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18 December 2015

The Hon Susan Ryan AO  
Age and Disability Discrimination Commissioner  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY, NSW, 2000

Dear Ms Ryan,

**Submission to the Willing to Work Inquiry**

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Australian Human Rights Commission's National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability.

In 2014-15, VLA provided legal advice and assistance in over 1,522 discrimination matters and our Legal Help telephone information service responded to 4,507 discrimination and employment related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification.

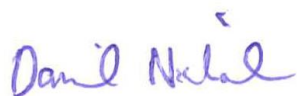
The enclosed submission focuses largely on the experiences of our clients who face age and disability discrimination during employment, and in most cases tells our clients' stories directly in their words, with their permission. The submission also outlines recommendations for reform based on our practice experience and the experiences of our clients.

If you have any queries about this submission, please do not hesitate to contact Melanie Schleiger (Manager, Equality Law Program) on (03) 9269 0112 or at [melanie.schleiger@vla.vic.gov.au](mailto:melanie.schleiger@vla.vic.gov.au).



Thank you for the opportunity to contribute to this Inquiry. We would welcome any further opportunity to assist the Inquiry.

Yours faithfully

A handwritten signature in blue ink that reads "Daniel Nicholson". The signature is written in a cursive style with a small mark above the 'i' in Nicholson.

**DAN NICHOLSON**  
Executive Director  
Civil Justice, Access and Equity  
South Coast Region

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

**Submission to the Australian Human Rights Commission**

December 2015

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Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

**Disclaimer.** The case studies and stories in this submission are real and have been included with our clients' consent. Names and identifying features have been changed to protect privacy.

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## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and designated mental health services as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service. We also deliver non-legal advocacy services to people receiving compulsory treatment under the *Mental Health Act 2010* (Vic).

### Our specialist practice expertise

Our dedicated Equality Law Program provides advice and representation to people experiencing discrimination, harassment, victimisation and adverse action in employment. We assist people with complaints of discrimination in various jurisdictions, using state and federal anti-discrimination legislation, including the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Fair Work Act 2009* (Cth). The services provided by the Equality law program include phone advice, duty lawyer services, weekly clinic advice sessions and ongoing case work and representation. In 2014-15 VLA provided legal advice in 1,522 discrimination matters and our Legal Help telephone service responded to 4,507 discrimination and employment related queries.

### Key contacts

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## Executive Summary

Victoria Legal Aid welcomes the opportunity to inform the Willing to Work Inquiry and supports the Australian Human Rights Commission's focus on the right of older Australians and Australians with a disability to work free from discrimination.

The focus of our submission is on the discussion questions contained at point five of the issues papers. We address the adequacy of existing laws and remedies, and outline opportunities for reform.

VLA's first-hand experience assisting those who experience discrimination has informed our observations and recommendations in this submission. Where possible, our suggestions for improvement are supported by case examples illustrating how the current deficiencies and gaps in discrimination laws operate to disadvantage our clients who have a disability or who are older Australians.

The stories in quotation marks in this submission have been told in the client's own words, with their permission, and reflect their real experiences. The stories have been de-identified to protect our client's privacy.

Our clients' experiences highlight two key barriers to Australia's discrimination laws providing effective protection from age and disability discrimination. The first is the reliance on individuals to enforce their rights, and the difficulties individuals face in proving discrimination. The second is the limited scope of the legal protection from discrimination, and the confusion caused by inconsistencies between discrimination laws. In our experience, the lack of any significant consequence for discrimination against employees leads to low levels of compliance with discrimination laws by employers.

Our submission makes practical recommendations which:

- Strengthen and clarify existing legal obligations on employers;
- Assist employees to enforce their rights when they experience discrimination; and
- Promote compliance with discrimination laws.

It is hoped that the Willing to Work Inquiry will encourage reforms that rectify the issues we have highlighted and which better promote workforce participation by people with a disability and older Australians.

We would be pleased to discuss any aspect of this submission further with the Australian Human Rights Commission (AHRC).



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## Summary of recommendations

### Common Recommendations

- Recommendation 1: That the AHRC have the power to conduct own motion investigations and enforcement actions without requiring an individual complaint to be made, and that the Fair Work Ombudsman expand its role in this area to bring more complaints on behalf of people who experience discrimination because of age or disability, or other protected attributes.
- Recommendation 2: The *Age Discrimination Act 2004* (Cth) (ADA) and *Disability Discrimination Act 1992* (Cth) (DDA) should be amended to require employers to make interview notes for all interviewees available to an individual interviewee on request.
- Recommendation 3: A 'questionnaire procedure' should be incorporated prior to conciliation to encourage the early exchange of relevant information.
- Recommendation 4: The definitions of discrimination in the ADA and the DDA should be simplified by removing the comparator test.
- Recommendation 5: There should be express protection of witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made.
- Recommendation 6: Section 46PO(4)(d) of the *Australian Human Rights Commission Act* should be amended to enable the Court to order a respondent to pay an applicant damages by way of consolation for personal distress and hurt, reparation for damage to their reputation, and vindication of their reputation, as well as compensation for any loss or damage suffered by the applicant, in line with the principles for damages payments in defamation cases, for the purpose of increasing awards of damages in discrimination cases.
- Recommendation 7: A costs provision should be inserted into section 46PO of the *Australian Human Rights Commission Act 1986* (Cth) which provides that cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.
- Recommendation 8: The *Fair Work Act 2009* (Cth) (FWA) should be amended to extend the time for filing general protections claims involving dismissal from employment, consistent with Commonwealth discrimination laws.
- Recommendation 9: After the complainant establishes a prima facie case, the burden of proving that an action is not unlawful should shift to the respondent under the ADA and the DDA consistent with the FWA.

### Disability Discrimination Recommendations

- Recommendation 10: The DDA prohibition on requesting discriminatory information should be strengthened by providing greater clarity as to what is a reasonable request for medical information. Specifically a request should be limited to:

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1. the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and
  2. circumstances where there is evidence that the medical information requested is required.

Recommendation 11: The DDA reasonable adjustments provision should be strengthened by providing greater clarity as to what adjustments may be reasonable.

Recommendation 12: The FWA should be amended to expressly prohibit indirect discrimination, to expressly require employers to make reasonable adjustments for employees with a disability, and to define key terms such as “disability” and “discriminates”.

Recommendation 13: Insert a provision into the DDA to make it unlawful to dismiss an employee due to a temporary absence for illness or injury, to bring it in line with the FWA.

### **Age Discrimination Recommendations**

Recommendation 14: That the ADA be amended to require employers to make reasonable adjustments for grandparents with carer responsibilities.

