

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

Legal Aid Queensland Submission

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Australian Human Rights Commission's *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997* (Qld), LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objectives, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQs services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and based on the extensive experience of LAQ lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

## Summary of recommendations

There are 18 specific recommendations in this submission. Broadly those recommendations provide detailed suggestions to simplify and improve the legislative regime, to consolidate the best of the existing laws and processes, and to target education resources.

## Legal Aid Queensland's work with workers with disabilities

1. LAQ has had a discrimination advice and casework program within its Civil Justice Services team for over a decade. The practice assists people who have been discriminated against because of any protected attribute in any covered area of public life, as well as people who have experienced sexual harassment.
2. In January 2014, having received Australian Government funding to expand its civil practice, LAQ began offering expanded advice and casework assistance in employment law. This program was substantially reduced with the loss of that funding in mid-2014. Since that program has contracted, LAQ has maintained a small employment law program which focuses on discrimination and human rights issues in the employment area.
3. The clients who we give advice to in the employment law service are:
  - a) Experiencing problems in their workplace, most commonly dismissal;
  - b) Low and middle (up to \$80,000pa) income earners in mainly non-unionised workforces including labour hire workplaces predominantly from these industries:
    - Retail;
    - Aged care;
    - Food service and hospitality;
    - Labouring.
  - c) Generally experiencing a complex range of intersecting legal and social problems;
  - d) Often grappling with making a choice between multiple jurisdictions in which to bring an action;
4. The clients who we give casework assistance to in employment law are almost always workers who have been dismissed in circumstances that suggest discrimination. We represent clients in the:
  - a) Australian Human Rights Commission;
  - b) Anti-Discrimination Commission Queensland;
  - c) Fair Work Commission (Unfair Dismissal and General Protections matters);
  - d) Federal Circuit Court and Federal Court; and
  - e) Queensland Civil and Administrative Tribunal.
5. LAQ does not collect specific data which would enable us to identify figures or trends in our clients as a whole group but we have collated a sample of relevant clients from recent months. A table of these clients is annexed to this submission. More detail about some of these clients is provided in the text of this submission with cross-referencing.
6. Although we maintain a large practice in advising and assisting clients with disabilities, there is not the same demand for our help from older clients seeking our advice or assistance about discrimination on the basis of their age. The majority of older clients seeking discrimination advice are older people with disabilities (including age related disabilities). As such, the majority of this submission addresses the issues for workers with disabilities. We are addressing the issues for older clients in a more limited way in this submission, primarily in our response to question 7 about intersectional discrimination.
7. From the experiences of our clients we are able to respond to several questions asked by this enquiry, particularly questions 5 and 7. We do not intend to address questions 3 and 4 and make only limited comments about questions 1, 2 and 6.

## Question 1. Programs, policies and initiatives are successful in increasing participation rates for people with disabilities? Are they adequate and what role do specific parties play.

8. As noted above, all of our clients are experiencing problems in their workplace. We do not see the successful recipients of workplace initiatives and programs. We do, however, see workers when the programs either fail to deliver or when well-intended programs are used to unintended negative ends.

### The supported wage system

9. Several clients have presented to us over the past year with problems with the supported wage regime.

#### **Case study 1: Support Wage System (client number 2 in the table)**

Our client came to us on referral by his union. He was a long term public service employee who had a disability which resulted, among other things, in a cognitive difference with characteristics that were both beneficial in his role, and also a problem. He had been working in an entry level position for over a decade. He was loyal, easy to have around and diligent. Because of the way his brain worked he was able to concentrate on a repeated, mundane task to a high level of accuracy without fatigue. He was, however, slow at his work.

Recently his local area had been hard hit by economic downturn and there was increased interest in positions at his level when those became available. The employer began to attract a standard of applicant who would not previously have considered these positions. As a result, our client began to appear a less desirable employee. The employer decided to set benchmarks at a level suited to this new, more skilled employee cohort.

Our client could not keep up. He was tested and tested, at much fruitless cost to the employer which eventually felt that it could only retain him on a reduced wage.

#### **Case Study 2 – Supported Wage System (client number 21 in the table)**

Our client lived in a remote area. He had been engaged in manual labouring work for some years, building and maintaining small wooden items. He had a mental illness which had a fluctuating impact on his life and work practices. He was careful and diligent and reliable. He was also unambitious and focused on the quality of the job in front of him at any given time. Annually, a supported wage assessor would come and assess him and assign him a percentage of normal productivity. Some years he would be 90% and other years 80% according to his functioning on the day of the assessment.

In reality, he was doing work that few skilled tradespeople would take on over a long term basis. The service he offered the clients of the business and the care in his work were not assessed. Given a figure, service and care would surely be valued at more than 10% of a base level wage.

10. These cases have several marked similarities. In each case:
  - a) The introduction of a supported wage has occurred some way into the employment relationship, usually several years in;
  - b) The work is base or entry level work;
  - c) A new employee has started and they are visibly more efficient, alerting the employer to the apparent slowness of the client;
  - d) The client is compared to a cross-section of other employees, some of whom are in 'entry level' positions simply because they are new or because there is an economic downturn pushing more qualified workers into lower level jobs, and not because their skills are limited to that level of work;
  - e) The client's other skills and contribution (including as their loyalty to a position that other workers might move past very quickly) are not assessed or taken into account;
  - f) They are only a little bit slower than the average;
  - g) Their speed and their disability are not necessarily directly correlated with other factors contributing to their speed of work including anxiety, diligence and carefulness in the testing process;
  - h) The testing has been done in times of downturn when there is a need to reduce staff or reduce costs or when a 'better' standard of worker has become available, rather than as a positive measure to increase participation for workers with disabilities;
  - i) The client has not been able to get any information about the use of the supported wage regime to cut the wages of long term employees;
  - j) The employer feels absolutely entitled to shift the employee to a supported wage because they are authorised by an award or workplace agreement;
  - k) Conflict over the imposition of a supported wage and the consequent reduction of income has led to the end of the employment relationship.
11. We are not aware of whether the cases we are seeing represent a broader systemic problem with the supported wage system. We note that this system is different from (and better than) the now much maligned Business Services Wage Assessment Tool (BSWAT) and it affects a very different group of employees. It is, however, not an entirely benign tool for improving participation either.
12. Even when used in accordance with its intentions the Supported Wage System results in lower take home wages for employees with disabilities. In many cases those employees are doing work that better skilled workers would be reluctant to take on, especially in the longer term (or outside an economic downturn). In some cases the client has a skill set which, when looked at as a whole, also includes some beneficial skills for the work that they do. For example, a worker with a particular disability (such as in case studies 1 and 2 above) may be slow but is also completely focused on the relatively mundane task at hand and will work diligently year on year at that same task without frustration or any other adverse personal or workplace impact. No other employees face pay cuts based on their speed of work.
13. We do not intend to address BSWAT but anticipate better qualified organisations will do so.

