

Redfern Legal Centre



Australian Human Rights Commission
Attn: National Inquiry Team

By email: ageanddisabilityinquiry@humanrights.gov.au

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Thank you for the opportunity to provide a submission to *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*. We appreciate the extension of the deadline to today's date.

We would welcome the opportunity to discuss this submission with you further.

Yours faithfully,
Redfern Legal Centre

Per. Joanna Shulman
Chief Executive Officer

Redfern Legal Centre



Australian Human Rights Commission

*Willing to Work: National Inquiry into Employment Discrimination against Older
Australians and Australians with Disability*

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence; tenancy; credit and debt; employment; discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's Experience with Disability and Commonwealth Laws

RLC has specialist practice areas in discrimination law and employment law. RLC offers free legal advice on employment related matters arising under the *Fair Work Act 2009* (Cth) (FW Act) and disability discrimination matters arising under the *Disability Discrimination Act 1992* (Cth) (DD Act). This submission is based on RLC's experience in providing free legal advice and information to people who have experienced inequality on the basis of their age and/or disability.

3. Outline of RLC's Submission

RLC welcomes this opportunity to comment on the intersecting areas of discrimination against older people and people with a disability and the impact on their workforce participation.

RLC has addressed questions 1, 5 and 7 from the Issues Papers in relation to older people and people with a disability.

It is our position that any changes to the law relating to disability should enhance the protections available to people with disabilities and not limit their ability to achieve equality.

4. RLC's Recommendations in Summary

Australians with disability

Question 5

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

Disability Discrimination Act 1992 (Cth)

Issues: Commonwealth anti-discrimination law limits the ability of people with disability to exercise legal capacity by providing reactive remedies to disability discrimination, not comprehensively protecting people from harassment on the grounds of disability, and placing the burden of proof in disability discrimination claims on people with disability.

Recommendations:

1. Remove the comparator test from the DD Act.
2. Include a definition of "harassment" in the DD Act.
3. Amend the DD Act so as to prohibit harassment on the grounds of disability across all protected areas of life.
4. Impose a positive duty to prevent discrimination under the DD Act.
5. Amend the DD Act so that the respondent bears the onus of proof once the applicant establishes a prima facie case of disability discrimination.

Fair Work Act 2009 (Cth)

Issues: The absence of a definition of "disability" in the FW Act limits the ability of people with disabilities to exercise legal capacity under the general protections provisions. Additionally, the short time frame for making a general protections application in cases involving the termination of a person's employment limits the ability of people with disability to exercise legal capacity under the FW Act.

Recommendations:

6. Amend the FW Act to include a definition of "disability" which is consistent with the definition of "disability" in DD Act, without importing the comparator test into the FW Act, or amend the FW Act to clearly provide that the DD Act's definition applies to the general protections provision.

7. Expand the list of circumstances the FWC can take into account in deciding whether to permit an extension of time to lodge a general protections claim relating to termination of employment to include the effects of a person's disability.

Issue: The general protections provisions of the FW Act offer a remedy to people with disability who have been treated adversely in their employment on the basis of their disability. However, the FW Act contains no provisions requiring an active approach to preventing discrimination and harassment of people with disability in the workplace.

Recommendation:

8. Amend the FW Act to include a positive duty on employers and organisations to take reasonable and proportionate measures to eliminate discrimination as far as possible, in the National Employment Standards.

Older Australians

Question 1

What policies, workplace practices, programs or incentives assist with increasing participation of older Australians? How adequate are these practices, programs or incentives?

Issue: Limits introduced to the Restart Program and restrictions to Workers Compensation for people over 65 are active disincentives to the employment of older people.

Recommendation:

9. Introduce incentives to encourage employment of older people, including by expanding the application of the Restart Program.
10. Examine the possibility for lifting restrictions to Workers Compensation for older workers.

Intersecting experiences of discrimination (the following refers to Question 7 in both Issues Papers)

Question 7

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

Issue: The existing Commonwealth anti-discrimination laws do not presently reflect the reality that people can experience discrimination for more than one reason, in more than one area of life.

Recommendation:

11. Include a protection for discrimination on the basis of disability and another attribute protected under Commonwealth anti-discrimination legislation, and prohibit harassment on the grounds of disability and another protected attribute across all protected areas of life.

5. RLC's Recommendations in Detail

Question 5

The Comparator Test

The DD Act provides two definitions of discrimination, direct and indirect. In determining whether there has been direct discrimination the court is required to apply a comparator test. The court has to compare the treatment of a person with a disability against a person without a disability who displays the same conduct.¹ The comparator test is complicated and contentious.² Creating a comparator in the area of disability is difficult as there is often no appropriate person against whom to compare someone.

