

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

Submission from Disability Employment Australia

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About Disability Employment Australia

Disability Employment Australia is the peak body for Australia's Disability Employment Service providers.

We are recognised internationally as the preeminent organisation representing, supporting and resourcing the disability employment sector throughout Australia.

As a membership organisation, we exist to represent the interests of Disability Employment Services at a national level to government and a range of other stakeholders, such as consumer and employer groups.

Disability Employment Australia supports the Australian Government to deliver high quality employment support to people with disability in Australia.

We have a unique responsibility to foster innovation and flexibility of service within the Disability Employment Services program.

We support our members to achieve best practice service provision in their role to find sustainable employment outcomes for people with disability.

We advise, advocate, train, inform and undertake events to strengthen and promote the sector.

We believe in the right of every member of society to be included fully in the community, and to have control over their own life choices. Participation in the open labour market is a crucial factor in recognising this goal.

We strive to inspire, challenge and celebrate the Disability Employment Services sector.

Executive summary

Disability Employment Australia (DEA) welcomes the opportunity to respond to the Australian Human Rights Commission's *Willing to Work Inquiry*. Our submission focuses on people with disability.

While we have seen progress in creating an equally accessible labour market for people with disability at all levels over decades, there is still much work to be done. We believe there is a primary role for the Australian Government, the business sector and general community in redressing perceived or real social and economic barriers to employment.

We call for the Australian Government to put significant additional resources into implementing the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in Australia in relation to eliminating discrimination around the employment of people with disability.

We need clear direction and a national goal for the employment of people with disability.

We recommend that the top 100 businesses listed on the Australian Stock Exchange form a coalition for change, facilitated by the Australian Government.

In summary:

- Employment outcomes for people with disability remain largely unchanged for the last 25 years;
- The *Disability Discrimination Act 1992* (DDA) has not improved employment opportunities for people with disability. The Australian Government's commitment to eliminating discrimination against Australians with a disability must go beyond legislation;
- Discrimination against people in the labour market includes subtle forms of discrimination, and these attitudinal barriers may be the biggest hurdle to job growth for people with disability; and
- Community attitudes are a cultural issue and can only be addressed at the cultural social level, by a strong coalition of business and government together with well-resourced community awareness campaigns.

Introduction

There are 1.1 million people with disability in employment in Australia, representing around half of people with disability in Australia of working age [1]. The other half are either unemployed or on disability support benefits. To achieve an equal level of employment with the rest of the nation, around another 340,000 jobs would need to be filled by Australians with disability who are currently not in work. There is no reason that Australia cannot commit to achieve this goal within 15 years.

We share a vision of the realisation of the right to work for many more people with disability within the coming years. We are also committed to full inclusion and combatting underemployment. As the National Disability Strategy notes:

There is an important relationship between educational outcomes for people with disability and their economic contribution as workers and taxpayers. Changing attitudes towards disability—accompanied by improved accessibility of buildings, transport, information and telecommunications—have the potential to increase the contribution of people with disability to the economy.

People with disability need:

- Jobs that match skills, interests and capacity to work;
- Flexibility and innovative practices in the workplace; and
- A disability support system that is built into the education system that values employment and career goals.

The AHRC National Disability Forum 2014, Survey Results, 5.3, Disability Rights and Employment is a useful guide to factors to create employment opportunities for persons with disabilities.¹

Case Study: James

One of James' life goals was to resume his work as an engineer after an accident that left him with considerable needs for external support. James' individualised plan through the NDIS was successful in allowing him to set aside three days a week to work. However, the lack of flexibility on the part of the employers in his region, and the scarcity of part time positions, meant that it is extremely hard for him to find employment, even with the assistance of a Disability Employment Services Provider. Also, the disability support pension he currently receives would be at risk once he starts employment, even on a trial basis.

The human rights context

Over the last thirty years, the human rights of people with disability have become increasingly prominent, including the right to participate in the workforce.

On 17 July 2008, Australia ratified the UNCRPD. This committed Australia to realise “the right of persons with disabilities to work, on an equal basis with others”, including the right to employment “in a labour market and work environment that is open, inclusive and accessible to persons with disabilities...” [2]. The right to work is a gateway to full participation in society. It parallels other important rights, such as the right to live independently, to have resources to have a decent standard of living, and to be included in all aspects of community life.