**Recommendation 1:** There is a need for clarification and education for employers regarding the use of the Support Wage System for long term employees in base or entry level roles.

**Recommendation 2:** There should be provision made in the assessment process for consideration of other positive factors instead of simply speed of work.

**Recommendation 3:** Employers, particularly public sector employers, ought to be able to access funding for long-term employees to assist them to maintain award level wages through difficult times.

## Question 2 - Are there distinct challenges faced by different sized businesses and organisations, sectors and industries in employing Australians with disability?

### Small business employers

14. In our experience it appears to us those smaller businesses, where the human resource management is more personal but less skilled, handle workers with disabilities differently from larger organisations. Our clients who have been employed by small businesses report that those businesses generally:
- Are more willing to make adjustments and accommodate workplace diversity over extended periods of time so long as the relationships between the individual worker and the small business owner are otherwise healthy; but
  - Tend to expect closeness, gratitude and increased loyalty from employees to whom adjustments have been afforded and may be more personally aggrieved by arising issues (for example, may perceive taking sick leave as *'ungrateful'* or saying *'after everything I've done for you...'* when asked about other workplace rights);
  - May incorrectly interpret employee behaviour as manipulative or optional (for example, having a panic attack as *'playing the mental health card'* or *'unreasonable'*); and
  - Are also more likely to outright dismiss an employee if things go wrong in the relationship (which is easy when the heightened expectations stated at (b) are not met) rather than attempt to manage the situation.

#### **Case study 3** (client number 6 in the table)

Our client was a teenager in a manual role using machinery. He had worked for two years for an employer he trusted and had disclosed his medical condition early on in his employment. He suffered from epilepsy. His condition was managed with medication and he had not had a seizure in some years.

He felt a bit lightheaded one day at work, switched off the machine he had been operating and bent over slightly until the feeling passed. He felt better within moments and kept on working.

He was summarily dismissed as *'unsuitable for the work'* and his employer also let other employers in the town know about the dismissal and provided them with his view about how unsafe it would be for them to employ him in roles which involved machinery.

### Change in supervisor

15. It is also relevant to this question that the single most common thread which runs through our (relevant) clients' experience is that the problems for them arose in their workplace after a change in supervisor. In our experience, there is no other single factor as likely to indicate an arising difficulty for a worker with a disability, (not size of employer, not length of service, industry type, disability type etc) as a recent change in supervisor.

16. It is not clear why this would occur to the degree that it does but our clients describe a range of intersecting factors of which the following are common:
- a) New supervisors need to prove themselves and may be tasked with reforming, shaking up or 'bringing up to standard' a team or work group;
  - b) New supervisors often lack supervisory or management experience;
  - c) The new supervisor may lack understanding about, and the history of, what adjustments have been developed and why, and workplaces very often have poor record-keeping about such things. There may be no handover of knowledge about adjustments from one supervisor to the next (particularly if the former supervisor has left the workplace as opposed to being promoted internally);
  - d) There is a loss of the existing protective relationship with the former trusted supervisor that built up over time. This is particularly destructive when the former supervisor had permitted the worker more than they are strictly entitled to in terms of adjustment, flexibility or accommodation;
  - e) In the long term supervisors come to value loyalty in relationships and take a broad view of the value of an individual employee, but new supervisors focus their immediate attention on measureable attributes like speed, efficiency, attendance rates and punctuality which disadvantages some workers with disabilities;
  - f) The 'storming and forming' stage of a new work team is more difficult to manage for some people, including workers with anxiety conditions, and change management is not always handled well by employers;
  - g) What was previously comfortable becomes competitive and some employees with disabilities struggle to compete, or develop anxiety about the need to do so;
  - h) There is often a change to workplace or team culture when there is a change at the management level and people with particular disabilities, such as Autistic Spectrum Disorder (ASD), are more vulnerable than other workers to being perceived as not a 'good cultural fit'.

**Recommendation 4:** Recognising that the change in supervisor represents a high risk factor for discrimination and dismissal of workers with disabilities, we recommend consideration of a range of options to help mitigate this which may include:

- a) A system of recording and/or registering adjustments made during times when things are going well (see recommendation 12);
- b) In relation to unfair dismissal, formal recognition of '*whether the employee's supervisor has recently changed and what training was given to the new supervisor*' as a factor requiring consideration in determining whether a dismissal was harsh, unjust or unreasonable;
- c) Financial incentives associated with employing a person with a disability also be available when:
  - i. A person with a disability has been transitioned into a new role or team within the same workplace;
  - ii. An existing worker develops a disability

## Question 5 – How adequately do existing laws protect Australians with disability from employment discrimination? How effective are the legal remedies for workers with disabilities who have experienced discrimination?

17. A range of legal requirements protects workers with disabilities. In addition to the legislative requirements set out in the discussion paper, in Queensland workers also have the protection of the *Anti-Discrimination Act 1991* (Qld) (*Qld Anti-Discrimination Act*). Workers with disabilities acquired at their place of work also have some protection provided by the Workers Compensation regime.
18. In our experience there are problems with the existing regime being used to address workplace discrimination for workers with disabilities.

### Out of date drafting

19. The way the law is drafted is no longer necessarily aligned with the way people with disabilities see themselves. This presents problems to, in particular, younger workers and workers with some particular disabilities. For example, in order to acquire the protection of the *Qld Anti-Discrimination Act* in relation to a request for a workplace adjustment, a person with a disability must align their need with the framework in the Act. This means that they must first identify an 'impairment'.

*Anti-Discrimination Act 1991 - Schedule –*

*Dictionary –*

...

*impairment, in relation to a person, means—*

- (a) *the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or*
- (b) *the malfunction, malformation or disfigurement of a part of the person's body; or*
- (c) *a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or*
- (d) *a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or*
- (e) *the presence in the body of organisms capable of causing illness or disease; or*
- (f) *reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;*

*whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—*

- (g) *presently exists; or*
- (h) *previously existed but no longer exists.*

...