In constructing various comparators in the case law, the courts have often found that there has been no discrimination because the respondent would have treated the hypothetical person in the same way.³ The following case study illustrates the effect of a comparator in disability discrimination on one of our clients.

Case Study: Nicholas

Nicholas (not his real name) is an RLC client who has a physical and mental disability. His physical disability limits the amount of time he can spend seated at desk on the computer. After being employed for over seven years, there was a restructure in the organisation that resulted in a substantial increase in the amount of time he had to spend seated at a desk on the computer.

Nicholas was no longer able to meet his targets and was experiencing harassment from his manager and other employees. The effect of the changes and harassment led to depression and anxiety, necessitating time off to address his mental health concerns. His employment was terminated.

The reason provided by his employers for the termination was the amount of sick leave he was taking.

Difficulty arises in Nicholas's matter when applying the comparator test, when comparing him to a person without a disability that could not meet his new targets and then had to take time off work.

The application of the comparator test has significantly inhibited the ability of people

¹ *Purvis obo Hogan v New South Wales (Department of Education & Training)* [2003] HCA 62 [11].

² Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (HREOC Legal Section, 2008) 179.

³ *Purvis obo Hogan v New South Wales (Department of Education & Training)* [2003] HCA 62; *Minns v New South Wales* [2002] FMCA 44; *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95.

with disability to exercise legal capacity under the DD Act. RLC is concerned about the ongoing use of the comparator element and again recommends removing it.⁴

Recommendation 1:

RLC recommends removing the comparator test from the DD Act.

Harassment

“Harassment” is not defined within Commonwealth anti-discrimination legislation. Reference must be made to the case law in order to understand it. This may limit the ability of people with disability to exercise legal capacity under Commonwealth anti-discrimination laws. To remove uncertainty over acts that constitute harassment, it should be defined at s 4 of the DD Act.

The *Sex Discrimination Act 1984* (Cth) provides a definition for the offence of sexual harassment at s 28A(1). The definition includes a “reasonable person” test. The Court must be satisfied that the harassment occurs “in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.”

Including a reasonable person test, such as that within the *Sex Discrimination Act 1984* (Cth), could address some of the uncertainty in determining whether or not a person has experienced disability harassment.

Alternatively, a similar test to that in *Racial Discrimination Act 1975* (Cth) regarding offensive behaviour could be adopted. It is possible to require that ‘the act [of harassment] is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’.⁵

Recommendation 2:

RLC recommends including a definition of “harassment” in the DD Act.

Prohibiting Harassment

Harassment in relation to a person’s disability, or that of an associate, is unlawful only in protected areas. Protection from harassment should be extended to all protected areas of life.

The DD Act protects people from discrimination on the grounds of disability in:

- Employment;⁶

⁴ National Association of Community Legal Centres, Submission to the Attorney General, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 6.

⁵ *Racial Discrimination Act 1975* (Cth) 18C(1)(a).

⁶ *Disability Discrimination Act 1992* (Cth) ss 15-21.

- Education;⁷
- Access to Premises;⁸
- The Provision of Goods, Services and Facilities;⁹
- Accommodation;¹⁰
- Land;¹¹
- Clubs and Associations;¹²
- Sport;¹³ and
- The Administration of Commonwealth Laws and Programs.¹⁴

In contrast, the DD Act only protects people with disability from harassment in relation to their disability in a more limited number of circumstances, namely in:

- Employment;¹⁵
- Education;¹⁶ and
- The Provision of Goods and Services.¹⁷

This has the effect of limiting equal recognition before the law in all public areas of peoples' lives. RLC recommends that changes be made to the DD Act to recognize and prohibit harassment on the grounds of disability across the other areas of protected public life.

Recommendation 3:

RLC recommends amending the DD Act to prohibit harassment on the grounds of disability across all protected public areas of life.

Preventing Discrimination and Positive Duties

The DD Act is retrospective and reactive, rather than preventative. A person with a disability has to have experienced discrimination, made a complaint and worked through a complaints process before appropriate adjustments may be made to accommodate their disability and to facilitate their participation in the protected areas of life, such as employment.

The achievement of a positive outcome for an individual with a disability through a discrimination complaint process does not necessarily prevent the discrimination from occurring again. Rather, the discriminatory practices about which the individual

⁷ *Disability Discrimination Act 1992* (Cth) s 22.

⁸ *Disability Discrimination Act 1992* (Cth) s 23.

⁹ *Disability Discrimination Act 1992* (Cth) s 24.

¹⁰ *Disability Discrimination Act 1992* (Cth) s 25.

¹¹ *Disability Discrimination Act 1992* (Cth) s 26.

¹² *Disability Discrimination Act 1992* (Cth) s 27.

¹³ *Disability Discrimination Act 1992* (Cth) s 28.