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## Improving Commonwealth discrimination law

The following recommendations address issues which are common to our clients who experience either age or disability discrimination. Our clients face barriers to workforce participation both when applying for jobs and during their employment, and many are dismissed for a discriminatory reason. The legal framework for protection from discrimination law is complex and confusing. Employees and employers must consider their rights and obligations under the FWA, Commonwealth discrimination laws (the ADA and the DDA) and State and Territory discrimination laws (collectively “discrimination law”). Our recommendations seek to strengthen and clarify the protection provided by discrimination law, and to support individuals to realise their rights when they experience discrimination.

## Enforcing discrimination law

A significant weakness of Australian discrimination law is its reliance on a complaints based system, where individuals must hold discriminators to account. In our experience, this is particularly problematic in situations of workplace discrimination where complainants and witnesses are often financially dependent on the discriminator and are discouraged from making a complaint by the potential repercussions within their workplace and industry. Research confirms that the majority of people with complaints of discrimination and harassment under Australian discrimination law do not report the conduct or make a complaint.<sup>1</sup> Even where clients are legally represented, due to a range of factors outlined below the burden of enforcing their rights is often so great that they either accept a poor settlement or simply walk away rather than pursue legal proceedings.

In the context of workplace discrimination against older Australians and Australians with a disability, it is our experience that clients are particularly deterred by:

- Fear of negative reputational consequences and of being punished at work;
- Difficulties proving the conduct, including due to lack of access to documents and other information held by the employer, and witness reluctance to give evidence. These problems have been referred to as the employer’s ‘monopoly on knowledge’;<sup>2</sup> and
- The poor cost-benefit of litigation (even if the complaint is successful) due to the significant time, energy and cost involved in pursuing a complaint of discrimination (at a period in life when the applicant is energy and time poor), the fact that compensation payments are usually low and the risk of an adverse costs order in the federal jurisdiction in the event that the proceeding is unsuccessful.

Many of our recommendations seek to address these barriers to enforcing discrimination law. The most significant reform we propose, with the greatest potential for systemic impact, is to empower and properly resource the Fair Work Ombudsman (FWO) and the AHRC to investigate and act on breaches of discrimination law in their respective jurisdictions.

Under section 682(1)(f) of the FWA, the FWO has the power to bring complaints on behalf of clients and has done so on a few occasions to date in relation to discrimination matters. However the

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<sup>1</sup> See Australian Human Rights Commission, *Sexual Harassment: Serious Business – Results of the Sexual Harassment National Telephone Survey* (2012): 20% of people who had been sexually harassed in the workplace made a formal report or complaint. Also Australian Human Rights Commission, *Headline Prevalence Data: National Review on Discrimination Related to Pregnancy, Parental Leave and Return to Work 2014*: 18% of women who experience pregnancy and parental discrimination complain internally or to a Government agency.

<sup>2</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180 and Laurence Lustgarten, ‘Problems of Proof in Employment Discrimination Cases’ (1977) 6 *Industrial Law Journal* 212, 213. See also Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ [2009] 31 *Sydney Law Review* 579, 583.

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number of prosecutions is extremely limited in comparison to the prevalence of discrimination. In 2014-2015 the FWO commenced just one piece of litigation in relation to discrimination.<sup>3</sup> The FWO's enforcement role in this area should be increased through provision of greater resources and priority status being given to discrimination investigations.

Additionally, the AHRC should be given investigatory and enforcement powers over discrimination matters. Specifically, we consider that the AHRC should be empowered and resourced to commence an investigation regarding an alleged breach of the law without requiring an individual to lodge a complaint (an 'own-motion investigation' function). In addition to this, the AHRC should be empowered to agree to enforceable undertakings, issue compliance notices, and issue administrative penalties.

It is necessary for both the FWO and the AHRC to have enforcement powers because the FWA and discrimination laws operate in different ways. For example, in some cases the discriminatory treatment will be connected to breaches of other employment obligations regulated by the FWA, so it is appropriate for the FWO to respond to all of these issues, rather than require the issuing of separate proceedings by two separate regulators. In other cases, the discrimination may involve the provision of goods or services, or another non-employment related area, which is outside the scope of the FWO.

Enabling a regulator to enforce compliance with the law is a standard practice in other statutory regimes, including workplace safety, privacy, environmental protection, animal welfare, and consumer affairs. The introduction of these compliance functions would remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation. Further, empowering the AHRC to enforce compliance with anti-discrimination law would recognise the significance of discrimination and harassment as unlawful behaviour that can result in substantial harm to individual health and safety as well as the broader community. Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive and productive, and will have better public health outcomes.<sup>4</sup>

### **Too unwell to take it further – Claire's story**

"I informed my bosses in the job interview that I suffered from depression and chronic Post Traumatic Stress Disorder (PTSD). I was asked how this would affect my employment, and I told them that it would not affect my ability to deal with customers but if someone is rude or aggressive to me I can become tearful and upset. They said that was fine and they could accommodate this. However during the time I worked for the company one of the bosses behaved in an abusive and derogatory way towards me. He shouted and swore at me on many occasions. I quit because I could not take the abuse anymore.

I put in a discrimination complaint with the Victorian Equal Opportunity Commission and went to conciliation. The process was horrible and although my bosses did not

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<sup>3</sup> Fair Work Ombudsman Annual Report 2014-2015, page 37

<sup>4</sup> See, for example: R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007); Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010)

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deny all of the allegations we couldn't get them to put a reasonable offer. I settled for a very low amount, which only covered the things I was already entitled to.

I was not mentally capable to take this matter any further, even though I knew I had a very strong claim. I knew in my heart that if I fought this matter I would have won. I was not capable of taking this matter further as my PTSD was exacerbated by my boss' treatment of me. I also desperately needed the money to help my daughter with her school studies.

Thinking about this matter still upsets me today because I know I should have fought it. But I am not a monetary person. I have never had a lot of money. This outcome would have been very different if there was a third party helping me and investigating the discrimination. Their help and support would have made me feel more confident and most definitely I would have taken this further. This whole process was totally overwhelming for me. People with PTSD feel things very strongly. This whole experience has changed my life. I have not worked since. I am too scared to work anywhere else because my ex bosses made me feel worthless."

**Recommendation 1:** That the AHRC have the power to conduct own motion investigations and enforcement actions without requiring an individual complaint to be made, and that the Fair Work Ombudsman expand its role in this area to bring more complaints on behalf of people who experience discrimination because of age or disability, or other protected attributes.