20. For younger workers exiting a school system which has focused on what they can offer as individuals rather than their 'malformation', 'condition' or 'malfunction', the



requirement to align a need with one of the specified sorts of 'impairment' on the list poses real difficulties.

21. A person with a cognitive variation such as Autistic Spectrum Disorder (ASD) will find that their way of viewing the world puts them into the categories for having 'a condition or malfunction that results in a person learning more slowly...' or 'a condition... that impairs a person's thought process, perception of reality, emotions or judgment or that results in disturbed behaviour' but neither of these is a really comfortable or affirming fit for a person with that diagnosis<sup>1</sup>.

#### **Case study 4 – client number 1 in the table**

Our client was hired straight out of school as an assistant with a promise of an apprenticeship if things went well. He was dismissed because his employer had assessed him as unsuitable for the apprenticeship. They had found him difficult to communicate with, he did not read social cues well, and he was awkward and insensitive. They felt his attitude was a problem. He failed to tell them things that were important and did not seem to be progressing as well in all areas of his work.

When our lawyers spoke with him he was totally perplexed by the employer's attitude to him. We asked him if he has a disability. He said no, but suggested we talk to his Mum. When we spoke to her, it became clear that he had been diagnosed with Autistic Spectrum Disorder (ASD - referred to by this family as 'Asperger's') but that he had never been told that it was a 'disability', that it would cause him any problems in the workplace, or that he had rights to ask for support if he needed it.

The family was unprepared for the transition from school where support and recognition are readily available without any real need on the part of the student to ask, into the rough and tumble of the open workforce. He had never informed his employer of his ASD and they asserted that they 'did not know' that he had a disability. His matter settled and he was reemployed elsewhere, this time with better awareness of what he needs to do to explain himself to future employers.

**Recommendation 5:** Consideration ought to be given to redrafting the definitions of disability to better reflect the way people with conditions such as ASD and ADHD see themselves. Please note that this recommendation must be read with recommendation 8 regarding broader reform to the legislative regime.

**Recommendation 6:** There should be targeted education to young people entering the workforce about appropriate disclosure of individual needs and the process for requesting adjustments.

## **Incomprehensibility and accessibility**

22. The anti-discrimination law is not at all accessible in its raw form. What looks like obvious discrimination to a layperson will often not fit with the technical legal tests for

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<sup>1</sup> For a broader discussion of this issue specifically for people with ADD and ADHD see Rice OAM et al "It Just Doesn't ADD up: ADHD/ADD, the Workplace and Discrimination" [2010] MelbULawRw 12; (2010) 34(2) Melbourne University Law Review 359

direct or indirect discrimination. The legislation is confusingly drafted and exists across a bewildering number of legislative instruments in multiple jurisdictions. Even if only one Act applies in a given scenario, it cannot be easily read by a non-lawyer (or even by a lawyer with a different specialty area). It is, for example, not at all clear to a lay person reading the legislation whether the way discrimination is described in the various 'areas of public life' limits the application of the relevant Act to those sorts of discriminatory conduct or they are mere illustrations<sup>2</sup>. The case law does not assist.

23. There is, fortunately, a volume of interpretive information on the various Commission websites and further information can be obtained by telephoning the Commission itself. There is still, however, much work to be done in this regard.
24. While many people with disabilities are as well educated as the general population, some people are limited in their ability to access and understand complex information by their disability.
25. The most substantive and noticeable point of confusion and lack of information is about where to go and what to do if things go wrong. None of the various Commissions are able to assist, on an information basis, with the question of which Commission is best able to handle a complaint. This issue is dealt with in more detail below.

## Taking action – making the choice

26. The immediately arising issue upon having a problem with discrimination in the workplace is to decide what to do and where to go. Complainants are prohibited from making multiple complaints in relation to the same conduct and their cases cannot be pleaded in the alternative. If there is a dismissal from employment for reasons including a person's disability, a decision about which action to take must be made within 21 days from the date of dismissal. The decision is highly complex, so complex that no Commission attempts to produce information on the subject probably because it is considered a matter that may only be resolved by legal advice — a situation that is particularly unhelpful to the dismissed employee.
27. It is never sufficient to make a decision for a client regarding their legal matter, and never more important to empower client decision making than for clients with disabilities pursuing their individual rights. It takes about 90 minutes for an experienced lawyer in our office to adequately advise an individual on the choice of jurisdiction across the four possible options which arise when they are dismissed for reasons which include, or may include, their disability<sup>3</sup>; provided their disability does not include neurological, mental health or cognitive impairment. For people with disabilities that affect thought and processing, this time may be doubled or tripled. Generally the client has waited a week for an appointment with us. They will then have perhaps a few days to decide which action to take AND lodge documents to commence proceedings.

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<sup>2</sup> For example see sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth), and then section 15.

<sup>3</sup> The four possible actions are an Unfair Dismissal application under Part 3-2 of the *Fair Work Act 2009* (Cth), a General Protections (Dismissal) application under Part 3-1 of the *Fair Work Act 2009*, an Anti-Discrimination complaint under the *Anti-Discrimination Act 1991* (Qld) or a Disability Discrimination complaint under the *Disability Discrimination Act*.

**Recommendation 7:** Broadly, Legal Aid Queensland recommends extensive reform and consolidation of Anti-Discrimination legislation (see Recommendation 8 below). Whether or not such broad scale reform is pursued, in any properly functioning system it needs to be possible for alternative arguments to be mounted within the one legal action.

It should not be necessary, for example, to choose between Unfair Dismissal and General Protections – Dismissal but the two should be arguable as alternatives. Likewise, it should be possible to argue discrimination under both the Fair Work Act and the Disability Discrimination Act in the one proceeding.

28. Ultimately a large number of our clients choose the Fair Work Commission over the other options, if they are within the time frame for lodging proceedings in that jurisdiction (typically 21 days from the date of dismissal). There are case specific reasons for this but frequently these include:
  - a) There are two sorts of discrimination or alternatively the ‘catch all’ unfair dismissal protections meaning that the coverage tends to be broader under the *Fair Work Act 2009* (Cth);
  - b) The problem of the comparator (Purvis) is less pronounced in General Protections discrimination compared with other anti-discrimination actions;
  - c) There is a reverse onus of proof for the traditionally tricky aspect of discrimination actions which is proving the link between the attribute and the treatment being complained about;
  - d) The law and the process is relatively simple to understand, and matters tend to be resolved quickly;
  - e) There is a much reduced risk of being ordered to pay legal costs if the case is lost in the Fair Work Commission, or the Federal Circuit Court coming out of the Fair Work Commission, compared with the other options;
29. The problems of using the Fair Work processes rather than the other Anti-Discrimination options include:
  - a) The 21 day time limit to commence proceedings is a problem for many workers with disabilities, particularly mental health problems.