¹⁴ *Disability Discrimination Act 1992* (Cth) s 29.

¹⁵ *Disability Discrimination Act 1992* (Cth) s 35.

¹⁶ *Disability Discrimination Act 1992* (Cth) s 37.

¹⁷ *Disability Discrimination Act 1992* (Cth) s 39.

has complained may continue. The reactive nature of the DD Act places the responsibility on the person who has experienced the discrimination to take the necessary steps to seek a remedy and does not reduce systemic disability discrimination.

Organisations and individuals should have a positive duty to prevent discrimination on the grounds of disability, as is required by Victoria's *Equal Opportunity Act 2010* (Vic). Section 15 of the *Equal Opportunity Act* imposes a positive duty to eliminate discrimination. It applies to everyone who has responsibilities under the Act and requires them to "take reasonable and proportionate measures to eliminate discrimination...as far as possible."¹⁸ The purpose of this duty is to make a provision that requires positive action to eliminate discrimination.¹⁹

The DD Act should be amended to impose positive duties on organisations and individuals to make reasonable adjustments to enable people with a disability to realize substantive equality with those who do not have a disability.

Recommendation 4:

RLC recommends imposing a positive duty to prevent discrimination under the DD Act.

Amending the Burden of Proof in Disability Discrimination Complaints

The onus of proof differs depending on where a person argues their matter. The FW Act provides that after raising a prima facie case there is a rebuttable presumption that the respondent must discharge, whereas the DD Act places a more significant burden on the applicant and does not provide for a rebuttable presumption.

The DD Act places the evidentiary burden on the applicant to establish each of the elements of the discrimination. RLC submits that this burden is too difficult for many of our clients to establish.

The difficulty arises for our clients because they do not have access to the reasons a decision was made. The evidence necessary to show an act is discriminatory is frequently in the possession of the respondent, not the applicant.

Case Study: Daniel

Daniel (not his real name) came to RLC after the termination of his employment. He had his employment terminated after he was unwell at work, in relation to his disability. He was reaching all of his targets and performing well in his role and he did not understand why his employment was terminated. What he did know was that he was treated differently to the other employees at the agency.

Daniel was able to raise a prima facie case of discrimination, but without being privy to the conversations between his manager and human resources prior to his

¹⁸ *Equal Opportunity Act 2010* (Vic) s 15.

¹⁹ *Ibid* s 14.

dismissal, the evidentiary burden on him to show that the reason for his termination was his disability is too high.

The difficulty of discharging this evidentiary burden of proof is often amplified by the many self-represented litigants navigating the legislation and system.

Changing the burden of proof would have the further benefit of establishing consistency between the DD Act and the FW Act.

Recommendation 5:

RLC recommends amending the DD Act so that the respondent bears the onus of proof once the applicant establishes a prima facie case of disability discrimination.

Defining “Disability” in the FW Act

Section 351 of the FW Act provides that an employer must not take adverse action against an employee because of, among other grounds, their “physical or mental disability”.²⁰ The dictionary at s 12 of the FW Act does not provide a definition for disability. However, it does provide a definition for an “employee with a disability”. The definition provided is:

employee with a disability means a national system employee who is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

This definition was included in the *Workplace Relations Act 1996* (Cth) to determine guaranteed basic rates of pay and federal minimum wages. Its inclusion in the current FW Act, and application to general protections matters, is problematic.

The first difficulty with this definition is that it appears to preclude prospective employees and contractors that are protected under the general protections provisions.²¹

Secondly, the reference to the *Social Security Act 1991* (Cth) in the definition is problematic in that it severely limits access by people with a disability to the general protections provisions of the FW Act. Section 94 (1)(b) of the *Social Security Act* requires a person to show on the impairment tables (not included in the *Social Security Act*) that they have an impairment of twenty or more points. The impairment tables, found in the *Social Security (Tables for the Assessment of Work-Related Impairment for Disability Support Pension) Determination 2011* (Cth), are not merely tables, but sixty-five pages of complex rules to determine the functional impairment of a person. Determining whether a person meets the twenty point requirement in the impairment tables, and therefore falls within the definition of

²⁰ FWA s 351(1).

²¹ FWA s 342.

“employee with a disability” for the purposes of s 351 of the FW Act, is a highly complex process, inaccessible to many people. In this way, the definition inhibits the ability of people with disability to exercise legal capacity under the FW Act.