## Making interview notes available

Many of our clients experience discrimination when applying for jobs. Our older clients report that employers often express concerns in job interviews about issues related to their age such as their ability to fit into younger teams, their expected retirement age, and even express concern about the fact they are entitled to a full adult wage. For our clients with a disability, issues can arise when they are asked to disclose any pre-existing medical conditions or disabilities in their application form.

The FWA, the DDA, and the ADA all protect against discrimination in determining who should be offered employment. However it is ordinarily very difficult to prove that a client was unsuccessful in applying for a position for a discriminatory reason. Even if our client's evidence about a discriminatory question or comment is accepted, this alone does not prove that they would have been employed if they were younger or did not have a disability. At the time when the client is deciding whether or not to take action about discrimination we do not know how qualified and experienced the successful applicant was, or what the employer's reasons for choosing that applicant were. Given the uncertainty of the claim and outcome most of our clients in these circumstances decide not to pursue the matter any further. This means that most employers are not challenged to demonstrate their compliance with discrimination law, reducing the impetus for employers to comply with discrimination law when selecting a successful candidate for a position.

### 700 applications in two years – Sharon's story

"A couple of years ago I was made redundant from a job I'd worked in for 10 years, they told me they were getting younger staff in cause they can pay them less. Since then I've been looking for work. I'm in my late 40s and I've been going for retail jobs. I would have put in over 700 applications to every place I can find over the last few years but no one will hire me. I was going anywhere and everywhere. It was definitely because of my age because of all the things they said to me. When I'd go for jobs I'd

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be told things like: “we’re hiring younger people, you’re too old” and “sorry, boss wants young people now”. And when I walked into the shops they were all young! All young!

The dole helped me a lot at that time. But I needed to borrow money from friends, family and Cash Converters just to stay afloat. There’d be nights where I’d go to pay my rent and I’d have no money for food, I’d just have a boiled egg and a piece of bread for dinner. I’m not a pensioner and I’m still young, I’ve been working all my life. It’s wrong, something here is wrong. I thought if I can’t get a job now I feel like I’m not going to have nothing, I’m going to be on the streets. Previously I was working two jobs. I love working. I just wanted to be given a job. I’ve got the qualifications, I’m willing to work seven days a week, any shift. It doesn’t bother me if I’m working one day a week as long as I’m working.

I wanted to take a stand about the discrimination but it’s so hard to prove. I got some advice but I just don’t have the time to do anything about it, particularly when I don’t have any proof. I’d rather keep trying to find a boss who wants me despite my age. It’s been like a rollercoaster. I got a job recently and when I found out I cried. My boss now has been so good. They’ve done so much for me. I gave them a box of chocolates to say thank you for giving me a chance.”

**Recommendation 2:** The ADA and the DDA should be amended to require employers to make interview notes for all interviewees available to an individual interviewee on request.

### Early exchange of relevant information

As outlined above, our clients experience a number of issues related to the employer’s monopoly on knowledge. It is rare to receive a substantial response from an employer following a discrimination complaint to the AHRC or the Fair Work Commission. It is very difficult for clients to make a decision about whether to pursue the matter further to a Court or Tribunal without a proper indication as to the evidence available to the employer to defend their claim. It is our experience that employers may raise events or defences at a Court or Tribunal that they did not rely on at the conciliation stage of proceedings.

Complainants should have a right to ask the respondent questions that are relevant to their allegations prior to conciliation, as is the case in the United Kingdom and Ireland. The response should be admissible as evidence, and courts should be able to draw an adverse inference from a failure to respond.<sup>5</sup> In addition to assisting complainants, introducing a questionnaire procedure can increase efficiency by enabling parties to better assess the merits of their case, leading to early settlement or withdrawal of a complaint.

**Recommendation 3:** A ‘questionnaire procedure’ should be incorporated prior to conciliation to encourage the early exchange of relevant information.

### Removing the comparator test

Both the ADA and the DDA require that a comparator be identified in order to establish that direct discrimination has occurred. In other words an applicant must show that another person without their disability or age, in circumstances which are otherwise not materially different to theirs, would have

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<sup>5</sup> For a discussion of this procedure, see Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’, (2009) 31 *Sydney Law Review* 579.

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been treated more favourably than they were. This requirement is restrictive and operates as a significant detriment and barrier to our client's utilising the protection provided by these laws. For example, a client who is dismissed because they required six weeks personal leave due to a hospitalisation following an exacerbation of their mental health condition might be compared with an employee who required six weeks unexpected and unauthorised leave unrelated to a disability. In this case the Court is likely to find that the employer would have treated the other employee requiring a long unexpected period of leave without a disability no differently to our client, therefore the dismissal was not discriminatory. Often it is the protected attribute which causes the circumstances to arise. Forcing applicants to prove that someone else in those circumstances would have been treated better if they didn't have a disability or were younger is artificial and fails to adequately address the cause of the discrimination.

Neither Victoria's *Equal Opportunity Act 2010* (Vic) nor the Australian Capital Territory *Discrimination Act 1991* (ACT) require a comparator in order to find direct discrimination has occurred. Not only is there no express requirement for a comparator in the legislation in these jurisdictions, the relevant Tribunals have confirmed that there is no implied requirement for a comparator.<sup>6</sup> We consider that the simplification and clarification of the definition of discrimination at a Commonwealth level will assist to promote greater compliance with anti-discrimination laws and assist business and service providers to understand their legal obligations.

**Recommendation 4:** The definitions of discrimination in the ADA and the DDA should be simplified by removing the comparator test.

## Protecting witnesses

As we have outlined above, one of the biggest barriers to clients taking action about discrimination is a lack of evidence. It is very rare for a client to be supported in a discrimination claim by a witness who continues to be employed by the respondent to the discrimination claim. This is because these witnesses are concerned that they will lose their job or be subjected to other unfavourable treatment. This issue affects our clients at the early internal complaint stage of proceedings in addition to subsequent legal proceedings.

Witnesses are provided some protection under the victimisation provisions of the ADA and the DDA. However this protection does not expressly extend to supporting a colleague's version of events during an internal investigation, nor does it expressly extend to other witness support that falls short of attending the conciliation conference or asserting their colleague's rights under discrimination law. Clarifying the scope of the victimisation protection to expressly cover the reasonable support of witnesses at any stage of a complaint of discrimination would assist witnesses to come forward at an early stage of proceedings.

