2 How could the system be improved to encourage the resolution of complaints of sexual harassment?

RCSA submits that the EOCV should be provided with greater capacity to informally resolve complaints of sexual harassment through immediate conciliation or mediation conducted without prejudice.

3.4.8.3 Is there any reason that discrimination against volunteers in the workplace should be lawful, but discrimination against paid workers should be unlawful?

RCSA submits that it we would support the exploration of extending the scope of the legislation to volunteers.

3.6.1 Are there ways of reducing discrimination in Victoria that do not require legislation?

RCSA would like to explore the opportunity for the embedding of individuals within workplaces to educate co-workers on the impact of working with a particular attribute. Such a program would extend awareness of workers who, in turn, may become ambassadors of the anti-discrimination cause.

RCSA believes this would be a novel way of introducing Recruitment Consultants to the human face of those living with particular attributes protected by the legislation.

RCSA would support the exploration of a recognition/certification system for employers from either the Commission or administered by employer associations on behalf of the Commission. The criteria may be set (e.g. participation in education programs) by the Commission and upon achievement of the recognition/certification the employer could advertise they have been "certified". This may increase education but also provide some commercial advantage for the employer by attracting candidates familiar with the certification standard. This would also have the advantage of publicly promoting EEO as a frontline issue in employment.

4.2.1 How does the current complaints system rate in terms of the criteria set out in the Attorney-General's Justice Statement for an effective dispute resolution system (fairness, timeliness, cost and complexity that is proportionate to the subject matter, choice of dispute resolution options, transparency, quality, efficiency and accountability)?

RCSA submits that there are opportunities to explore ways of improving timeliness and reducing cost. As previously mentioned, we believe this could be achieved by presenting a greater range of immediate conciliation and mediation options without having to prepare and file large Statements of Complaint and responses to such.

4.2.2 Are there any other considerations that should be taken into account in assessing the effectiveness of the complaints system?

As has been the experience in the unfair dismissal regime under the federal *Workplace Relations Act* 1996, all care should be taken to prevent the use of the complaints system as a means of extracting 'go away' money from employers.

The Commission should be provided with greater liberty to reveal to VCAT the extent to which parties have attempted to reach a resolution before reaching the hearing stage at VCAT. This is important for VCAT to understand in the context of vexatious claims and where individuals have not reasonably settled.

The Commission should be given further freedom to express an opinion to parties about the merits of a complaint. This, in the opinion of RCSA, would prevent unnecessary action being taken within VCAT.

4.3.2.1 Are there benefits of alternative dispute resolution methods, such as conciliation and court ordered mediation, in the context of a discrimination dispute?

Yes, RCSA has articulated in previous answers the benefits of more flexible and responsive resolution through alternative dispute resolution.

4.4.2.1 Should the Commission or any other body have a role in providing legal or advocacy assistance to complainants?

RCSA does not support this as it undermines the independent nature of the Commission.

4.4.2.2 Does alternative dispute resolution, as practised in the anti-discrimination area, avoid the problems of inequality of bargaining power? If not, what steps could be taken to limit the impact of such inequality?

RCSA submits that alternative dispute resolution does minimise inequality of bargaining power and is therefore a more appropriate resolution forum.