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**Submission for the Australian Human Rights Commission**

**Willing to Work, National Enquiry into Discrimination against**

**Older Australians and Australians with disability**

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**Who is the Physical Disability Council of NSW?**

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW

The objectives of PDCN are:

• To educate, inform and assist people with physical disabilities in NSW about the range of services, structure and programs available that enable their full participation, equality of opportunity and equality of citizenship

• To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (ie: self-advocate).

• To educate and inform stakeholders (ie: about the needs of people with a physical disability) so they are able to achieve and maintain full participation, equality of opportunity and equality of citizenship.

**Background**

The Physical Disability Council of NSW (PDCN) appreciates the opportunity to respond to the Willing to Work enquiry into discrimination against older people and people with a disability, and have endeavoured to provide feedback on the questions of relevance to PDCN and its constituency.

Socio- economic circumstances of people with disability in Australia

Despite national and state human rights legislation, draft employment standards, numerous inquiries, strategies and programs over the past 20 years these interventions have done little at increasing the rate of employment for people with disability. Data from the Australian Bureau of Statistics (ABS) and the Australian Public Service Commission highlight these concerns. Data from the ABS illustrate the additional challenges for people with disability with additional needs (e.g. women, Aboriginal and Torres Strait Islander (ATSI) peoples, people from culturally and linguistically diverse backgrounds (CALD) and Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people).

Approximately 14.4% of the Australian population are of a working age (between the ages of 15- 65 years) with a disability. Labour force participation rates provide a measure of the proportion of the population who are either employed or actively looking for work. Over the past 20 years this measure has decreased slightly for people with disability from approximately 55% to 53% with less people with disability seeking employment, but has increased by 6% from 77% to 83% for people without a disability. Interestingly labour force participation for people with disability varies from state to state with the highest amount employment in the Australian Capital Territory measuring approximately 63% and the least in Tasmania measuring approximately 45%. [[1]](#footnote-1)

Additionally the unemployment rate for people with disability has decreased from 17.8% to 9.4%, over the past 20 years, similarly to the decline in unemployment for those without disability from 12.0% to 4.9%. It needs to be stressed that the unemployment rate for people with disability has continued to get worse. [[2]](#footnote-2)

People with disability are frequently unemployed for longer periods than people without disability. 65.5% of people with disability were significantly more likely to still be looking for employment 13 weeks or longer after they first started, compared to only 56.1% of people without disability. [[3]](#footnote-3)

People with disability are 45% more likely to be on or below the poverty line and as a result:

* Disability can reduce a person’s ability to earn income and accumulate wealth, so disability can be a direct cause of economic disadvantage at the individual level. Family members of people with disability may also reduce or cease employment in order to care for them.
* People or households whose income is reduced by disability may move to relatively more disadvantaged areas in order to access low-cost housing.
* People with severe disability may cluster in more disadvantaged areas if disability-related services or accessible transport are located nearby, even though they may not necessarily experience high socioeconomic disadvantage at a personal level. [[4]](#footnote-4)

Australia, when compared with other OECD countries, ranks 10th out of 29, with 74.9% employment for people without disability, and 21st out of 29 with 39.8% employment for people with disability, even with some other nations underestimating the quantity of people with disability. Among the other 29 nations employment for people without disability ranges from 62.1%- 86.4%, and for people with disability employment measures from 17.8%- 62.3%. [[5]](#footnote-5)

**Discussion questions**

**1. What policies, workplace practices, programs or incentives assist with increasing participation of people with disability? How adequate are these policies, practices and incentives? What is the role of Government, peak business and employee groups, and individual employers?**

National Disability Strategy (NDS)

To determine the success of reforms outlined in the NDS and improve the economic sustainability of people with disability, government needs to articulate long and short term goals indicating improved employment for people with disability. Without this information it is not possible to determine the success of reforms identified in the NDS.