#### **Case study 5 - client number 15 in the table**

Our client was dismissed after a heat of the moment resignation. He was suffering from reasonably severe anxiety and depression at the time of the resignation. It is apparent that there were arguments before that too – many of which he handled badly. His employer refused to allow him to recant the resignation. He may have had a claim in unfair dismissal.

He sought our advice within the 21 days but struggled to engage with the content. He felt angry and defeated. It was obvious that the end of his employment was a big blow to him when he was already struggling to cope. He told us that he was aware of the time limit but ‘cannot bring myself to do anything’.

Because he was able to make phone calls and seek legal advice, and he knew about the time limit within the 21 days, he would find it hard to argue later that he should be given an extension of time. The requirement to identify ‘exceptional circumstances’ to obtain an extension is a high bar.

- b) The process is robust and hardy at the Fair Work Commission stage and often not suited to people with more complex disabilities;
- c) There is substantial reliance on telephone conciliations when often people with disabilities are better served face-to-face;

- d) There is no support provided by the Fair Work Commission directly to the parties in preparation for the conciliation whereas in other jurisdictions support is often given to narrow the issues, ensure advice has been sought and received, and to make sure needs are known and addressed;
- e) The file is moved from person to person (or is held by a team rather than an individual) within the Fair Work Commission as it progresses and there is no single contact point until a matter is allocated to a decision maker (which does not happen at all for general protections matters as there are no decisions made at the Commission stage);
- f) Conciliators are not specialists in anti-discrimination law and may lack skills or experience in working with people with disabilities;
- g) The simpler drafting in the *Fair Work Act 2009* (Cth) (*Fair Work Act*) offers broad interpretive scope for decision makers. At the present time this means that there are some complicated unresolved legal questions in the Fair Work jurisdiction including:
  - i. whether discrimination includes indirect discrimination and the right to request reasonable adjustments (except for work injury related disabilities – for which adjustments or ‘light duties’ are, for a period at least, a workplace right);
  - ii. how the characteristics extension found in the anti-discrimination legislation works under the *Fair Work Act*;
  - iii. whether ‘disability’ includes a presumed or past disability;
  - iv. whether subsections 351(2)(a) and (3) brings in the comparator articulated in *Purvis* to *Fair Work Act* discrimination and how that might interact with the concept of ‘adverse action’;
- h) If an applicant brings a General Protections action that includes dismissal as an adverse action they cannot raise Unfair Dismissal as an alternative and cannot change the action later on because of the time limit issue.

## Which hurdle do you prefer?

- *Purvis v New South Wales* [2003] HCA 62 (*Purvis*)
- *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (*Barclay*)

*Purvis* and *Barclay* are leading High Court cases which confine the application of their respective areas of law. For clients who have been dismissed from employment for behaviours connected with their disability, the two cases often represent alternative hurdles.

*Purvis*, applying the *Disability Discrimination Act 1992* (Cth) (*Disability Discrimination Act*), clarifies the identity of the comparator when a person with a disability exhibits disturbing behaviour. It drew a line between the disability itself, and the behaviour or impact of that disability. If a person is treated less favourably because of the manifestations of their disability (the violent/anti-social behaviour caused by the disability) *Purvis* makes it harder to argue unlawful discrimination. Although there has been some legislative reform to soften the harshest aspects of *Purvis*, it still represents an ongoing problem for people with disabilities.

*Barclay* is a *Fair Work Act* General Protections case. In *Barclay* an employee sent an email in his capacity as union member (which is a protected attribute) with content his employer regarded as inappropriate. He was suspended from work because of that content and was required to show cause why he should not be subjected to disciplinary action. His employer successfully argued that the behaviour he engaged in was considered by them separately to his protected attribute, even though he was exercising a protected right

when he engaged in that behaviour.

For employees who have been treated less favourably because of their disability, particularly for those disabilities which manifest in unusual behaviour, these cases are alternative hurdles. We ask ourselves, could this client overcome Purvis? Could they overcome Barclay?

**Recommendation 8:** Broad scale reform and modernisation of the Anti-Discrimination law regime ought to be pursued and such reforms must include:

- a) An amalgamation of the various legislative instruments into a minimum number of Acts (ideally one);
- b) Adoption of the beneficial aspects of the *Fair Work Act* including the partly reversed onus of proof, the simpler definitions and the rule against costs;
- c) Replacement of the highly problematic 'comparator' test with a more appropriate test of discrimination;
- d) Provision for alternative arguments in the one proceeding (see recommendation 7);
- e) Definitions and language that are more accessible and better reflect community understandings and expectations;
- f) A clarified process for disclosing disability and requesting adjustments along with an option for formal registering or recording agreed adjustments (see recommendation 12).

**Recommendation 9:** Within the *Fair Work Act* it would be desirable to amend provisions for applying to extend the 21 day time limit to provide for 'disability' as a factor that must be considered when deciding whether 'exceptional circumstances' exist.

**Recommendation 10:** There ought to be a review of the disability access policies and procedures at the Fair Work Commission with a view to developing a disability access track through that Commission which may include:

- a) Asking applicants whether they have a disability and what adjustments they need;
- b) Increased resourcing for face-to-face conciliations (including outside major cities) when applicants with disabilities would be better served by that format;
- c) Referral processes to ensure applicants with disabilities have access to advice and assistance where that is available;
- d) The option of having a single point of contact when appropriate.

**Recommendation 11:** The problem of the lack of information about the complicated issue of jurisdictional choice must be addressed. If there is amalgamation of the legislation and provision for arguing alternatives (see recommendations 7 and 8) this will assist. In addition (or alternatively if reform is not pursued), an accessible education package needs to be developed.

## Taking action - defences

30. The defences to otherwise unlawful discrimination are similar across the jurisdictions. Three in particular present a problem to many workers with disabilities. Within the legislation the two defences that we commonly encounter are the 'Inherent requirements of the job' defence and the 'workplace health and safety' defence. Frequently employers also argue that they were unaware of the disability or their employee's needs.
31. Of these, in our view, the latter two are being used inappropriately in many workplaces and conciliation conferences by employers.
32. Clients often report to us that their employer has determined, for reason of their disability, that the client either represents a risk to Workplace Health and Safety or that the employer cannot provide a safe workplace to a person with that client's needs.
33. Clients with mental illness or any other condition which results in strange behaviour struggle particularly in this regard.