### **No support – Peter's story**

"My doctor told me to take some time off work for my mental health. It wasn't until I was ready to return to work that my employer said they're not satisfied that I was well enough to do the job. The doctor looked at my position description and said you can perform these duties that's fine. I gave that to them and they said they were going to arrange an independent medical examination. I did that and they still didn't let me back. It was a job that I loved and that I really wanted to get back into, and it was part of my

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<sup>6</sup> In the ACT see *Prezzi v Discrimination Commissioner & Anor* (1996) 39 ALD 729, in Victoria see: *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869

rehabilitation as well to do that because I didn't like being off work. Eventually it was arranged for me to come back to work but the guy they had hired to replace me told me my boss said I had to sit in the office and do nothing. To be told this on top of everything else – it's debilitating. I asked Management does the company want me to stay and they said no, the company wants you to move on. So basically I knew at this time that my time is numbered, they're going to get rid of me. I really felt like I didn't have any other choice but to resign.

I'd actually asked my replacement in the time I was back at work would you mind putting on paper exactly what's occurred here. He said he could, no problem at all. Later on I spoke to him and I let him know I'm going to pursue this and he said look I thought you just wanted to let it go and move on, which were strange words because they were the same words the company used. This was also at the time where it was up in the air whether he was going to get another contract or not. He went from being very open and friendly to being at one point just pretty much cutting me off and not saying anything. I don't know whether he was told not to communicate with me but that's pretty much the impression that I got.

Basically it feels like you've got really no support. At one point I actually felt like giving up, I thought what help have I got? Nobody is going to back me up, the truth isn't going to come out, what am I going to do? It's always in the back of your mind that people can say whatever they want. And that's exactly what they did. The company said that it's 'inconceivable' that my boss would have done the things I alleged. I was stunned when I read that. Basically my feeling when I read that was how can you blatantly lie like that? It says a lot about the company, I can't really blame the individuals who didn't support me, they were put in a difficult situation where they weren't really able to say what they wanted to say.

In the end my matter did settle, but it would have been much quicker if the people involved had been able to stand up for me and tell the truth. Losing this job was a massive loss. I was eventually allowed onto Newstart but that's less than what I'm paying in rent. My savings were running out and I was at risk of losing my housing by the time my matter settled. I've applied for 120 jobs in the last six months and it's really tough. I think it subconsciously affects how I perform in job interviews now because I really don't want to go through this again."

**Recommendation 5:** There should be express protection of witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made.

## Increase the amount of damages

We see first-hand the often devastating impact of discrimination on our clients, and the lasting effects of being excluded from the workforce because of their disability or age. Discrimination is more often experienced by people who are poor, particularly people receiving government payments, and people who are experiencing other forms of disadvantage.<sup>7</sup> Research also shows that discrimination has a greater impact on disadvantaged groups than it does on relatively advantaged groups.<sup>8</sup> As our clients' stories demonstrate, the harm that flows from discrimination is

<sup>7</sup> Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012) 27 and 85.

<sup>8</sup> Michael T Schmitt, Nyla R Branscombe, Tom Postmes, Amber Garcia, 'The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analysis', in American Psychological Association, *Psychological Bulletin* (February,



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significant and can last for years after the event. It impacts on our clients' mental health, on their relationships with their family, and on their financial security.<sup>9</sup> It can lead to further legal issues such as eviction from housing, debt from unpaid bills and credit cards, and relationship breakdown. We often see the lasting impact that discrimination has on our clients careers. It takes most of our clients a significant time to re-enter the workforce as they recover and rebuild their self-esteem. Discrimination can also have a lasting impact on a client's reputation in their industry, particularly in regional areas. Our clients often report the difficulty they have in job interviews when they are asked about their previous employment, about why they left the job and why they took some time to find another job.

### **The impact of discrimination – Mary's story**

"My self-esteem and dignity were diminished to the lowest when I was told by my employer that I was no longer working for them. This was not due to the fact that I was not qualified for the position. In fact, I was more than qualified and was even told this by the organisation when they were terminating me by a phone call. When I started the job I wanted to be honest with them about my cancer and the small adjustments I would need. I didn't expect them to react the way they did. I was now being told that I could not work for this organisation because I had cancer. I gave reports from my doctors to say I'm in remission, I'm fine to work, and I'm at no higher risk of injury than anyone else, but they maintained that I am too much of a risk.

Having to go through cancer and now this. It happened over a year ago but I am crying whilst writing this as I still feel so low. It's made me feel like I can't move on from my cancer. There were times after I was dismissed where I did not want to leave my house or get out of bed. I was confused and doubted myself to the point of seeking help for my mental health. I have applied for more positions but in interviews I am no longer myself due to the damage caused by the discrimination. I doubt myself and am unsure of what to disclose as I now have trust issues. It's made me feel so useless because my son has had a job and is helping the family out but I've just been rejected over and over.

As a result of my discrimination and as a person with a disability, I am now looking to work in the disability sector, so people with a disability know their rights when it comes to being discriminated against by an employer and do not have to go through the humiliation of not being part of their community. I hope that no one has to go through what myself and my family have been through."

With some notable exceptions, awards of damages in age and disability discrimination matters are very low when compared to the harm suffered. It is our experience that individuals are discouraged from pursuing complaints of discrimination because the amounts of compensation awarded in discrimination matters do not adequately off-set the time and expense of pursuing a complaint. This is particularly the case for many of our clients who are poorly paid and work part time or casually, which means that their claims for economic loss are severely limited. Given compensation is largely determined by the amount of lost earnings, it is essentially cheaper for employers to discriminate against lower paid workers because the overall award of damages will be lower. The outcomes for

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2014), 2 and 10

<sup>9</sup> Empirical research also shows that discrimination causes physical and stress-related illnesses, housing insecurity, relationship problems, and poverty: Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012) 172.

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these clients do not recognise the significant harm caused by the discrimination. For these clients the cost of pursuing the matter to hearing is often likely to exceed the damages they stand to receive if successful.

The low rates of compensation discourage many of our clients from enforcing their rights under discrimination law. In 2014-15 there were just two successful discrimination cases in the Federal Court and the Federal Circuit Court.<sup>10</sup> This means that discrimination law is largely invisible to employers, because they do not see any consequences for breaching the law. Even where employers are held to account, in our experience the low financial consequences to employers for discriminatory behaviour is a further disincentive for them to comply with the law.