In 2012 there were 2.2 million (14.4%) Australians aged 15-64 years, of 'prime working age', with disability, and 880,000 people with disability employed. If the government was aiming for a similar level of employment for both people with disability as people without a disability - that is 86.4%, it is estimated that an additional 880,000 people with disability need to be employed. Using this as a benchmark, if the Australian government was to implement programs aimed at increasing the number of people with disability by 100, 000 per annum, 1,760,000 or 80% of people with disability between the ages of 15-64 years would be employed by 2025. This needs to be documented in the NDS with estimated targets assigned to different programs and plans.

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| **Recommendation 1:** PDCN would recommend that the Australian government provide annual targets identifying the number/rates of people with disability employed, and that these estimates are inserted into the National Disability Strategy. |

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| **Recommendation 2:** PDCN would recommend that the Australian government work towards achieving a similar unemployment rate for both people without disability, as people with disability. |

Recruitability

Recruitment of people with disability in both the Australian and NSW Public Service has declined over the past 25 years from 5.3% to 3.0% in the Australian Public Service [[6]](#footnote-6) and from 7.0% to 3.5% in the NSW Public Service. [[7]](#footnote-7) To improve the employment of people with disability the Australian Public Service Commission (APSC) has introduced a new program called Recruitability with the aim of attracting and developing applicants with disability with cultural change in selection panels and agency recruitment practices.

The APSC Disability Employment Strategy contains many resources useful for applicants with a disability such as the Disability Champions Network and a set of principles to better inform people with disability about reasonable adjustment. Recruitability was piloted from 2012-14, providing opportunities for applicants with minimum selection skills to automatically be selected for an interview regardless of the scope of other applicants. Although recruitment of people with disability is still low in the APSC, PDCN believes that this program will continue to expand and provide more opportunities for people with disability.

Graduate Talent Research

Australia needs a skilled workforce where it can rely on all TAFE and university trained graduates. The value of all graduates regardless of disability or not needs to be recognised. In the past, due to a relatively small number of people with disability completing Year 12 schooling and then obtaining a tertiary education, the number of TAFE and university graduates seeking employment has been minimal. Subsequently further research needs to be completed to determine why graduates with disability are not seeking employment. PDCN believes that this research is needed and would support the Australian Disability and Diversity Employment; a disability employment peak, with their Graduate Talent Research. This need has also been recognised in the NDS in the following quote:

‘It has been estimated that the Australian community is contributing to an annual recurrent cost of $18.8 billion dollars per annum by not addressing the vocational training needs of people with a disability. Failure to address this issue nationally is keeping productive people out of the workforce. Research shows that people with vocational education and training qualifications are more likely to be employed than those who have no post-school qualifications. People with a disability, however, are not reflected in participation rates compared to their presence in the community.’ [[8]](#footnote-8)

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| **Recommendation 3:** PDCN would recommend that the Australian government continue to support the following 3 programs:* Identification of benchmark targets
* Recruitability
* Graduate Talent Research
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**3. What other data or information is available on employment discrimination against Australians with disability?**

1. The legal needs of people with different types of chronic illness or disability- Law Foundation of NSW 2009 [http://www.lawfoundation.net.au/ljf/site/articleIDs/8F7E30A44DA0D60ECA2575BB00083A10/$file/JI11\_Chronic\_illness\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/8F7E30A44DA0D60ECA2575BB00083A10/%24file/JI11_Chronic_illness_web.pdf)
2. Australia’s Second UN Periodic Review- AHRC 2015 <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/australia-s-second-universal-periodic-review>
3. People with Disability in the Open Workplace – National Inquiry into Employment and Disability AHRC 2006 <https://www.humanrights.gov.au/sites/default/files/Workability%20II%20-%20Solutions%202005_0.pdf>
4. Review of the Disability Discrimination Act 2004 – Productivity Commission 1992 <https://www.humanrights.gov.au/sites/default/files/Workability%20II%20-%20Solutions%202005_0.pdf>
5. Australia’s Welfare 2015 – Australian Institute of Health and Welfare 2015 <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129552019>
6. Disability Discrimination Act 1992 – Australian Government- ComLaw <https://www.comlaw.gov.au/Details/C2015C00252>
7. Australia has Legal Obligation to Implement Key Human Rights Reforms 2011 Human Rights Law Centre [Australia has Legal Obligation to Implement Key Human Rights Reforms](http://hrlc.org.au/australia-has-legal-obligation-to-implement-key-human-rights-reforms/)

**4. What lessons and leading practices can we learn from other countries to address employment discrimination and increase workforce participation of Australians with disability?**

PDCN has chosen to document employment strategies in Sweden and Germany as these two countries employ a significant number of people with disability.