Furthermore, the definition of “employee with a disability” itself limits the ability of people with a disability to exercise legal capacity under the general protections provisions of the FW Act. In order to satisfy the twenty point requirement in the impairment tables, a person’s disability must be in the category of “severe”. For example, it excludes people with a disability that impacts their:

- (a) use of hand or arms to the extent that they cannot use a standard keyboard;²² or
- (b) use of lower limbs to the extent that they use a wheelchair and cannot use stairs or steps without assistance;²³ or
- (c) ability to work to the extent that they often have “interpersonal conflicts at work...requiring intervention by supervisors...or changes in placement”²⁴

The mental health function table requires such severity of impairment that it actually provides the example that the “person is unable to attend work...on a regular basis over a lengthy period due to ongoing mental illness”.²⁵

The twenty point requirement thus excludes the majority of people with disability who are able to participate in the workforce. This creates an anomaly, arising from the distinctly different purposes of the *Social Security Act* (an Act for the determination of whether or not a person is qualified for a government subsidy because they have a continuing inability to work²⁶) and the general protections provisions of the FW Act (which aims to protect people from discrimination in employment). The incorporation of concepts from social security legislation into the definition of “employee with a disability” under the FW Act raises a significant question as to whether a person could ever satisfy the twenty points or more required to have their disability recognised under the FW Act for the purposes of protection from discrimination in the workplace.

The definition of “employee with a disability” has not been judicially considered in a large number of cases, and those cases that have considered the definition have not interpreted it uniformly.

Burnett FM has followed the process outlined above in determining whether or not the applicants had a disability in *Corke-Cox v Crocker Builders Pty Ltd*²⁷ and *CFMEU v Leighton Contractors Pty Ltd*.²⁸ In *Corke-Cox v Crocker Builders Pty Ltd* he stated that:

²² Table 2 – Upper Limb Function.

²³ Table 3 – Lower Limb Function.

²⁴ Table 5 – Mental Health Function.

²⁵ Table 5 – Mental Health Table.

²⁶ *Social Security Act 1991* (Cth) s 94(c)(i).

²⁷ [2012] FMCA 677 [144].

²⁸ [2012] FMCA 487 [159].

A threshold question exists concerning the existence of a disability within the terms of s 351 FW Act. The term “employee with a disability” is defined within s 12.²⁹

In both cases Burnett FM found that the disability claimed by the applicant did not meet the threshold test and there was no disability for the purposes of s 351 because of the very specific definition provided in the FW Act.³⁰

In *Hodkinson v The Commonwealth*³¹ Cameron FM rejected the applicant’s argument that the definition of “disability” in the DD Act should be applied. Although noting the heading “discrimination” of s 351, His Honour was precluded by the *Acts Interpretation Act*³² from taking it as part of the FW Act.³³ He further argued that as there was no reference to the word “discrimination” in s 351 that there was no connection to the DD Act.³⁴ Although the definition was available to His Honour in s 12 of the FW Act for “employee with a disability”, Cameron FM instead construed the definition in accordance with its ordinary meaning³⁵ and concluded that for s 351(1) of the FW Act disability should “be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person’s movement, activities or senses”.³⁶

Smith FM agreed with the approach in *Hodkinson*, and noted that in the “absence of any statutory definition” (notwithstanding the definition provided in s 12), disability ought to be determined by its ordinary meaning.³⁷

Since the decisions in *Hodkinson* and *Stephens*, the *Acts Interpretation Act*³⁸ was amended, and it is now permissible take into account headings.³⁹ The courts are now required to consider the heading of s 351 – “Discrimination”. Arguably, this affects the reasoning provided in *Hodkinson*.

However, in 2012 O’Sullivan FM followed precedent and applied an ordinary meaning test.⁴⁰ Jarrett FM in *Winter v Ostwald Bros Civil Pty Ltd*⁴¹ provided no reasoning but accepted that the applicant had a disability as “he was at risk of re-injury if he returned [to work]”.⁴² The most recent judicial consideration of the

²⁹ [2012] FMCA 487 [145].

³⁰ *CFMEU v Leighton Contractors Pty Ltd* [2012] FMCA 487 [162].

³¹ [2011] FMCA 171

³² 1901 (Cth) s 13(3).

³³ [2011] FMCA [140].

³⁴ [2011] FMCA [141].

³⁵ [2011] FMCA [145].

³⁶ [2011] FMCA [146].

³⁷ *Stephens v Australian Postal Corporation* [2011] FMCA 448 [86].

³⁸ 1901 (Cth).

³⁹ *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755 [12].

⁴⁰ *Cugra v Frankston City Council* [2012] FMCA 340 [163]

⁴¹ [2012] FMCA 51.

⁴² [2012] FMCA 51 [38]

definition of disability is found in *Flavel v Railpro Services Pty Ltd*:⁴³

[86] In my opinion, the decision-maker's reason for Mr Flavel's dismissal was because Mr Flavel's health at that point in time prevented him from undertaking his duties. The respondent was requiring Mr Flavel to undertake duties that they knew, or at least suspected, he would be unable to perform.