Damages for non-economic loss (for example for hurt and humiliation) are also extremely low, particularly under the FWA where compensation for pain and suffering is rarely awarded and rarely exceeds \$10,000. The low amounts of damages awarded in discrimination cases is particularly stark when compared to damages awards other jurisdictions for similar wrongs and types of harm, such as in cases of defamation,<sup>11</sup> employer negligence,<sup>12</sup> breach of employment contract,<sup>13</sup> and misleading and deceptive conduct in employment.<sup>14</sup> In discrimination law the focus is on compensating for the loss caused by the discrimination, whereas in defamation law damages extend beyond compensatory loss and serve three purposes: consolation for personal distress and hurt, reparation for damage to the applicant's reputation, and vindication of the applicant's reputation.<sup>15</sup> In the Full Court of the Federal Court's decision in *Richardson v Oracle Justice* Kenny observed that there is a substantial disparity between the quantum of awards in defamation and discrimination matters, despite the similar situations of applicants in both cases.<sup>16</sup> Both claims relate to the dignity and standing of the applicant in the community which warrants protection, perhaps even more so for discrimination claims given the broader societal interest in the effective operation of discrimination law.<sup>17</sup> There is no justification for valuing the harm caused by defamation more than that caused by discrimination. Therefore, the quantum of damages for discrimination should be brought into line with compensation for defamation.

### **Low compensation – Michael's story**

“This was the first official job I've had in 10 years. It meant a lot to me, I was really happy about it. I felt really good having a job again. I was sick for two weeks and I was in contact with my employer during that time, they didn't say anything about my job being in jeopardy or anything, and I rang up saying I'm ready to come in and he told me he doesn't need me anymore. Then I got a separation certificate which said I'm being dismissed because of health issues. I started to realise that what my employer did to

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<sup>10</sup> *Pop v Taylor* [2015] FCCA 1720 (26 June 2015) (\$5,000 awarded as general damages plus \$5,000 s special damages for disability discrimination); and *Haider v Hawaiian Punch Pty Ltd* [2015] FCA 37 (6 February 2015) (\$9,000 awarded as general damages for racial vilification). (This total does not include proceedings brought under the FW Act.)

<sup>11</sup> Carol Andrade, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), 12

<sup>12</sup> *Swan v Monash Law Book Co-operative* [2013] VSC 326, cited in *Ibid* at [101].

<sup>13</sup> *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [104].

<sup>14</sup> *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [105-6].

<sup>15</sup> *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652

<sup>16</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at 109

<sup>17</sup> Carol Andrade, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), 12

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me was wrong. He had no reason to do that. I didn't know my rights, I had to read tonnes of information just to fill out the forms.

I went to a Fair Work conference and I didn't like it at all. My employer was denying my claim and he was disregarding everything my lawyer said. I feel like he didn't know what the law was. I wanted six months of what I would have been earning if I hadn't been dismissed but my employer would only offer a few weeks' worth of pay. He refused to go any higher. I accepted it because I had no choice. I couldn't take the matter to the Federal Circuit Court because it wasn't going to be worth it. I was working casually so my lost wages weren't that high, and there was no guarantee what compensation I would get for pain and suffering. The legal costs would have defeated the purpose. The money I lost is a lot of money to me. I'm now still looking for work and it's hard because I can't use my old employer as a reference.”

**Recommendation 6:** Section 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) should be amended to enable the Court to order a respondent to pay an applicant damages by way of consolation for personal distress and hurt, reparation for damage to their reputation, and vindication of their reputation, as well as compensation for any loss or damage suffered by the applicant, in line with the principles for damages payments in defamation cases, for the purpose of increasing awards of damages in discrimination cases.

## Costs

It is our practice experience that many clients will not pursue a potentially meritorious claim of discrimination under the ADA or the DDA for fear of incurring an adverse costs order. This is a significant disincentive, particularly noting the traditional power imbalance between many complainants and respondents (particularly in the area of employment) and the respondents' 'monopoly on knowledge'.

While there is discretion not to award costs under Commonwealth discrimination law, it is clear that the Courts do not consider discrimination claims to warrant any departure from the ordinary rule in that jurisdiction that costs will follow the event.<sup>18</sup> The approach to costs under Commonwealth discrimination laws is contrary to the approach to legal costs in the relevant provisions of the FWA and State and Territory discrimination laws. Under the Victorian *Equal Opportunity Act 2010* (Vic), for example, costs may be ordered at the Tribunal stage but only where one party has unreasonably caused the other to incur unnecessary costs. The Victorian Civil and Administrative Tribunal has ruled that costs orders should not be made lightly in the discrimination jurisdiction so as not to deter applicants from using the method of redress provided by discrimination law.<sup>19</sup> Unfortunately, however, the reality is that the failure to reward successful applicants with a favourable costs order is having the opposite effect.

Just as the presumption that costs follow the event discourages meritorious applicants from pursuing their discrimination complaint to hearing due to the significant financial risk, the presumption that the parties bear their own costs discourages meritorious applicants because an award of compensation is extremely unlikely to cover their legal costs. For example in a recent case under Victorian discrimination law the applicant was awarded \$100,000 in compensation for a meritorious claim but incurred approximately \$140,000 worth of legal fees. Justice Garde declined to

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<sup>18</sup> *Hollingdale v North Coast Area Health Service (No.2)* [2006] FMCA 585 per Driver FM

<sup>19</sup> *Tan v Xenos* [2008] VCAT 1273 per Judge Harbison VP

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award more than a small portion of the applicant's costs leaving the applicant with little or no benefit from her claim despite the stress, time, and resources that went into achieving the successful outcome.<sup>20</sup> Contrast this with the outcome in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 where the applicant was awarded over \$130,000 in compensation and the respondent was ordered to pay her legal costs which were in excess of \$220,000. If that case were brought in a 'no cost' jurisdiction the applicant would have been left almost \$100,000 out of pocket despite winning her case. (Notably, at first instance in this case the applicant was awarded a much lower amount of compensation and ordered to pay the respondent's legal costs due to a Calderbank offer). As outlined by Member Fitzpatrick in a different discrimination case heard by the Queensland Civil and Administrative Tribunal "it is not in the interests of justice that [the applicant] suffer the complete erosion of her award of compensation by legal costs necessarily incurred in successfully bringing her claim".<sup>21</sup>

We submit that the potential deterrence effect of a presumption that parties will bear their own costs can be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in discrimination cases in the United States.<sup>22</sup> The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. Under section 43 of the *Federal Court of Australia Act 1976* (Cth) and section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) the Courts' costs powers are subject to any restrictions placed by other Acts. The *Australian Human Rights Commission Act 1986* (Cth) could be amended insert a provision adopting this approach.

**Recommendation 7:** A costs provision should be inserted into section 46PO of the *Australian Human Rights Commission Act 1986* (Cth) which provides that cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

## Time limits under the FWA are too short

Many of our clients are unable to obtain legal advice and take legal action immediately after their dismissal within the 21 day time limit for a General Protections claim set by the FWA. For some clients the loss of employment leads to financial hardship and housing insecurity which takes priority in the first few weeks following their dismissal. For other clients the dismissal may have been related to an illness, or may exacerbate an illness, which means that they are too unwell to pursue their claim for a few weeks' time. Further due to the complexity of discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint. Many clients then delay in seeking advice after lodging their claim until a conciliation date is set, and by this time it is often too late for them to change jurisdictions and bring a General Protections claim.