### **Case study 6** (*client number 3 in the table*)

Our client had a complex mental illness. Most of time he was asymptomatic or managed his symptoms with medication and had been in stable employment for two years. About six months before we met him he had begun to get uncontrollably unwell. It came on slowly but he ended up so unwell that he was unable to work. He had not done anything dangerous at work but he was becoming incoherent and bizarre in his speech. His employer was aware of his illness and he had taken sick leave, partly at the suggestion of the employer.

It was patently obvious that he was unfit for work during this period but he had a volume of sick leave which he could, and did, access. While he was unwell he engaged in conduct which his employer deemed as misconduct.

At no time did he make physical threats and there was no prior or current risk of any physical harm to any person. Nonetheless, the employer assessed him as representing a too high risk to the Workplace Health and Safety of other employees and dismissed him.

Although his matter ultimately settled, his employer did not abandon its position that he was a risk to other employees. It made it very clear that it would never consider reemploying him because of his behaviour.

### **Case study 7 (client number 4 in the table)**

Our client was aged in his 50s when we met him. He had been long term unemployed and finally, with help from a specialist employment agency, got a job in a manual role. The job opened up a world that he had previously never known. Friends, colleagues, collegiality, discretionary income - were all new and exciting. Early in his employment he was given explicit instructions about behaviour. He followed those instructions exactly but he did other things which his colleagues perceived as weird and which were not part of the initial set of instructions. Over time he howled, sang and chattered too much. Sometimes he stared and 'made eyes' and otherwise was a bit bizarre. His employer had experience working with people with disabilities and attempted to explain again what they needed from him in terms of behaviour.

Each time a particular behaviour was pointed out he stopped doing that but ended up doing something else instead. Eventually, in exasperation, his employer dismissed him, having made a snap assessment that although he had never done anything unsafe before, he was 'unsafe' due to his unpredictable interpersonal behaviour.

He came to us. We asked him if he had a disability. He said no. We asked him about his education and he told us that he had been 'special schooled' but it was apparent to us that his written expression and his recall of detail were well over average. We referred him for assessment and the psychiatrist identified Autistic Spectrum Disorder.

He brought an Unfair Dismissal action. The matter resolved by agreement but he did not achieve the reinstatement he desperately desired because the employer maintained that his behaviour rendered him an ongoing risk to health and safety.

34. There is a real difficulty faced by some clients in meeting employer's communication requirements regarding their disability and their needs. It is a common source of dispute in the post-dismissal phase that the worker did not provide sufficient evidence or supporting material to their former employer and that the employer therefore 'did not know' that the employee had a disability. There is no standard for how much information must be supplied and in what format.
35. Workers who have been placed in employment by disability employment services tend, in our experience, to rely on the placement service to canvass their needs with their employer. Different placement workers take different views on the management of the competition between the right to privacy and the right to request adjustments.
36. It is reasonably common to have an employer argue that even though it had an employee placed by a disability placement agency (and may have been receiving a period of wage relief/subsidy in respect of that employee), that it did not know that the employee had a disability, what the disability was, or what was needed to accommodate that worker.
37. In some cases the employee has behaved in a way that any ordinary member of the community would understand to be a likely manifestation of a disability but some employers are still labelling such behaviours as misconduct unless the employee has explicitly, and with supporting material, put the employer on notice that such a behaviour may occur.

**Recommendation 12:** A simple to use and efficient process is required for people to request and record adjustments within their workplace. This could include an external registration option. A non-adversarial dispute resolution process would be useful in this regard, akin to an Ombudsman. It is critical that any process developed to improve access to adjustments be separate from any 'complaint' or 'claim' handling body.

## Taking action – remedies

38. The remedies that can be delivered by the current legal system are frequently inadequate to meet the actual needs of workers with disability.
39. The problem is threefold:
  - a) Litigation cannot, on an individual level, replace the decency needed to really make a work environment accommodate a diverse workforce that includes people with disabilities<sup>4</sup>;
  - b) The intended focus on reinstatement and retention does not bear out in practice with most disputes resulting in compensation outcomes and not reinstatement<sup>5</sup>;
  - c) Amounts of compensation are low with the range of compensation for discrimination and workplace matters generally out of step with community expectations.

**Recommendation 13:** Publication of outcomes of conciliation in both the AHRC and the ADCQ needs improving and updating.

**Recommendation 14:** Reinstatement as a remedy be retained with increased support for that outcome for workers with disabilities. Increasing support for this may include legislative reform but without reform could include access to particular services and packages of support for employers taking back an employee with a disability. It is essential that there be a dramatic increase in support for reinstatement for, in particular, workers with episodic mental illnesses.

**Recommendation 15:** Consideration should be given to how compensation amounts for unfair dismissal are calculated in circumstances where the dismissal is for reasons connected to a person's disability. Any such consideration should take into account factors such as the greater difficulty in regaining employment experienced by people with disabilities compared to others in the community, but also any disincentive to the employment of people with disabilities that may inadvertently arise from such an approach.

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<sup>4</sup> We have included some information in the annexed table which addresses this issue for individual clients.

<sup>5</sup> See Fair Work Commission results and outcomes webpage: <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>



## Question 7: What are the distinct challenges faced by certain groups of people with disability (e.g. women, Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds or LGBTI people) in relation to employment discrimination?

### Type of disability

40. Although this is not the question asked in this section, the main challenges in this space arise, for our clients, in the type of disability that they have, in particular those disabilities that include eccentric, weird and bizarre behaviour.
41. These disability types are prominent among our clients and appear to cause more difficulty for employers as they affect the behaviour, likability and relatability of the workers. These workers are often informed that they are 'unsuited for the employment' or not a good 'cultural fit'. They are also a group that struggle to identify and request adjustments. In some cases the clients' difficulties in this regard are compounded by a lack of insight into their condition and/or their own needs.
42. Several of the clients in case studies expanded upon above have a disability arising from a cognitive difference, a permanent variation in the way that person interacts with the world. Most commonly for us, this is ASD but we also find clients with Attention Deficit Hyperactivity Disorder (ADHD) have similar struggles. See in particular the clients in case studies 4 and 7 both of whom have ASD.