**Legal obligation to employ workers with disabilities in Sweden**

Employers who hire workers in Sweden with reduced working capacity, are eligible for the wage subsidy scheme funded by the public employment services*.* This also applies to currently employed workers who acquire a disability.

As part of the *Technical Aid and Adaptation* scheme, the employer receives a grant to adjust the workplace while the disabled employee receives funding to acquire personal technical aids. The scheme is made available to newly hired disabled employees as part of the wage subsidy scheme by the Public Employment Services and to existing employees who are registered with the Public Insurance Office. Employers who hire disabled employees whom require assistance are supported through one of two *Personal Assistance* schemes. The first scheme offers the funds to cover the appointment of an existing employee to assist the disabled worker. The second option concerns disabled workers who require assistance in both their personal and professional lives: they are eligible for a specific allowance to cover the hire of a personal assistant who will provide them with the necessary support in both their private and job related tasks. [[9]](#footnote-9)

**Legal obligation to employ workers with disabilities in Germany**

In Germany there is a special Law as part of the social legislation dealing with persons with disabilities. This law designates that all companies employing more than 20 employees have to assign 5 % of these jobs to disabled persons. Persons with severe disabilities, to which blind and partially sighted individuals also belong, are to be considered in particular.

Employers are obliged to report vacant positions to the Employment Offices and have to pay at present an amount between 105 and 260 Euros - depending on the number of available jobs in their enterprise - for each job not being filled by a disabled jobseeker.

A further legal stipulation is the supplementary vacation of normally five days annually in addition to the general holidays; this is intended to be a compensation for the additional expenditure of time and energy that a disabled person has to suffer due to his/her disability.

Companies with more than five impaired employees have a representative of employees with disabilities in order to look after the special interests of these employees. It is the job of these representatives to safeguard the interests of the employees with disabilities, starting with the application for a job up to the notice of its termination. They are elected by the respective employees of an enterprise. [[10]](#footnote-10)

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

DDA Employment Standards- In 1996 AHRC sought community feedback via a discussion paper on the merits of preparing Employment Standards under section 31 of the DDA. Following extensive consultation, stakeholder views varied, with little agreement on flexibility, clarity or detail of information contained in the DDA standard, and consequently a DDA Employment Standard was not prepared.

In hindsight following preparation of the Access to Premises Standards, PDCN believes that there are advantages and disadvantages of the implementation of DDA Standards. PDCN believes that by establishing minimum standards that this introduces further regulation whilst inhibiting creative and innovative strategies.

Brochures and fact sheets- Brochures, and fact sheets can be located on the AHRC website providing guidance on the implementation of reasonable adjustment, inherent requirements and unjustifiable hardship. Due to limited case law, PDCN believes that it would be helpful if additional information on the AHRC website contained examples that could be compared where one is consistent with the DDA and one that is not legal. These examples would highlight differences in the interpretation of these important legal concepts contained in the DDA. As case law becomes more available these examples may need to be revised to remain consistent with the law.

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| **Recommendation 4:** PDCN would recommend that brochures and fact sheets provide case studies where each of the following terms are defined - with one case study that meets the DDA and another case study that does not meet the DDA, to assist people with disability and all other stakeholders:* Reasonable adjustment
* Inherent requirements and
* Unjustifiable hardship
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Complaints process- All complaints referencing the DDA need to be initially submitted to the Australian Human Rights Commission (AHRC). Following this, AHRC tries to find a solution where both parties are satisfied by conciliation. Conciliation can take place in a face-to-face meeting called a ‘conciliation conference’ or through a telephone conference. In some cases complaints can be resolved through an exchange of letters or by passing messages by phone or email through the conciliator. Where a complaint cannot be resolved through conciliation, the applicant forwarding the complaint may then opt to have the complaint heard in either the Federal Circuit Court or Federal Court. Conciliated outcomes do not become case law and subsequently precedents are not established and rarely facilitate systemic advocacy. Ideally PDCN would prefer a mechanism where the benefits of systemic advocacy could be achieved.