The Fair Work Commission has a discretion to extend the time limit in exceptional circumstances under Section 366 of the FWA. The threshold for extending this time limit is set very high and

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<sup>20</sup> *GLS v PLP (Human Rights)* [2013] VCAT 1367

<sup>21</sup> *Bell v State of Queensland & Anor* [2015] QCAT 369

<sup>22</sup> *Christianberg Garment Co v EEOC* 434 US 4012 (1978)

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operates as a bar to most clients bringing a General Protections claim outside the 21 day period. For example in the case of *Cole v Key Resources Pty Ltd* [2014] FWC 3278 Commissioner Blair found that the fact the applicant had a miscarriage and seizure within the 21 days and was shocked, distressed and confused did not justify a three day extension. Given Commonwealth and State discrimination laws allow at least 12 months to bring a claim our clients still have the ability to bring a discrimination claim outside of this 21 day time limit. However the FWA may have been the most favourable jurisdiction to them, particularly if they can bring an additional claim for dismissal because of a temporary absence for illness or injury, or because of an exercise of their workplace rights.

### **Missing the time limit – Tracy’s story**

“Sometimes it would be an effort for me to get out of bed to walk to the toilet, let alone go to work, and I’d have this boss that just doesn’t seem to understand. I’d explained the condition to him, said sometimes I’ll need a few days off work. I said I get you’re frustrated but it’s frustrating on my end as well. All I want to do is get out and work. It’s not like I’m doing it on purpose. I didn’t ask to be sick. Quite a lot of times I’d still go in and do my job even when I shouldn’t of. There’s times when I should have been resting but I’d go into work because he didn’t understand. I still did my job as best I could. I didn’t take lots of days off, I was still working 35 hours a week. But in the end I needed some time in hospital and my boss fired me for it.

I couldn’t get my claim in within the 21 days to the Fair Work Commission. I put it in late anyway but then I was told to withdraw it. I just didn’t have enough time. After I was fired I was in and out of hospital for pain management. They were giving me medication which made me really sleepy. I found it really challenging trying to get stuff done when I wasn’t well enough to even cook myself a meal or do simple basic household duties. I found it hard trying to fill out forms and that online, or ring around and make phone calls to try and find someone to help. I’m not very good with big words at the best of times, I was having to deal with all these big words, trying to read information, where to go, I was having that much trouble with it. I spent a lot of my time sleeping to try and recover which didn’t give me a chance to get it in.

If you had more time it would be easier for people when they are suffering and finding it hard to do things and they’re stressing. I’d be worrying knowing I had this deadline to meet but I couldn’t do simple things let alone get that done. I’d think ‘I’ll get up and do that tomorrow’, then you’re worrying about it in your sleep, then you get up the next day and you’re sick because you’ve been worrying about it. If you have that bit more time you’re not worrying as much so you can get it done.”

**Recommendation 8:** The FWA should be amended to extend the time for filing general protections claims involving dismissal from employment, consistent with Commonwealth discrimination laws.

### **Difficulties of proof**

The significant power imbalance resulting from the respondent’s monopoly on knowledge is partly alleviated by the General Protections provisions in the FWA. Under section 361 of the FWA an employer has the burden of proving a non-discriminatory reason for an action taken if a General Protections claim is lodged. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) outlines that this section “recognises that, in the absence of such a clause, it would often be extremely

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difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason”. The Courts have held that this first requires the applicant to establish a prima facie case that the discriminatory conduct occurred before the burden of proof shifts.<sup>23</sup> This approach is in line with the approach of comparative jurisdictions such as the United Kingdom to the employer’s monopoly on knowledge.<sup>24</sup> Our experience is that shifting the burden of proof to the employer improves the prospect of the matter resolving by agreement at a mediation as well as at hearing. This is because an employee can shift the focus of a mediation to what evidence the employer has that its actions were lawful, rather than focussing solely on the limited evidence available to the employee.

However currently it remains the case under the ADA and the DDA that the burden of proving discrimination rests with the applicant. In our view, shifting the burden of proof is key to addressing discrimination in our community. As outlined above, our experience shows that clients who suffer even the most severe discrimination regularly decide not to make a formal complaint due to difficulty proving the conduct.

Unfortunately, section 361 of the FWA has been interpreted very restrictively, so applicants have been unable to enjoy its full potential benefit. The High Court has held that the subjective reason of the decision-maker is determinative,<sup>25</sup> which means that discrimination that is unconscious or justified after the fact is likely to be lawful, so long as the reason provided for the impugned conduct is credible. The approach taken by the Courts under the DDA is more appropriate, where a discriminatory motive is not necessary to prove unlawful discrimination, and the Court will look beyond the stated reason to the real reason for the treatment.<sup>26</sup>

### **Problems of proof – Elizabeth’s story**

“I had a longstanding association, off and on, with my employer and my work is appreciated and respected in my field. A few years ago I filled a replacement contract for my employer and they appeared delighted to have me. The incumbent decided to retire and so the position was readvertised. I presumed I was a strong applicant given my experience and existing relationships with staff. When I asked about the interviews I was told sorry but I wasn’t going to get the interview, they have a policy that when someone retires they want to replace them with someone who is younger. I was told that they are “looking for a new generation”.

The person they hired instead of me wasn’t coping in the role and they asked me to step in and save them from a lot of embarrassment. When it came towards the end of the year they readvertised the position and I had an interview which I felt went very well, but I received a letter which said thank you for doing a wonderful job but you were not successful. I was dismayed and disappointed. I sought an explanation but I was not given one. I found out that the person they hired to replace me is a recent graduate with no relevant experience. When I heard that it really ruffled my feathers. If they had chosen someone maybe not as experienced as me but with some relevant experience then that’s fair, that’s their decision. But when I found out that they had only just

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<sup>23</sup> *Stephens v Australian Postal Corporation* [2014] FCA 732 (10 July 2014)

<sup>24</sup> Sex Discrimination Act 1975 (UK) c 65, ss 63A, 66A; Race Relations Act 1976 (UK) c 74, ss 54A, 57ZA; Disability Discrimination Act 1995 (UK) c 50, s 17A(1C); Race Relations (Northern Ireland) Order 1997 NI 6, art 52A; Sex Discrimination (Northern Ireland) Order 1976 NI 15, arts 63A, 66A.