### Intersectional discrimination

43. The main (relevant) intersectional issues that appear as prominent for our clients are:
  - a) Victims of violence or abuse (which is not a protected attribute in any jurisdiction) who have mental health disabilities;
  - b) People with parental responsibility (or another attribute for which adjustments are commonly sought in the workplace) and also a disability; and
  - c) Older people with age related disabilities.
44. The problems for people experiencing intersectional discrimination are, in some ways the same as for people with one relevant attribute, but magnified, and in other ways very different.
45. Sometimes it is a question of adding the challenges associated with one attribute to those of another attribute, such as for a worker with a disability as well as children. Depending on the individual circumstances a worker with disability or a worker with children may be off work more often than other employees, take more sick days and need adjustments to their hours (such as working part time). For someone with both those attributes, their needs in those regards are doubled or tripled. This worker is more likely than others to be perceived as intolerably unreliable.

46. At a more fundamental level people with more than one attribute may be experiencing multiple disadvantages. This has more of a multiplying or compounding effect. We see this in particular for our clients who have mental illnesses arising from trauma, typically experienced as a victim of violence or abuse. Although being the victim of violence is not a protected attribute, an arising disability is. These vulnerable clients have highly complex needs that are not met by the existing systems or structures.

**Case study 8 (client number 23 in the table)**

Our client had a childhood history of abuse, which meant that she could not live at home. She later married but her husband was abusive. When she left him, he gained custody of their children. By the time she was in her 20s our client had developed a serious mental illness and found it very difficult to gain meaningful employment.

She came to us after losing the latest in a long history of short-term positions. She had been employed for only a few weeks when she began complaining to her employer about the conduct of her colleagues. When we spoke with her, the conduct she described was not at all unusual or concerning. She was struggling to manage the volume of ordinary interactions, the pace of the workplace and responding to instructions. Her employer decided she was unsuited to the work and dismissed her.

47. When it comes to applying the law to a client's situation, when there are multiple attributes the apparent contribution of each one can appear watered down. In the Qld *Anti-Discrimination Act* the protected attribute must be a substantial reason for the less favourable treatment. Under the *Fair Work Act*, it must be a substantive and operative reason for the adverse action. Where each attribute is one among many (some of which may not even be protected attributes – such as in the case of being a victim of violence) then it is harder to align the treatment with a particular attribute. It is a perverse outcome when the more acute the cumulative disadvantage, the harder it is to apply beneficial legislation to obtain relief.
48. In the Federal anti-discrimination legislation the protected attribute need only be one of the reasons for the less favourable treatment. However, the Federal law is contained in a number of pieces of legislation which are aligned in some ways and not in others which can cause significant difficulties in obtaining beneficial outcomes for clients. The risk of an adverse costs order is also unpalatable to many potential litigants in that jurisdiction.

**Recommendation 16:** There is a need for clarification in either or both of the Fair Work Act and the anti-discrimination regime as to the right to request adjustments for multiple concurrent reasons.

**Recommendation 17:** Being a victim of violence, particularly domestic violence, needs to be considered for inclusion as a new protected attribute giving people access to the protections of the anti-discrimination regime.

**Recommendation 18:** A substantial investment is required into education about age related discrimination in the workplace which provides people with appropriate advice about all relevant matters in the one resource or location. It is possible to do this in a publication to accompany the AHRC's 'Your Rights at Retirement' or via a dedicated website (or both). We note that such a website is currently being developed for young workers by Caxton Legal Centre in collaboration with Legal Aid Queensland. Included in such a resource would need to be consolidated information (rather than just links) about:

- a) The anti-discrimination regime and fair work legislative rights;
- b) Workers compensation information;
- c) Information about access to retirement and superannuation benefits in cases of inability to work;
- d) Information about insurance options such as TPD claims;
- e) The process to request adjustments;
- f) Clear guidance on indirect discrimination and addressing bias in the workplace;
- g) Social security law;
- h) Jurisdictional choice if things go wrong.

49. Legal Aid Queensland thanks the Australian Human Rights Commission for its consideration of this submission. We would welcome the opportunity to make further submissions in relation to reforms to the anti-discrimination regime if that is a proposed outcome of this Inquiry.

## Appendix A

### Willing to work submission – Representative sample table of 25 clients

Client alias	Disability	Work type	Brief summary of problem	What could the client do about it with the current legal framework?	What was really needed?
<b>CASE WORK CLIENTS</b>					
1 (age 17)	Autistic Spectrum Disorder	Apprentice – food/hospitality	Employed through disability placement service. Worked diligently for a year in base level position believing he had been promised an apprenticeship. In the end he was sacked for minor issues which arose out of communication problems.  Employer denied knowledge of disability, saying they thought employee had an attitude problem.	Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or AHRC.  He chose general protections, the matter proceeded to conciliation and he was compensated. He had gained alternative employment prior to the conference.	Support in the workplace to manage communication.  More education through school to help him to be aware of his disability and the impact on him, and to teach him how to ask for adjustments.
2	Physical disability – use of wheelchair  Cognitive impairment	Mail room	Long term (over a decade) employee had been working in entry level position for over a decade. He was loyal, easy to have around and diligent but not at all fast.  He was subjected to lengthy and detailed	He commenced claim in disability discrimination while still employed and though the discrimination process was able to negotiate an exit package.	A better framework for the use of the supported wage regime.  Employer recognition that bringing a claim for

	Mental illness - Anxiety		<p>productivity testing with a view to reducing his wage as he was unable to meet benchmark standards for speed of work. There were disputes about the benchmark and disputes about the testing process.</p> <p>Though the investigation and testing process the client developed worsening anxiety and became slower again. Eventually his anxiety rendered him unable to work.</p>	<p>He was referred for workers compensation advice and is considering application for compensation for the psychological injury.</p>	<p>discrimination does not inevitably lead to the end of the employment relationship.</p> <p>Recognition that an employee has values other than simply speed of work.</p> <p>Genuine efforts at retention.</p>
3	<p>Mental illness - Disorder included psychotic symptoms</p> <p>Acquired Brain Injury</p>	<p>Back dock and stocking shelves</p>	<p>Client had a car accident some years back which was followed by a single psychotic episode. He worked without difficulty for four years and then fell ill again. He has some insight into his condition as it moved into an acute phase. He went off work sick, and underwent treatment.</p> <p>He was sacked, with the employer citing serious misconduct and workplace health and safety breaches. The employer denied awareness of the disability.</p> <p>The misconduct referred to things that the client had said, though none amounted to violent threats.</p>	<p>Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>He chose General Protections on the advice of the Fair Work Commission..</p> <p>The matter settled with a compensation outcome quite far into the bitterly fought litigation. He was not reinstated.</p>	<p>Sick leave while in hospital.</p> <p>Compassion on the part of the employer, as well as genuine understanding of the interaction between mental illness and safety.</p> <p>His job back after he was well enough to return to work.</p>