¹ Available online: <https://www.humanrights.gov.au/our-work/disability-rights/publications/national-disability-forum-2014-summary-survey-results#results-employment>

The domestic implementation of the UNCRPD primarily takes the form of the National Disability Strategy 2010-2020 (NDS) and National Disability Insurance Scheme (NDIS). These are exciting new developments, which hold the expectation of significantly improving participation for people with disability. They reflect the collective aspirations of millions of Australians with disability to more fully and independently participate in Australia's social fabric and economy.

The role of Disability Employment Services (DES) providers is part of a system of supports and expert facilitation to realise the right to work. The system has undergone change in the last decade, and is still evolving to be more tailored to job seekers' aspirations and better understandings of what employers need. However, DES providers can only have limited impact on the receptivity of the market to people with disability.

It may seem obvious, but it is worth stating that the NDS and NDIS will not by themselves create jobs for people with disability. For example, job seekers have started to arrive at DES providers with NDIS plans for flexible work on a part time basis. Whether their plans can be realised largely depends on the mindset of employers who are seeking to fill gaps in the workforce.

For job seeking efforts to be successful, people with disability entering the job market need to be perceived as valuable and capable employees. In the future, if we are to live up to the goals in the National Disability Strategy, businesses will need to be much more receptive to job seekers with disability and more flexible with their terms of employment – and Government has a vital role in making that happen. A starting point in creating a more enabling environment is Government acting as the facilitator for employers and the greater community in developing disability awareness and confidence.

Current situation

There has been little change in over twenty years in labour force participation of people with disability. It was roughly the same in 1993 (55%), one year after the DDA became law, as it was in 2012 (53%); this remains significantly lower compared to other Australians (77% in 1993 and 83% in 2012) [3].

People with disability are significantly more likely to collect welfare and live in poverty than their fellow Australians [4].

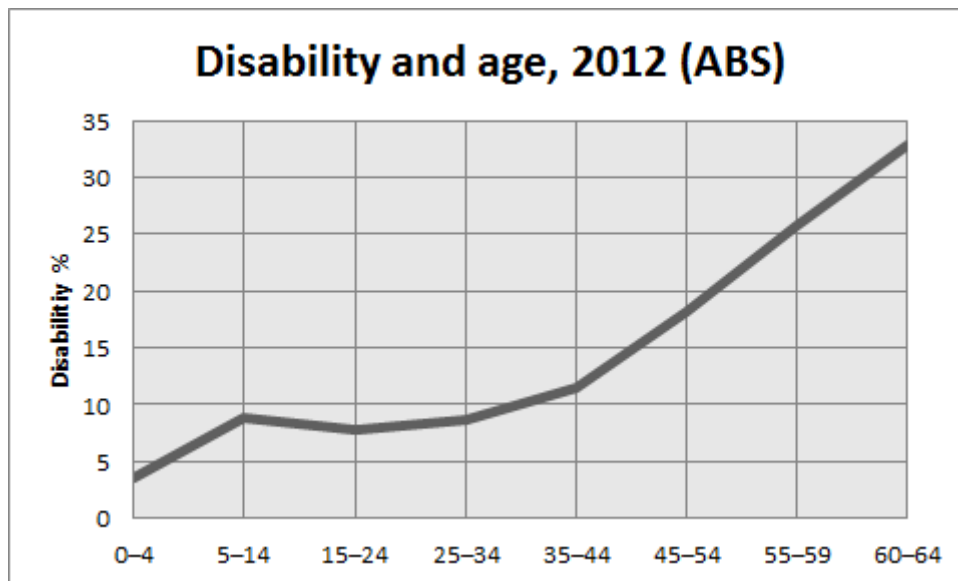
Many other reports and inquiries contain extensive information on the results of employment inequality. For example: *Workability 2* (2005) – the final report of the National Inquiry into Employment and Disability, *Shut Out: The Experience of People with Disabilities and their Families in Australia* (2009) the precursor to the National Disability Strategy; the *Improving Employment Participation of People with Disability Inquiry* (2013); and the review of the National Disability Employment Framework (2015).

Disability and age

We note the current inquiry is investigating the situation regarding people with disability and older workers. While the issues of disability and age are sometimes distinct, there is a great deal of overlap.