<sup>25</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32

<sup>26</sup> *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92

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finished university and had no experience I felt it was a professional insult. I thought the only reason for it had to be my age.

Initially I hadn't wanted to make a fuss because I think there are always repercussions with costs with your relationships, however I soon realised that what was at stake here was my professional credibility. I think I realised that this decision was really the end of my professional career. No one is going to give me a job now for the last few years before I retire. It has had big financial repercussions for me because I still have a mortgage. I made a discrimination complaint and had a conciliation. I was still not given any explanation for why I wasn't given the job. I was not given a copy of the interview notes. I felt like I had a legitimate case but all the costs were probably far in excess of what I might get, and there was no clear evidence that I didn't get the job in the end because of age discrimination. It's all through inference, you're reading between the lines. I was seeking compensation for what I would have earned up until retirement but I settled my claim for far less."

**Recommendation 9:** After the complainant establishes a prima facie case, the burden of proving that an action is not unlawful should shift to the respondent under the ADA and the DDA consistent with the FWA.

## Discrimination on the basis of disability

The following recommendations seek to improve access to justice for people experiencing discrimination in employment on the basis of disability.

### Requesting discriminatory information

Many of our clients are placed in a difficult position when their employer requests their medical history or requests that they attend a medical assessment. Often this information is sought in circumstances where there are no reasonable grounds to question the client's fitness to work, and employers often seek access to wide ranging medical information, arguably beyond what is reasonable or necessary. An employee risks disciplinary action or dismissal if they refuse the request because they have an obligation to obey their employer's lawful and reasonable directions. While such directions may not be reasonable the employer generally believes they are and it is incredibly difficult to convince them otherwise. If the employee is dismissed for not complying then employee then must take legal action to test whether the direction was reasonable.

Section 30 of the DDA already makes it unlawful for employers to make a request for information for the purpose of discriminating against an employee. This protection does not apply if the information is required to assess whether the person can perform the inherent requirements of the job or for assessing what "reasonable adjustments" may be required. An example of what request might be unlawful is given in the section, but it does not provide guidance on when a request for information might go too far. Greater clarity is needed on the scope of the protection, to make it clear that a request for medical information must be limited to:

- the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and
- circumstances where there is evidence that the medical information requested is required.

This greater clarity would empower employees to negotiate with their employers about directions which they consider to be unreasonable.

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### **Unnecessary requests for medical information – Tom’s story**

“I’ve been trying to go back to work for a few months now. They’ve got a report saying I’m fit to start back but it’s not enough. I just feel like they don’t understand. They see me as a liability if I go back. They’ve asked for more reports about my physical injury, which is why I’ve been off work, but then they wanted me to do an independent psychiatric assessment too. It’s been a tough time for me but my doctors all say my mental health has no impact on my ability to work and it never has, so it makes no sense to insist on that. I asked them why all the reports they’ve already got aren’t sufficient and they said no, they need to have me independently assessed. I’ve already been through that and it’s tiring telling the same story all the time. I feel like they just want to get rid of me and they’re making me jump through all these hoops to force me to leave.

I feel humiliated and embarrassed actually, having to go to the doctors, having to go to the psych, having to report back. Having to go to the psych made me feel very apprehensive and insecure. They wanted to know about my background my history. There was a fair bit of personal detail that was documented. I haven’t got the report so I don’t know what’s in it. So I’m a bit unsure of what was actually documented. I don’t know if everything I told the psychiatrist has been put into writing or whether he edited it for the purpose of what my employer wants. They don’t need to know some of the stuff that I said to him. The psych said the sooner I get back to work the better, but I’m very concerned about the outcome. It’s detrimental on my health and mental state because I sit there and I wonder, and maybe I wonder too much because it’s out of my control. I’m passionate about what I do and I want to return back to work.”

### **Excessive requests for medical information – Rebecca’s story**

“I had a few days off work for a medical condition after I spent a few hours in a hospital emergency ward. I took my doctor’s advice, rested for a few days, and went back to work when my GP said I was fit to do so. When I came back to work my employer called me in and asked for full unrestricted access to my medical records. I said I’m happy to get a letter from my doctor saying I’m well, but I’m not prepared to sign all my documents over to you. I don’t believe my medical history needs to be included with my employment file. I gave them a letter from my doctor which confirmed I was fit to work but this wasn’t enough for them. They insisted on direct liaison with my doctor regarding my medical records. That scared me and I spoke to the union who told me you’re going to lose your job if you don’t release your records and kept asking me what I was scared about. I advised that it is a privacy issue.

After being back at work for some time my employer then said I had to take sick leave. They walked me out and said I couldn’t come back to work until they had my records. The union said take it to the Fair Work Commission but I said no. I never wanted to upset my employer. My union was trying to negotiate for me to come back to work but weeks went by. Everybody kept telling me we can’t help you until you get sacked. I just wanted to get back to work. I had accrued lots of sick leave before this all occurred, so you can see that I’m not a person who takes a day off on a Monday or a Friday. I was so embarrassed to be on sick leave for so long. I felt insulted that they were trying to make me sick when I wasn’t.”



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**Recommendation 10:** The DDA prohibition on requesting discriminatory information should be strengthened by providing greater clarity as to what is a reasonable request for medical information. Specifically a request should be limited to:

1. the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments; and
2. circumstances where there is evidence that the medical information requested is required.

## Strengthening reasonable adjustments

In our experience many employers are confused as to what exactly is required by their obligation to make “reasonable adjustments” under section five of the DDA. No examples are given in the section as to what kinds of adjustments are envisaged to be reasonable. One of the biggest issues our clients face is employers insisting that they be fully fit to work their full hours and duties, with no adjustments required, before they are allowed to return to work from a period of illness or injury. It would assist our clients to negotiate with their employers and avoid the need for litigation if greater guidance was provided for employers as to what adjustments might be reasonable.

Section 20 of the *Equal Opportunity Act 2010* (Vic) provides examples of adjustments that may be reasonable such as allowing the person to be absent during work hours for rehabilitation, or allowing the person to take breaks more frequently. A similar list of examples should be inserted into the DDA, including the example of a gradual return to full hours and duties.

### **Back full time or not at all – Sarah’s story**

“Prior to my heart operation my boss told me that I was not to worry about my job - it would always be there for me. Then after the operation when I dropped off my medical certificates the same boss said to me no matter how long it took my job was safe and that when I was ready to go back I could work half a day a week if that suited me and then after that I could work up to my full time hours. I was on leave for a few months recovering and then my doctor said that I could gradually return to work. After much communication (backwards and forwards) and many delays on my boss’s behalf I was then able to start back at work. I came back the first week for a half day, which I found exhausting, and then I came in the following week for 2.5 days. I was then told I could no longer do my old job and was given other jobs to do (which I had never done before). There was a lot of work involved and new skills to learn, which on top of trying to get my confidence back whilst dealing with the fatigue was extremely stressful. I was continually berated by a younger worker who said that I was slow and wasn’t including all the details required. I felt useless and very upset as I wasn’t given much training in the new role, I was just thrown the work and told to do it.

