



## AUSTRALIAN NETWORK ON DISABILITY RESPONSE TO THE FAIR WORK ACT CONSULTATION PAPER

Australian Network on Disability strongly supports the Australian Government's efforts to examine, consider and strengthen anti-discrimination laws and to clarify exemption provisions. We welcome the opportunity to provide input and recommendations that ensure greater equity and inclusion for people with disability in Australia.

### WHO WE ARE

Australian Network on Disability is a national, membership-based organisation that helps organisations welcome and retain people with disability into all aspects of business.

We work with our 440 member organisations - who in combination employ around 2.2 million people or 18% of Australia's workforce - to remove barriers that limit opportunities and prevent the employment and advancement of people with disability.

As the peak body for disability inclusion in the workplace we provide expert guidance, services and programs to employers, Government representatives and industry bodies. Our mission is to create a disability-confident Australia. We are also part of global networks, notably the International Labor Organisation (ILO), Valuable 500, Purple Space and Open Inclusion.

We are the employers' voice to government, industry, and community to achieve the inclusion of people with disability.

In this submission we are responding to questions 1, 2 and 3.

### **Question 1: Should the Fair Work Act expressly prohibit indirect discrimination?**

Australian Network on Disability recommends that the Fair Work Act specifically prohibit indirect discrimination, removing any doubt as to what is required of employers when complying to anti-discrimination provisions.

We recommend clarification of indirect discrimination using the Disability Discrimination Act's definition which states that indirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute. <sup>(i)</sup>

Each year, the Australian Human Rights Commission (AHRC) receives more complaints about disability discrimination than about any other forms of discrimination. In 2019-20, 44% of AHRC complaints were about disability discrimination. <sup>(ii)</sup>

The AHRC does not identify whether the complaints involve direct or indirect discrimination however we believe that indirect discrimination captures many of the complaints that would not be considered direct discrimination.



There are countless instances when indirect discrimination could happen in Australian workplaces. The AHRC outlines commonplace examples which illustrate how often indirect discrimination could occur.

For example:

- It is indirect disability discrimination if the only way to enter a public building is by a set of stairs which prohibits wheelchair users from entering the building.
- It is indirect discrimination if a policy says that managers must work full time, which could disadvantage parents with children or people with disabilities or health conditions who may need to work part time.

Given the volume of disability discrimination complaints in Australia, it could be argued that there is a need for national unity regarding anti-discrimination laws and protections at the federal level.

People with disability can be vulnerable, particularly in the workplace, and we would argue the any fragmentation or confusion regarding workplace protections only heightens this vulnerability.

Amending the Fair Work Act to expressly prohibit indirect discrimination would signal to Australian employers and employees that the Government recognises that indirect discrimination is no less critical than direct discrimination.

## **Question 2: Should the Fair Work Act be aligned with the DDA and include a definition of disability?**

Section 351 of the Fair Work Act prohibits employers from taking “adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”<sup>(iii)</sup>

However, the Act’s lack of a definition of physical or mental disability leaves the definition of disability open to interpretation.

The Fair Work Act also fails to acknowledge disabilities which cannot be clearly defined as physical or mental such as intellectual, sensory, neurological, and learning disabilities.

The much broader definition of disability outlined in the Disability Discrimination Act 1992 includes: physical, intellectual, psychiatric, sensory, neurological, learning disabilities, physical disfigurement, and the presence in the body of disease-causing organisms. It includes current, previous, potential future or imputed disability.<sup>(iv)</sup>

The Disability Discrimination Act’s much broader definition ensures that everyone with a disability is protected.

According to the University of NSW Law Journal, “It is not clear why the drafters chose not to define disability (or indeed any of the attributes in section 351) or why they did not import the broad definition in section 4 of the DDA.”<sup>(v)</sup>

“In many cases this has not been problematic as the court has accepted that the employee’s condition constituted a disability but in the instances in which it has had to determine what disability means, its approach has been far more restrictive than under the DDA,” states Monash Business School Associate Editor Dominique Allen in her paper “Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?”<sup>(vi)</sup>

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) protects all persons with disabilities, who are defined in Article 1 as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>(vii)</sup>

This broad definition adopts the social model of disability. It acknowledges that disability is a multi-faceted and evolving concept, and that barriers of attitudes and environments prevent people with disability from experiencing many human rights and freedoms.

“The Convention seeks to alter social attitudes by ensuring that governments, individuals and organisations recognise that we have the same human rights and fundamental freedoms as all other persons.”<sup>(viii)</sup>

Australian Network on Disability endorses broader definitions of disability which also adopt the internationally acknowledged social model of disability, rather than the medical model of disability.

The social model – developed by people with disability – states that people are disabled by barriers in society, such as buildings not having a ramp or accessible toilets, or people’s attitudes, such as assuming people with disability can’t do certain things.<sup>(ix)</sup>

The Australian Federation of Disability Organisations (AFDO) argues that the medical model of disability says people are disabled by their impairments or differences and looks at what is ‘wrong’ with the person, not what the person needs.