It is well known that disability and age are statistically correlated [1]. Only 3% of people are born with a disability. The majority of people acquire a disability within their working years – often after considerable investment in their education and career. The main conditions that qualify for DSP are chronic in nature – mental illness and musculoskeletal issues [5]. The figure below shows how

disability onset compares with age, particularly the acceleration once a person enters their late forties:



A literature review on older job seekers' narratives reported that fears of discrimination due to age and disability were interspersed [6]. This is sometimes called 'intersectional discrimination', where causes of discrimination cannot be meaningfully separated.

Employees with disability retiring prematurely

Human resource practice is just beginning to reflect that a large percentage of Australians will experience disability before they retire. Traditionally human resources practice is informed by the notion that when a serious diagnosis is made people will exit the workforce. Organisations that have not catered for disability may not be aware of the regrettable loss caused by outdated attitudes [7].

The Australian Government has made it a priority to help people on the disability support pension back into employment. However, it is far more cost effective if people do not leave the labour market in the first place.

Little is known about the phenomenon of people acquiring disability and making a premature exit from the market. Further research is required to assess the scale of the issue and suggest better interventions than the ones available.

Mental Health Commission reports indicate that businesses not engaging early intervention strategies costs the economy billions per annum in productivity. This issue could be targeted by increasing the role of a DES program intervention (currently known as Job in Jeopardy Assistance) to assist employers and employees before they become unemployed. This would require some small changes to Job in Jeopardy Assistance – including its name – but it is built for purpose for this challenge.

Further research is required to understand what can be done to prevent people with disability leaving their employment prematurely and unnecessarily.

Anti-discrimination law

Anti-discrimination laws are important as substantive tools to address wrongs and also as symbols of cultural values about the importance of tolerance and diversity. However, laws must reside in the social and cultural environment as well. These environments are more resistant to change, and therefore change occurs slowly: stigma cannot simply be legislated away [8].

At the end of the UN International Decade of Disabled Persons, the Australian Parliament passed the *Disability Discrimination Act 1992* (DDA). The DDA made it unlawful to discriminate against people with disability in a range of areas.² The first mentioned area in the Act is employment, and arguably this is the priority aim underlying the legislation because, as previously noted, employment is a good indicator for inclusion and independence.

The Act also includes other facets of life such as education, access to premises used by the public (including public transport), and the provision of goods, services and facilities.

DDA enforceability

Complaints to Australian Human Rights Commission on DDA-related employment matters have been among the highest for any category of discrimination. A common concern is that cost barriers are high for individuals with disability to enforce their rights under the DDA if the alleged discriminator refuses to conciliate.

The process for bringing a complaint about disability discrimination to the courts is set out in the Australian Civil Society Report to the United Nations:

If a complaint under the Disability Discrimination Act 1992 fails to be conciliated by the Australian Human Rights Commission, it can be referred to the Federal Court for adjudication. The Federal Court is a cost jurisdiction, which means people with disability making complaints risk having to pay the other party's costs if their case is unsuccessful. While this provides a safeguard against potentially vexatious litigants and frivolous claims, the current costs regime creates a barrier for people with disability who wish to pursue litigation matters in the public interest [9].

Representative proceedings are not allowed in actions for discrimination under the DDA. Representative actions would be a catalyst for deserving cases to reach the courts. In 2009, the federal Attorney-General's Access to Justice Taskforce recommended that Government consider "amendments to allow representative and advocacy groups to bring actions based on claims of discriminatory conduct" under the DDA, however this amendment has not been pursued [10].

While DEA is not advocating the introduction of representative actions we do want to draw the Inquiry's attention to it to reflect on ways to improve the operation of the DDA. Court cases can be avenues for changing social norms.

Employment outcomes were not improved by the DDA

As the Productivity Commission noted in their review of the DDA in 2004, attitudes must be at the core of any effort to achieve a fair go for people with disability – as their employment prospects had

² There are also complementary protections to the DDA in the *Fair Work Act 2009 (Cth)* on discriminatory grounds including physical or mental disability

not improved ten years after the Act became law [4]. The Commission found that while education and transport had become more accessible, job opportunities had stayed at the same levels.

The Commission's review suggested that changing community attitudes held a deeper potential for the inclusion for people with a wide range of disabilities, especially those with mental health disabilities.

Negative attitudes in the business community

Negative attitudes to people with disability present in the Australian community are well documented and provide a foundation for subtle forms of discrimination [11]. Attitudes tend to be seen as the biggest barrier to employment domestically and in many jurisdictions around the world [12] [13].