[88] Further, I find that the respondent's termination of Mr Flavel's employment was because of Mr Flavel's mental and physical disability which reason for dismissal is unlawful pursuant to s 15(2) of the Disability Discrimination Act 1992 (Cth) ("DD Act"). This reason for dismissal is in breach of s 351 of the Act.

It is RLC's view that a unified definition of disability would reduce uncertainty, simplify the application of the DD Act and FW Act, and increase the equal recognition before the law of people with disability.

Recommendation 6:

RLC recommends inserting the same definition as that which is contained in the DD Act into the FW Act, including a protection for imputed disabilities.

Alternatively RLC recommends inserting the definition into section 351 or clearly providing that the DD Act's definition applies to the provision.

Late General Protections Applications for People with Disability

The limitation period of 21 days to make a complaint under the FW Act general protections to the FWC⁴⁴ diminishes the ability for a person with a disability to exercise their legal capacity in the event of adverse action involving the termination of their employment. This time limit is insufficient to ensure people with disabilities have time to lodge their applications.

RLC often sees clients, only for the first time, after the limitation period has expired. Many people often do not realise their complaint is a legal complaint and people with disabilities may experience further difficulties on account of their condition.⁴⁵ A lack of awareness as to rights creates a barrier to accessing justice.⁴⁶ Individual barriers for persons with cognitive impairments in accessing legal assistance have been identified as including: being disorganised or overwhelmed, a mistrust of legal service providers, difficult behaviour and communication problems.⁴⁷ People with

⁴³ [2013] FCCA 1189.

⁴⁴ *Fair Work Act 2009* (Cth) s 366 (1)(a).

⁴⁵ Maria Karras 'On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW' (Law and Justice Foundation of NSW, Vol 4, May 2006) 95.

⁴⁶ Abigail Gray, Suzie Forrell and Sophie Clarke, Law and Justice Foundation NSW, *Cognitive Impairment, Legal Need and Access to Justice*, Justice Issues Paper 10 (March 2009) 5.

⁴⁷ *Ibid* 94.

disabilities often experience significant marginalisation, which can include not knowing where to access legal advice and information.

Case Study: James

James (not his real name) had had his job for over five years when his employment was terminated. He had recently been diagnosed with depression and anxiety and was on sick leave with a medical certificate to address his disability when his employment was terminated.

Around the same time, James had carer's responsibilities and was dealing with other complex personal issues. By the time he managed to come to RLC for advice in relation to his termination, the limitation period under the FW Act had just expired. James had no recourse under the FW Act and had to seek remedy under the DD Act instead.

People with disability face specific barriers to accessing civil justice including poorly resourced specialist services, a reliance on others to access legal assistance, a lack of access to AUSLAN interpreters and an inability to navigate or access information on websites.⁴⁸ For others access to justice is simply too difficult, hostile or ineffectual.⁴⁹

The time frame fails to take into account the effect of a person's disability in organizing their complaint within the strict time frame.

Case Study: Sarah

Sarah (not her real name) suffers from a severe form of psychosis and paranoia. She finds it difficult to trust anyone. Coming to RLC in relation to her employment's termination was traumatic for her and receiving instruction from her was difficult as her paranoia impeded her ability to talk to us.

Our communications with Sarah were conducted over a month. By the time she could trust us to fully disclose what had happened we were unable to make an application under general protections because the time limit had already expired.

Recommendation 7:

RLC recommends amending section 366 (2) to include that the FWC may allow a

⁴⁸ Louis Schetzer & Judith Henderson, 'Public Consultations: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW' (Law and Justice Foundation of NSW, Vol 1, 2003) xvi.

⁴⁹ Compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, 'Disability Rights Now: Civil Society Report on List of Issues of Australia' (Aug 2012) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=883&Lang=en> 74.

further period taking into account “the effects of a person’s disability”.

Overlap between FW Act and DD Act

Both pieces of Commonwealth legislation are purporting to cover the same area, however there are some significant differences in the areas that overlap.

The following table provides a comparison of the key issues between the general protections of the FW Act and the DD Act.

Issue	FW Act	DD Act
Definition of Discrimination	“because of” disability.	Treated less favourably than a person without a disability; ⁵⁰ or Requiring a person to comply with something that has the likely effect of disadvantaging people with a disability. ⁵¹
Protection Areas	Protected from adverse action in employment and prospective employment only. ⁵²	Work, education, access to premises, goods services and facilities, accommodation, land, clubs & incorporated associations, sport, and administration of Commonwealth Laws and programs. ⁵³
Harassment	No Protection.	Protected in employment, education and in relation to provision of goods and services. ⁵⁴
Vilification	No Protection.	No Protection.
Exceptions	Inherent requirement; ⁵⁵	Unjustifiable hardship; ⁵⁷

⁵⁰ *Disability Discrimination Act 1992 (Cth)* s 5.