Australian Network on Disability agrees with the AFDO that the medical model of disability creates low expectations and leads to people with disability losing independence, choice, and control in their lives.

However, the social model of disability helps us to recognise the attitudinal, environmental, institutional and communication barriers that make life harder for people with disability and acknowledges that the removal of such barriers will help create equality for people with disability.

Australian Network on Disability strongly recommends that the Fair Work Act – at a minimum - be aligned to the DDA by incorporating a broad definition of disability. However it would be best practice to ensure the definition was based on the UN’s social model of disability.

### **Question 3: Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustments?**

Australian Network on Disability has 22 years of experience helping organisations to implement workplace adjustments. A survey of our member organisations conducted in November 2022 found 57% have a formal workplace adjustments policy and a further 31% offer workplace adjustments on a less formal/ad hoc basis. Our member organisations

commonly report surprise at how little cost and effort is required to implement workplace adjustment.

Australian Network on Disability understands first-hand the benefits of employing a diverse workforce, through the introduction of reasonable adjustments. Over 40% of Australian Network on Disability's employees are with disability.

We strongly recommend that the Fair Work Act be amended to clarify the requirement for employers to consider reasonable adjustments, as outlined in the Disability Discrimination Act.

Clarification of the requirement to consider reasonable adjustments would signal the Government's commitment to enhancing employment opportunities for people with disability and improving the unemployment rate for people with disability.

Only 53.4% of people with disability are in the labour force, compared with 84.1% of people without disability. This gap has remained largely unchanged since 2003. (x)

The AHRC has stated "People with disabilities or health conditions must be assessed on their current ability to do the job – not on the assumptions about how their disability." (xi)

The current lack of clarity in the Fair Work Act regarding the requirement to consider reasonable adjustments exposes people to disability to potential direct and indirect discrimination.

For example:

- The Fair Work Act allows for a probationary period of 6 months which cannot be extended. We advocate that the probation period begin after workplace adjustments have been implemented.
- Our Relationship Managers report that some member organisations have taken more than 6 months to implement reasonable workplace adjustments. This highlights where the Fair Work Act could be strengthened.
- Australian Network on Disability advises our member organisations that when an employee requests an adjustment, any probation period or performance management period should be 'paused' until the adjustments are in place. Clarification in the Fair Work Act would reinforce the case for employers' commitment to reasonable workplace adjustments.

Australian Network on Disability endorses the AHRC's position that, "having in place a clear policy statement on reasonable adjustments can help to build confidence so that employees voluntarily disclose and discuss disability issues rather than holding back information because of fears of discrimination." (xii)

## CONCLUSION

The current discrepancies between the Fair Work Act and the Disability Discrimination Act present challenges for employers and employees with disability who are required to navigate a complex and contradictory legal landscape.

Australian Network on Disability recommends that the Government update and align the Fair Work Act with Commonwealth anti-discrimination laws to provide employers and employees with clarity in all aspects of workplace protections for people with disability.



## ENDNOTES

<sup>i</sup> Disability Discrimination Act 1992. <https://www.legislation.gov.au/Details/C2018C00125>

<sup>ii</sup> Australian Institute of Health and Welfare. *People with Disability in Australia 2022*. <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/employment/employment-rate-and-type>

<sup>iii</sup> Fair Work Act 2009. <https://www.legislation.gov.au/Details/C2017C00323>

<sup>iv</sup> Disability Discrimination Act 1992. <https://www.legislation.gov.au/Details/C2018C00125>

<sup>v</sup> University of NSW Law Journal. *Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?* 2018. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3477761](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477761)

<sup>vi</sup> University of NSW Law Journal. *Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?* 2018. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3477761](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477761)

<sup>vii</sup> United Nation Convention on the Rights of Persons with Disabilities. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

<sup>viii</sup> International Paralympic Committee. *The UN Convention on Rights of Persons with Disability 2012*. [https://www.paralympic.org/sites/default/files/document/120818093927291\\_2012\\_08+The+UN+Convention+on+Rights+of+Persons+with+Disabilities\\_ENG.pdf](https://www.paralympic.org/sites/default/files/document/120818093927291_2012_08+The+UN+Convention+on+Rights+of+Persons+with+Disabilities_ENG.pdf)

<sup>ix</sup> Australian Federation of Disability Organisations. *Social Model of Disability*. <https://www.afdo.org.au/social-model-of-disability/>

<sup>x</sup> Australian Institute of Health and Welfare. *People with Disability in Australia 2022*. <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/employment/employment-rate-and-type>

<sup>xi</sup> Australian Human Rights Commission: *Inherent Requirements*. <https://humanrights.gov.au/quick-guide/12052#:~:text=The%20inherent%20requirements%20of%20a,a%20team%20or%20other%20organisation>

<sup>xii</sup> Australian Human Rights Commission: *Reasonable Adjustment*. <https://humanrights.gov.au/about/news/speeches/reasonable-adjustment>

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