4	<p>Autistic Spectrum Disorder</p> <p>Undiagnosed until a medical report obtained in the unfair dismissal process.</p>	Manual	<p>Client was long term unemployed and placed in the workplace by a placement agency which specialises in finding work for long term unemployed people.</p> <p>Client loved his job to unusual degree, he also displayed strange behaviour, interacting with colleagues in unusual and unpredictable ways etc and was dismissed for breaches of the workplace code of conduct.</p> <p>There were no performance issues with his work.</p> <p>He was not aware of his disability (at that time) but knew he found other people perplexing.</p> <p>It would have been apparent to other people that he had a disability although exactly what sort of disability would not have been obvious to a lay person.</p>	<p>Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>He brought unfair dismissal proceedings because of the issue of whether or not the employer knew about the disability.</p> <p>He received a settlement someway into the litigation but no reinstatement.</p>	<p>Support with communication in the workplace, when it became apparent he was struggling with directions, even though the exact nature of his disability was not known to him at that time.</p> <p>His job back, especially once the employer received information his disability, even though it had already dismissed him.</p> <p>He is at very high risk of returning to long term unemployment.</p>
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ADVICE ONLY CLIENTS					
5	Temporary/ Sickness Disability - Cancer	Goods inwards	<p>Client dismissed after taking extended leave for medical treatment. The employer had been accommodating for some months but when the client sought to return to work bit by bit there began to be a financial cost to the employer.</p> <p>The workplace decided it could not accommodate her changed needs.</p>	<p>Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>Her case is difficult because of the extended leave.</p> <p>If she is successful, she may receive a modest amount of compensation.</p>	<p>More accommodation from her employer.</p> <p>Her employer may have also needed more support to manage the costs associated with retaining her through her treatment.</p>
6 (age 19)	Physical Disability - Epilepsy	Machine operator	<p>Client had disclosed disability to employer and assured employer that his risk of a seizure was next to nil as had not had one in four years and was managed with medication. His doctor wrote a letter in support which had been given to the employer.</p> <p>Client had dizzy spell at work. He switched off the machine and lent down to recover. After a few moments, he felt better and continued to work. No seizure occurred.</p> <p>He was summarily dismissed as unsuitable for the work type based on the employer's judgment and without assessment or</p>	<p>Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>His case is strong and he will likely achieve a compensation outcome through this process.</p>	<p>Employer to have followed proper procedures for assessment if ability to perform job in issue.</p> <p>To keep his job.</p> <p>Employer to cease informing other prospective employers of the client's disability and how he thinks it impacts on work.</p> <p>This client would have been broadly assisted by a standard for giving employers information</p>

			<p>consideration of medical material.</p> <p>Employer informs other prospective employers about the disability and his assessment of the client as unsafe on machines.</p>		about disabilities.
7	Mental Health - Depression and Anxiety	Sales	<p>After a year unemployed, client got a job in sales. He performed the role adequately but expressed to his employer that he was finding some of the work stressful. He disclosed his disabilities unexpectedly in a group environment accompanied by an outpouring of emotion which would be highly unusual in that work environment.</p> <p>His employer made sympathetic motions but took no steps to assist the client to cope.</p> <p>Within the week the client was dismissed as 'unsuitable for the work'. In subsequent conversations it is apparent that the employer considered that it could not provide the adjustments it thought he might need and could not, therefore, offer him a safe workplace.</p>	<p>Action in general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>His claim would be affected by his ability to do the inherent requirements of the job and WHS considerations.</p> <p>If successful, he would likely achieve a modest compensation outcome.</p>	<p>A clear, established framework or protocol for disclosing disability and asking for adjustments.</p> <p>Extra support when he asked for it.</p> <p>Proper consideration given to adjustments.</p> <p>Genuine efforts at retention.</p>
8	Mental Health - PTSD (veteran)	Truck driver	Client was a labour hire employee contracted by his employer to drive a truck. The host agency informed the labour hire company that	Action in any of unfair dismissal, general protections (discrimination) or anti-discrimination at ADCQ or	An adjusted process for performance management when the worker has a mental health



			<p>it would no longer accept him for labour at its site.</p> <p>The labour hire employer took him off that job and attempted to talk with him about redeployment.</p> <p>Client struggled to manage it calmly and provide a satisfactory response. Instead of redeployment he was sacked. He struggled to cope with the dismissal.</p>	<p>AHRC.</p> <p>Such a claim would have moderate prospects of success because of:</p> <p>Labour hire structures make claims by employees difficult in any event;</p> <p>There are comparator problems;</p> <p>Client not an ideal witness;</p>	<p>disability.</p> <p>More community support and connection.</p>
9	Mental Health - PTSD and Depression	Machine operator	<p>The client became unwell after falling victim to a serious incident of violence.</p> <p>Sympathetic employer – client given extensive leave, struggled with the return to work. Employer attempted to find suitable return to work arrangement for over a year but client too ill.</p> <p>Dismissed as unable to perform inherent requirement of the job.</p>	<p>There is no legal claim that would not be defeated to the fact that client could not perform the job at all.</p>	<p>The Disability Support Pension.</p>
10	Temporary sickness/ impacted walk	Retail	<p>This client was on unpaid sick leave for more than 3 months. Her Employer contacted doctor without client's permission and then dismissed her for unable to perform the</p>	<p>Unfair dismissal/General protections/Anti-Discrimination</p>	<p>A reasonable adjustment needed to be found for the period of time until her illness resolved.</p>

			inherent requirements of the job due to being unable to wear the correct footwear.		
11	Osteoarthritis, degenerative disease	Trade/supervision	GP gave him a medical certificate for three weeks off work so he could rest and avoid straining a degenerative condition. Client was afraid to tell his employer what was wrong, was worried he would lose his job.	The client was advised on the amount of information he had to provide his employer about his medical condition while ill, and if he wanted to request adjustments, and his rights if his employment is threatened.	Advice and support on what reasonable adjustments could be made in the workplace.  A WHS system that accommodate degenerating conditions.
12	Mental illness	Youth worker	Client received death threats at work, and did not feel supported by management. He became unable to cope and developed a mental illness.  Client went on stress leave and then resigned from workplace but felt that was forced to do so because of the lack of a supportive workplace.	Client would have limited options at this stage.	Support in workplace, better recognition of the need to recover from trauma.
13	Hearing impairment	Cleaner	The employer brought in a new communication system which was auditory instead of visual. Our client could not hear. A former supervisor had communicated with him differently but a new supervisor found it a pain to do so, and	Client could not bring an unfair dismissal claim because of short employment.	For the reasonable adjustments to remain in place and his job be secure.