⁵¹ *Disability Discrimination Act 1992 (Cth)*

⁵² *Fair Work Act 2009 (Cth)* s 342.

⁵³ *Disability Discrimination Act 1992 (Cth)* ss 15-19.

⁵⁴ *Disability Discrimination Act 1992 (Cth)* Division 3.

⁵⁵ *Fair Work Act 2009 (Cth)* s 351(2)(a).

	and Religious exemption ⁵⁶	Under Statutory Authority, ⁵⁸ and Charities. ⁵⁹
State Employees	No Protection – need to access State Industrial Relations and Employment legislation.	No Protection - need to access State Anti-Discrimination Legislation.
Time Limitations	21 days from dismissal if a general protections claim. If not a dismissal, then six years from the date of adverse action.	12 months from discrimination.
Complaint made to	Fair Work Commission.	AHRC.
Complaint Procedure	The applicant must send in FWC application form. This form is sent to the employer who then has 7 days to respond to the Employee and the FWC. The FWC will convene a private conference. If the matter is still unresolved, then the FW Act will issue a certificate and the applicant can elect to make an application to a court.	An applicant can fill in a complaint form from the AHRC website. The AHRC will contact the respondent, provide them with a copy of the complaint and ask for their comments. The AHRC may decide to cease dealing with a complaint. AHRC tries to organise a conciliation. If the matter is not resolved the applicant can elect to make an application to a court.
Cost of Attending Commission	\$65.50	Nil.
Onus of Proof	Applicant to show unfavourable treatment, then the respondent to show it was not	Applicant to establish all elements of the discrimination, the respondent to argue any

⁵⁷ *Disability Discrimination Act 1992* (Cth) s 11.

⁵⁶ *Fair Work Act 2009* (Cth) s 351(2)(c).

⁵⁸ *Fair Work Act 2009* (Cth) s 47.

⁵⁹ *Disability Discrimination Act 1992* (Cth) s 49.

	discrimination on a protected ground. ⁶⁰	exemptions or defences.
Cost Orders	Can only be ordered if the applicant has no reasonable prospects of success. ⁶¹	A no cost jurisdiction at the AHRC, but if it proceeds beyond conciliation costs can be ordered.
Available Outcomes	Parties can agree to remedies in their conference.	Parties can agree to remedies in their conciliation.
If the matter is unresolved.	Applications may be made to the Federal Circuit Court or the Federal Court of Australia. Adverse cost orders can be ordered.	Applications may be made to the Federal Circuit Court or the Federal Court of Australia. Adverse costs orders can be ordered.

Areas where the differences create the most inequality for people with disabilities are:

- the definitions of disability;
- the definitions of discrimination, as the DD Act requires the use of a comparator test while the FW Act requires establishing a causal nexus between the disability and the discrimination.
- the time limits; and
- the onuses of proof.

Understanding Discrimination

The inconsistency in the definition of discrimination, between the comparator test and the causal nexus, does little to clarify the complexity of disability discrimination. This impacts the ability of people with disabilities to access discrimination law equally, creating unnecessarily different test depending on where the discrimination occurred.

As discussed above, the DD Act requires using a comparator to determine if there has been discrimination. Following *Purvis* a comparator is a person who exhibits the same behaviour but does not have the disability.⁶²

Section 351 of the FW Act prohibits an employer taking adverse action against an

⁶⁰ *Fair Work Act 2009* (Cth) s 361.

⁶¹ *Fair Work Act 2009* (Cth) s 376(1)(ii).

⁶² *Purvis obo Hogan v New South Wales (Department of Education & Training)* [2003] HCA 62.

employee “because” of the employee’s physical or mental disability. This provides a different test from that which is in the DD Act. The word “because” requires the court to identify the actual reasons an employer took adverse action, and then determine if the person’s disability is a “substantial and operative reason” for the adverse action.

Having two different tests as to what is discrimination creates confusion with each definition presenting problems and limitations. It creates a two-tiered system for people who have experienced discrimination in employment, and those who have experienced discrimination in other areas.

These inconsistencies result in inequality of protection for people who experience discrimination on the grounds of their disability depending on where the discrimination occurred.

Recommendations

RLC recommends having greater consistency between the two pieces of legislation to improve their interaction.

Recommendation 5

Amend the DD Act so that the respondent bears the onus of proof once the applicant establishes a prima facie case of disability discrimination.

Recommendation 6

Amend the FW Act to include a definition of “disability” consistent with the definition of “disability” in the DD Act; without importing the comparator test into the FW Act;

Recommendation 7

Expand the list of circumstances the FWC can take into account in deciding whether to permit an extension of time to lodge a general protections claim relating to termination of employment to include the effects of a person’s disability.