The *Shut Out: The Experience of People with Disabilities and their Families in Australia* report involved consultation with over 2,500 people. It noted that "by far the biggest barrier identified was employer attitudes" [14]. Other issues are: misconceptions about workplace adjustments and their costs; stereotypes and misconceptions influencing attitudes and behaviours of employers, recruiters and government; perception of 'employment as charity'; and inflexible welfare that acts as a disincentive to work. Social stigma particularly affects people with mental illness and intellectual disability [14].

In 2011, Australian Human Resources Institute (AHRI), the national association for human resource professionals, found:

Negative cultural attitudes from the workplace at the executive, line management and co-worker levels are a significant barrier to the recruitment and continuing employment of people with disability... [15].

AHRI stated that their members faced strong opposition to any efforts to redress the inequity of hiring decisions:

Some HR practitioners report having to fight internal cultural battles to get results and some conclude that the fight is too hard and too lonely, and is not worth the struggle against cultures that are either indifferent or intransigent. One respondent said that the boss made it clear that it would not be worth his job to short-list a candidate with a disability [15].

Because of the endemic and entrenched social attitudes to people with disability, any intervention that focuses only on reasonable adjustments or disability itself is unlikely to be effective [11]. UK research also confirms that the biomedical view is not helpful. Employment disadvantage has little connection to medical impairment, and more to do with how society treats the individual [16]. As PwC stated in their report on the NDIS and employment:

Active participation of those with a disability in society generally can only occur with a change in attitude [17].

The biopsychosocial approach

Professor Sir Mansel Aylward has detailed high quality evidence on work and returns to work using the biopsychosocial conceptual framework [18]. This approach is central to an understanding of disability in the policy context.

The findings and recommendations of the body of research presented are:

- The psychosocial dimension emphasises that how people think and feel about their health conditions determines their impact and how they are dealt with;
- Extensive clinical evidence confirms that beliefs aggravate and perpetuate illness and disability;
- The biopsychosocial model puts the health condition or disability into the personal and social contexts and allows for interactions between the person and their environment;
- Barriers to work are primarily psychological, social, personal and cultural – not medical issues as might be expected; and
- Social and psychological factors are a bigger barrier to work than impaired function. Some of these factors include low self-efficacy, motivation, resilience and goals.

To improve employment outcomes, in this view, any measures to improve employment must be flexible enough to address adverse social contexts. Beliefs, perceptions and personal responses of participants are central to making it work.

The social attitudes present in the Australian community are largely outside the control of job seekers with disability and their advocates. These social factors create psychological issues in the DES client base, such as perceptions of incapacity and ‘unemployability’ in job seekers, which then act as a vicious cycle. While it may take a generation for attitudinal change to take full effect (and that is with the NDIS and the National Disability Strategy leading the way) there is a starting point. That is, the presumption of employability. That presumption would need to be built into the education system.

Harder to get work and stay at work

The Australian Public Service (APS) could be a window into modern Australian workforces because of the detailed statistics it collects and publishes about its workforce annually [19]. By comparison, private sector businesses do not usually publish the results of their confidential staff surveys.

In an annual confidential survey of approximately 100,000 public servants, employees with disability report that they were twice as likely to be bullied or harassed in the last 12 months (30%) compared to the rest of the APS workforce (15%) [20]. They also have lower satisfaction at work and they are more likely to be forced out of the APS for reasons other than their choosing. These figures are consistent with previous years.

With knowledge of this data, there needs to be a question mark placed above the principle of merit in the public service and the broader Australian workforce. There seems to be an outward message of ‘if you are really good, you too can be promoted’, however, the reality behind closed doors is different.

Case Study: US federal government agencies lift their performance

The 44th President of the United States of America, Barack Obama, has taken an active role in using his office to champion disability employment in the US federal government sector. In 2010 the President required agencies and federal contractors to hire 100,000 people with disability over 5 years. He also asked his executive to create model policies for hiring and retaining people with disability [21]. Of more than symbolic significance, progress reports go directly to the President’s office.

In addition to the focus on the public service itself, in 2014, the US Department of Labour ruled that employers that act as contractors to the US government must take affirmative action to recruit, hire, promote, and retain people with disability to a 7% target [22].

The White House announced that these measures have resulted in more Americans with disability in federal public service employment than at any point in the last three decades, with the highest hiring rate in the last 17 years (20% of recruits in 2014 had a disability) [23]. In 2014, 13.6% of its workforce had a disability compared to around 7.2% of the Australian federal public service [24].