A few weeks into my return to work my boss took me outside the office door where there were no witnesses and asked me how I was. I said not too bad. My boss then said ‘will you be back to work full time in three weeks’? I said no, as discussed previously I was working on increasing my hours each week and in a couple of months I would be back full time. She then stated ‘well then I don’t have a job for you and you can go now’. At the time this whole experience of returning to work in an unknown job, the constant degrading by younger co-workers and the constant chopping and changing of my days of work was horrible. And then to be told there was no job for me was the ultimate rejection, which made me feel useless and depressed. I cried for days

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because I wasn't given a chance to recover - ask anyone who has had heart surgery how tired the operation leaves you let alone how painful it is for months.

I feel there were completely unrealistic expectations and pressure placed on my return to work. There should've been a clear and realistic return to work procedure. My mind was perfect, my body just needed to adjust to working again. I have long since recovered physically and if I had been given the opportunity I would've been back to full time work as I had originally agreed upon. It took a very long time to gain even an inch of my confidence back after this experience, and as a result of this I have never returned to the workforce, as who is going to employ an elderly lady that has had heart surgery? I have found this terribly sad as I have worked my entire life and to be treated with absolutely no dignity or compassion was appalling.”

**Recommendation 11:** The DDA reasonable adjustments provision should be strengthened by providing greater clarity as to what adjustments may be reasonable.

### **Discrimination under the *Fair Work Act 2009 (Cth)***

The extent to which the “discriminates between employees” aspect of adverse action in section 342 of the FWA extends to indirect discrimination is not yet settled. The Federal Court has held that it is open to find that adverse action could extend to indirect discrimination where the employer’s reason for imposing the “facially neutral” criterion was a discriminatory one.<sup>27</sup> This concept of “indirect discrimination” is far more limited than that under the ADA or the DDA. Under the ADA and DDA it is not necessary to prove that the employer intended to discriminate against their employees in order to find indirect discrimination occurred. Further, the Courts have held that the concept of a “failure to make reasonable adjustments” for an employee with a disability is not captured by the FWA.<sup>28</sup>

It is confusing for both employers and employees to have different protections provided by different discrimination laws. In our experience employers focus heavily on their obligations under the FWA, and are often unaware of their broader obligations under other discrimination law. It would increase compliance with discrimination law to have consistency between the Commonwealth discrimination laws.

**Recommendation 12:** The FWA should be amended to expressly prohibit indirect discrimination, to expressly require employers to make reasonable adjustments for employees with a disability, and to define key terms such as “disability” and “discriminates”.

### **Temporary absence due to illness or injury**

There is a significant disparity between the protection provided by the FWA and that provided by the DDA for employees who are dismissed for being temporarily absent due to illness or injury. Section 352 of the FWA expressly makes it unlawful for an employer to dismiss an employee because they were temporarily absent from work due to illness or injury. However there is no such express protection under the DDA. Instead, the employee must prove that the dismissal or other unfavourable treatment due to their absence from work was because of their disability. While this is certainly possible, the comparator requirement in the DDA can make it difficult for employees to satisfy the test for discrimination when they have been absent due to their disability.

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<sup>27</sup> *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402

<sup>28</sup> *Hodkinson v The Commonwealth* [2011] FMCA 171

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To further complicate things, the Courts have indicated that the FWA does not protect employees from discriminatory adverse action other than dismissal if it is taken because of an employee's temporary absence from work due to illness or injury. In the case of *Hodkinson v The Commonwealth* [2011] FMCA 171 Cameron FM found that the practical consequences of a disability, such as an absence from work, are not an aspect of a disability covered by section 351 of the FWA. In our experience, this patchwork of different protections is confusing for both employers and employees.

Many of our clients are dismissed or treated unfavourably because they have required time off work due to their disability. The client in the case study below would have had difficulty establishing direct discrimination under the DDA. The DDA should be amended to expressly cover unfavourable treatment taken by an employer because an employee is temporarily absent due to illness or injury.

### **Dismissed due to a temporary absence – Chantel's story**

"I started suffering panic attacks at work as I had become extremely stressed. This stress had a flow on affect and exacerbated my other permanent health conditions. Despite my condition, I did my best to turn up to work each day and perform my duties. I had worked for my employer for over five years.

One day I became unwell on shift and had to go home. I gave notice to a colleague and provided medical certificates, but I was told I would receive a warning for taking leave. I then took two weeks leave as recommended by my doctors. My employment was terminated when I returned to work, despite the fact that I had over 400 hours of accrued sick leave and I had provided medical certificates to cover the period off. My employer said their decision was based on my performance but I knew it was in relation to taking sick leave.

My matter settled out of court but I was still unhappy with the outcome. I wish I had been mentally fit enough to take it further. I have been unable to return to work and I now rely on Centrelink. I have become bankrupt due to what happened to me. I still have nightmares about how I was treated and struggle to be around people due to trust. Employees with disabilities need more protection and empathy from their employers as they have enough to cope with already."

**Recommendation 13:** Insert a provision into the DDA to make it unlawful to dismiss an employee due to a temporary absence for illness or injury, to bring it in line with the FWA.

## **Discrimination on the basis of age**

The following recommendation seeks to improve access to justice for people experiencing discrimination in employment on the basis of age.

### **Grandparents with carer responsibilities**

Increasingly grandparents who seek to remain in the workforce take on carer responsibilities for their grandchildren.<sup>29</sup> This may take the form of a school pick up a few times a week, or a full day or two

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<sup>29</sup> According to the Australian Bureau of Statistics grandparents now provide child care for almost one-third of children of working parents. See: ABS Media Release, 'Grandparents are the main providers of informal care for children of working parents', 28 April 2015, accessed online:

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of care every week or in the school holidays. In order to gain access to or remain in the workforce grandparents may need some flexibility with their hours and days of work. Unfortunately there are currently limited protections under discrimination law for grandparents. Under the *Sex Discrimination Act 1984* (Cth) protection from discrimination based on family responsibilities is limited to direct discrimination. This restricts the ability of grandparents to negotiate with their employers to reasonably accommodate their responsibilities to their grandchildren.

**Recommendation 14:** That the ADA be amended to require employers to make reasonable adjustments for grandparents with carer responsibilities.