			the client was dismissed.	General protections claim, ADCQ or AHRC would be available.	
14	Learning difficulty - Illiterate	Truck driver	<p>Stood down without pay for failing to follow instructions to drive from Point A to Point B (Point A was a city and client had only ever driven in the country) using written maps.</p> <p>Issues with literacy only arise in urban/built up areas, it is not an issue in rural/areas. Employer was aware of literacy issues and only gave client rural/country routes.</p> <p>Client was concerned that if lost this job would not be able to find a new one because of his age.</p>	Unfair dismissal	<p>Employer to provide the client with the training they requested - client requested assistance to learn new routes (partner was prepared to travel with the client – this was refused)</p> <p>Client wished to be reinstated</p>
15	Mental Illness	Sales	<p>Ongoing arguments with employer, lead to heated argument, client left. Employer took this as the client quitting , though that is not what the client intended.</p> <p>Client was aware of time limits in this area of law but could not bring himself to do anything because of depression and anxiety.</p>	Action in any of unfair dismissal (constructive dismissal), general protections (discrimination) or anti-discrimination at ADCQ or AHRC.	Consideration of mental illness in relation to time limits.
16	Temporary illness (involving pain and	Goods	Doctor told client they must take sick leave, gave client a medical certificate for one month.	In probation period so ineligible for	An employer with better empathy towards their ill

	fatigue)	inwards	<p>This was during busy period. Client gave medical certificate to employer, explained the illness and the reason for the time off.</p> <p>Employment was terminated – within the probation period and employer said client was no longer required.</p>	<p>unfair dismissal.</p> <p>General protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p>	employees.
17	Physical impairment - Hand Injury	Technician	<p>Client informed that he was made redundant. Company said they would not refill his role for at least 12 months but the client found out they were advertising for his old position.</p> <p>Client believes it is not a genuine redundancy but he found out about the replacement after the 21 days expired.</p>	<p>Out of time for unfair dismissal and general protections.</p> <p>Could bring a discrimination action in either the ADCQ or the AHRC but he would have faced the question of whether he was able to perform his job. In the end it was probably better to accept the redundancy and move on.</p>	Honesty by the employer, though the outcome may not have changed.
18	Back injury  Mental Illness	Trade	<p>Client had an injury which was being accommodated by his employer. However, there was a downturn and he was made redundant, having very likely been selected because of his injuries and his mental illness.</p>	<p>Unfair dismissal – not available because it was a redundancy</p> <p>GP or Anti-Discrimination options would be available but need to prove less favourable treatment because of an attribute.</p>	<p>More transparency in the process for redundancy.</p> <p>A more sympathetic workplace with better understanding of workers with mental illness.</p>

19	Physical injury	Ranger	<p>Injured at work – did not lodge a WorkCover claim (doctor said not eligible). Took time off work for medical treatment, provided doctor's certificates to employer. Contract had come to an end while off sick and was never offered another.</p> <p>Appears because client took temporary absence from work, due to injury, employer is not intending to renew client's contract.</p>	<p>General Protections -adverse action for prohibited reason</p> <p>Anti-Discrimination – physical or mental illness, adjustments need to be made to accommodate for incapacity.</p>	<p>More communication from his employer about decision.</p>
20	Mental health	Sales	<p>Client went to hospital for surgery, came back to work and assigned to a different supervisor who struggled to cope with an anxious team member.</p> <p>There were performance management issues and client had concerns about lack of training that weren't addressed. She went on stress leave and sought advice.</p>	<p>Advised of her rights and complaint options. Also advised about requesting adjustments though she was reluctant to do so as the workplace felt hostile to that.</p>	<p>An easy way to request and record adjustments and support to do that in her workplace.</p>
21	Mental illness	Trade - carpentry	<p>Client was a long term employee with a cyclical mental illness which affected him acutely when he was unwell and the rest of the time affected him mainly in that he was taking medication that slowed him down and made him a bit unsteady.</p>	<p>Action in any of general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>As an ongoing employee he would need to balance the cost to the workplace relationships against the</p>	<p>Better recognition in the supported wage regime of positive workplace attributes other than simply speed of work.</p> <p>An appeal process against the assessment itself rather than the</p>

			<p>After some years in that workplace he was put onto a supported wage. He was, thereafter, assessed annually and depending on the day of assessment might be anywhere between 70% and 90% as productive as other employees. The work he was doing was detailed and careful work and he was as sought after craftsman by clients of the business. He wanted this recognised in his wage which he felt should be award level.</p>	<p>likely benefit to him. He lived in a small town.</p> <p>He decided not to take action and this year will draw a wage at 80% of his colleagues.</p>	<p>employer for having engaged it.</p>
22	Mental illness	Sales	<p>Client had a difficult day in a new job and had a panic attack as she left the workplace. She had anxiety for some years and employed a range of tools to manage that. After the panic attack she knew she needed to see her doctor to check in and assess her medication. She informed her employer the next day that she was feeling unwell and she needed the day off. She explained why.</p> <p>She was dismissed from her employment in the probation period for being unsuited to the employment.</p>	<p>Action in any of general protections (discrimination) or anti-discrimination at ADCQ or AHRC.</p> <p>She chose a General protections action and accepted a settlement outcome at the conciliation conference. She was able to find alternative work fairly quickly.</p>	<p>Her employer needed to have been calm and compassionate about the situation instead of overreacting.</p> <p>At that stage she was not asking for any adjustments and there was no suggestion that the workplace contributed to her illness. She could have easily been incorporated into that team with very little additional care.</p>
23	Mental Illness – trauma related	Aged Care	<p>The client had a very difficult life resulting in multiple mental illnesses, all linked to trauma.</p>	<p>She had not disclosed her conditions to her employer for fear of dismissal. This was a pattern for</p>	<p>To be assisted to find work that is emotionally gentle, support to ask for her needs to be met.</p>

			<p>She made repeated bullying complaints about conduct that was not bullying.</p> <p>She was dismissed in the probation period as not fit for the work.</p>	<p>her in multiple jobs.</p> <p>She was referred for social work or counselling support and helped to understand what she can ask for as adjustment and what bullying is.</p>	<p>In the alternative, the DSP.</p>
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