The Australian Public Service would be an ideal place for the Government to show strong leadership to address the issues confronting people with disability in the broader workforce.

How do we get to where we want to go?

A change agenda

Many of the first steps towards the goal of deep and persistent cultural change still need to be taken. To use a famous change management model from Dr John Kotter [25]:

1. Change must be seen as a pressing and urgent issue;
2. A powerful coalition must exist;
3. A vision must exist;
4. That vision must be communicated;
5. Others must be empowered to act on that vision;
6. There must be planning for and the creation short term wins;
7. There must be a consolidation phase and further planning; and
8. New approaches must be institutionalised.

In Australia there are some good initiatives like JobAccess and the Employment Assistance Fund that build on best practice engagement between employers, DES providers and people with disability entering the workforce. The National Disability Employment Framework principles can be viewed as the start of implementing this change model in Australia in relation to disability employment.

Role of Government and business leaders

DEA believes more can be done to characterise change as a pressing and urgent issue (step 1). We therefore recommend emphasis around awareness that the situation is one of concern and also opportunity.

We recommend that government and business form a powerful coalition (step 2). While there have been improvements in the practices in some large Australian businesses, these are not enough to sustain a cultural change. We cannot see this change occurring without the active involvement of the Australian Government in concert with the nation's biggest employers.

We will need strong champions for change at all levels of business and government. We need leaders that put their disability employment policies closer to their budget-streams, and commit to targets that they can aim towards.

A social change process of this magnitude cannot be undertaken without Government taking the wheel. After twenty years of no improvement, acknowledging that attitudinal change occurs incrementally, we also believe that Government should lead the way by setting goals and compliance targets in departments and agencies under its direct control.

These are essentially the first two steps of the model and provide a starting point for action.

Recommendations

DEA calls for the Australian Government to put significant additional resources into implementing the UNCRPD and the National Disability Strategy in Australia with the aim of reducing the discrimination of people with disability in the employment market.

- A Council of Australian Governments' **goal of 22,000 new jobs for people with disability per year** over the next 15 years – to reach 80% employment participation
- The **Prime Minister receive a specific annual report on inclusion for people with disability connected to federal government employment**, and use of the Prime Ministerial directions to set targets for the Australian Public Service and its contractors – following the lead of the US federal public service
- A **coalition of leaders from Australia's 100 top businesses** to raise disability employment as a priority in their own organisations, facilitated by the Australian Government
- **Well-resourced awareness campaigns** aimed at:
 - Professional specialists, those who make hiring decisions and human resources professionals that deal with disability employment issues in the workplace;
 - The business community generally to foster positive attitude formation towards people with disability;
 - Small, medium and large employers; and
 - The greater community.
- **Legislative change** to give the ability to bring representative actions under the DDA

Conclusion

As we pass the midway mark of the National Disability Strategy it is timely that the Australian Government and the Australian Human Rights Commission embark on this Inquiry. The Hon George Brandis QC, Attorney-General of Australia requested the Commission make recommendations “as to Commonwealth laws that should be made or amended, or action that should be taken, to address employment discrimination against older Australians and Australians with a disability.”

DEA has noted in its submission when other countries, such as the USA, have engaged in more clear and monitored actions then attitudinal changes that can be measured has occurred. This is the bedrock of breaking down the stigma and reducing discriminatory employment practices. Building awareness and confidence will correlate in a rise in workforce participation of people with disability and lead to a decline in discrimination.

The *Netherlands Participation Act (2015)* is the resulting action of a government that “regards it as very important for everyone in the Netherlands, with a disability or otherwise, to participate in the labour market” [26].

France set its course, with legislation and employment targets in 2005. Campaigners and advocates say:

[...] there had been "enormous progress" in France since 2005 [...] The country is better, more open and more mature in its approach to disability [...] today there is in general more acceptance, more integration and more opportunities [...] After the 2005 law, I suddenly saw what was possible [...] today companies make more effort to recruit, schools are more competent and their approach is much more modern, and people feel more protected. Attitudes have also changed [27].

In many ways Australia is equal to or better than contemporary countries social and disability policies, especially with the establishment of the NDIS. When it comes to recruiting people with disability, or people with disability already in employment there is much more we can do. DEA trusts that its submission to this Inquiry will assist the Commission and Government to produce real actions (and, if needed, legislation) that will eliminate discrimination and mitigate unconscious bias and low expectations.

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