Barriers to employment

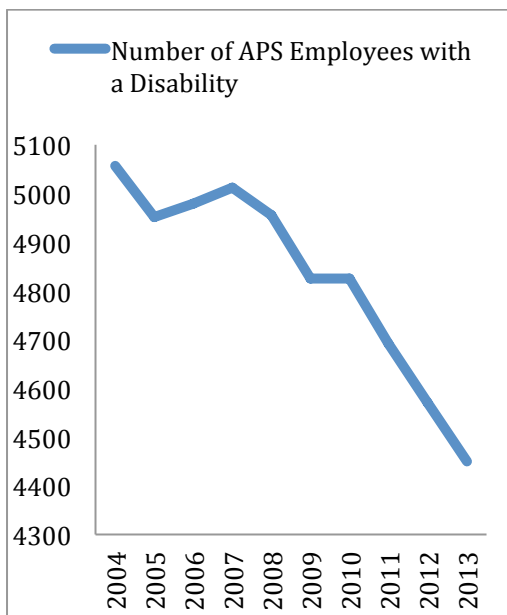
Unemployment among people with disability continues to remain a concern. Only 53% of people with disability are participating in the labour force, compared with 83% of people without a disability.⁶³ These participation rates have not significantly

⁶³ Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers Australia: Summary of Findings 2012* (Nov 2013)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E82EBA276AB693E5CA257C21000E5013?opendocument>>.

changed since the introduction of the DD Act.⁶⁴ However there been an increase in the unemployment rate among people with disability. It has increased from 7.8% in 2009 to 9.4% in 2012, while the unemployment rate remains steady for those without disability (5.1% in 2009 to 4.9% in 2012).⁶⁵

The trends in the Australian Public Service (APS) also show a decreasing trend in equal opportunity employment. The following graphs highlight the decline in numbers of employees with a disability and the percentage of APS employees who have a disability.

Graph 1.1⁶⁶

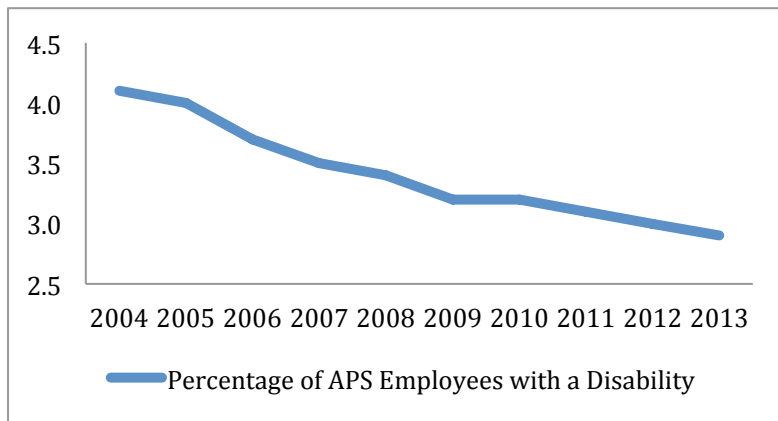


⁶⁴ Australian Human Rights Commission, Submission on the UN Committee on the Rights of Persons with Disabilities *Information Concerning Australia and the Convention on the Rights of Persons with Disabilities*, 11 March 2013, 13.

⁶⁵ Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers Australia: Summary of Findings 2012* (Nov 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E82EBA276AB693E5CA257C21000E5013?opendocument>>.

⁶⁶ Graph created from data provided in Australian Public Service Commission, APS Statistical Bulletin 2012-13, Table 55: Ongoing Staff: EEO Group, 30 June 1999 to 30 June 2013, <<http://www.apsc.gov.au/publications-and-media/current-publications/aps-statistical-bulletin/2012-13/eo/table55>>.

Graph 1.2⁶⁷



Although there are protections for people with disability, it is evident that this is not translating into increased employment participation. This appears to be the case in both the private and the public sector.

RLC can identify several barriers to employment for older Australians and Australians with disability. These are:

- Restart Program - the Restart Program provided employers with a subsidy of \$10,000 a year to employ a person aged 50 years and over for a period of 2 years. Due to the slow take up, the government has now changed it to \$10,000 for one year of employment. This change decreases the level of certainty for employers and acts as a disincentive to employ older Australians. Additionally, to be eligible, older employees must have been long-term unemployed and have been in receipt of the Newstart allowance. These criteria effectively preclude older Australians who are most in need of employment.
- Workers Compensation – we have seen an increasing reluctance on the part of employers to employ people over 65 (despite the pension age to be raised to 67 by 2021) as they cannot obtain appropriate worker’s compensation for them. The same issue is preventing older people from being accepted as volunteers.
- Disability Support Pension – some Australians with disabilities are not being provided with sufficient support if they have been previously employed (and dismissed) as they are placed on the Newstart allowance instead of the Disability Support Pension on the basis that they can be employed again if they have been previously employed.