Complaints data located on the AHRC website illustrate the following trends;

* In comparison to other human rights legislation, the DDA is the most commonly used human rights legislation.
* The majority of complainants are people with physical disability.
* Approximately 50% of DDA complaints are resolved by conciliation.
* Commonly complaints are made about the following sections of the DDA:
	+ Goods, services and facilities – 35%
	+ Employment – 31%
	+ Education – 9% [[11]](#footnote-11)

Court requirements- Legal precedents can only be established from case law heard in court. Due to risks and stresses associated with the possibility of needing to pay the legal fees of the respondent if the court goes against the applicant and favours the respondent, case law has been limited. The following case law has helped clarify relevant sections of the DDA:

* *Ryan v Presbytery of Wide Bay Sunshine Coast-* Due to the particular circumstances involving employment of a priest, the term ‘employment’ was considered and clarified by the court.
* *Y v Human Rights & Equal Opportunity Commission*- This case identifies the minimum arrangements required when an employer is selecting the preferred applicant.
* *Ware v OAMPS Insurance Brokers Ltd-* Discrimination in this case involved the respondent making the following unreasonable changes to the performance of employment responsibilities.
* *‘Inherent requirement’-* This term refers to a skill essential to the job description. A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.
* *X v Commonwealth-* This case provides further clarity over the extent to which an employer must assist an aggrieved person to be able to carry out inherent requirements. [[12]](#footnote-12)

**7. What are the distinct challenges faced by certain groups of people with disability that also fall into the following categories in relation to employment discrimination?**

* **Women,**
* **Aboriginal and Torres Strait Islander peoples, (ATSI)**
* **People from culturally and linguistically diverse backgrounds (CALD) or**
* **LGBTI people)**

People with disability in any of these categories are potentially discriminated on at least two fronts. If assisting a female with disability to advocate, depending on the circumstances, it would be necessary to decide on the relevancy of the following pieces of legislation and the most appropriate legal process:

* Sex Discrimination Act 1984
* Family Law Act 1975
* Australian Human Rights Discrimination Act 1986
* Disability Discrimination Act 1992
1. Australian Bureau of Statistics (2012) 4433.0.55.006 - Disability and Labour Force Participation [↑](#footnote-ref-1)
2. Australian Bureau of Statistics (2012) 4433.0.55.006 - Disability and Labour Force Participation [↑](#footnote-ref-2)
3. Australian Bureau of Statistics (2012) 4433.0.55.006 - Disability and Labour Force Participation [↑](#footnote-ref-3)
4. Australian Institute of Health and Welfare 2009. The geography of disability and economic disadvantage in Australian capital cities

 ADDE Australians for Disability and Diversity Employment (2013) The Way Up [↑](#footnote-ref-4)
5. ADDE Australians for Disability and Diversity Employment (2013) The Way Up [↑](#footnote-ref-5)
6. Australian Government- Australian Public Service Commission (2014) State of the Service Series 2013- 14 [↑](#footnote-ref-6)
7. NSW Government- NSW Public Service Commission (2014) State of the NSW Public Sector Report 2014 [↑](#footnote-ref-7)
8. Council of Australian Governments (2011) National Disability Strategy 2010- 2020 [↑](#footnote-ref-8)
9. ADDE Australians for Disability and Diversity Employment (2013) The Way Up [↑](#footnote-ref-9)
10. ADDE Australians for Disability and Diversity Employment (2013) The Way Up [↑](#footnote-ref-10)
11. Australian Human Rights Commission Complaints Data <https://www.humanrights.gov.au/publications/complaint-statistics-annual-report-2009-2010-australian-human-rights-commission> 4 December 2015 [↑](#footnote-ref-11)
12. Australian Human Rights Commission (2008/ 09) Federal Discrimination Law- Chapter 5 (Disability Discrimination Act 1992) [↑](#footnote-ref-12)