⁶⁷ Graph created from data provided in Australian Public Service Commission, APS Statistical Bulletin 2012-13, Table 55: Ongoing Staff: EEO Group, 30 June 1999 to 30 June 2013, <<http://www.apsc.gov.au/publications-and-media/current-publications/aps-statistical-bulletin/2012-13/eo/table55>>.

- Probationary periods – we have observed an increasingly common practice of using extended probationary periods for people with disabilities in the employment market. These practices are difficult to target in terms of proving the existence of discrimination but are detrimental for retaining Australians with disabilities in the workforce.
- Unable to assert workplace rights - RLC understands that it is common for older employees in situations where they are being treated unfairly or not being afforded their workplace rights, to be deterred from complaining to their employer for fear of losing their job as it will be difficult for them to find subsequent employment. This indirect consequence of age discrimination is often very difficult to prove.
- From our involvement in assisting with unfair dismissals, we have found that clients aged over 50 at the time of their dismissal found difficulties in finding new employment. In fact, in our interviews with three clients over 50, none of them were able to gain new employment.

The general protections contained within the FW Act protect people with disabilities from discrimination in the workforce, as employees and prospective employees.⁶⁸ However, the effect of this protection is called into question when the figures suggest decreasing rates of participation in the work force of people with disability.

RLC recommends imposing positive duties on employers and prospective employers to make reasonable adjustments to enable people with a disability and older people to obtain employment. The APS should be at the forefront of these initiatives and set the benchmark for a more inclusive workforce.

Recommendation 8:

RLC recommends including in the National Employment Standards a positive duty on employers and organisations to take reasonable and proportionate measures to eliminate discrimination as far as possible.

RLC recommends amending the FW Act so as to include a positive duty to prevent disability discrimination and harassment.

⁶⁸ *Fair Work Act 2009* (Cth) s 342 (1).

Prohibiting Intersectional Discrimination and Harassment

People with disabilities have been identified as a group of individuals with unmet legal need. Disability is a consistent indicator of increased vulnerability to multiple legal problems.⁶⁹

Presently the DD Act does not address the complexity of legal issues often present when an individual comes to RLC with a disability discrimination matter. The DD Act allows the client to only pursue the disability discrimination claim. If a person was also discriminated against on the basis of another attribute, such as race, then they must bring another separate complaint. The Concluding Observations of the Committee on the Rights of Persons with Disabilities recommended that Australia include provisions to address intersectional discrimination.⁷⁰

The DD Act should recognise intersectional discrimination as a ground of discrimination, connecting the various pieces of Commonwealth anti-discrimination legislation. RLC raised this argument in the joint NACLC submission to the Attorney-General on the Consolidation of the Commonwealth anti-discrimination legislation inquiry. The following case study from this submission illustrates the problems created when there is no prohibition of intersectional discrimination.

Case Study:⁷¹

An Aboriginal elder from northern NSW was forced to leave his community and move to a large town so that he could access dialysis treatment, which he requires three times a week. Many non-Aboriginal people who live outside his town and who require regular medical treatment are able to use community transport services to take them to the hospital and accordingly are able to remain in their communities. However, the community transport service does not travel to many of the Aboriginal communities, including to the Aboriginal elder's town.

Unable to drive, the elder had no choice but to leave his community. The man is not being discriminated against because of his disability – as community transport is provided to others who require dialysis. Nor is he being discriminated against because of his race, as other Aboriginal people can access community transport when they are healthier and able to walk or drive to another town. It is really the intersection between these two attributes that have led to the discrimination.

⁶⁹ Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Law and Justice Foundation of NSW, Vol 7, August 2012) 18.

⁷⁰ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013) (21 October 2013) CRPD/C/AUS/Co/1 2.

⁷¹ National Association of Community Legal Centres, Submission to the Attorney General, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 39.

In this elder's circumstances, it would not have been possible to show discrimination on the grounds of his disability. It was not a single attribute on which he faced discrimination, but the intersection of his race and disability that led to his unfavourable treatment. The DD Act should not attempt to consider a person only in light of their disability, but enable the complexity of individual circumstances, such as those in the elder's life, to be taken into consideration.

While the Commonwealth anti-discrimination legislation remains fragmented and separate, a provision needs to be included in the DD Act that allows for discrimination on the basis of disability and another attribute protected under Commonwealth anti-discrimination legislation.

Recommendation 8:

RLC recommends including a protection for discrimination on the basis of disability and another attribute protected under Commonwealth anti-discrimination legislation.

Additionally RLC recommends prohibiting harassment on the grounds of disability and another protected attribute across all protected areas of life.