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

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# Introduction

Thank you for the opportunity to make a submission to the Australian Human Rights Commission’s inquiry into employment discrimination against Australians with disability.

The following provides information on the situation within Tasmania and includes a summary of complaints received by me in relation to this issue.

I would be happy to elaborate on these issues should you wish me to do so.

Robin Banks

Anti-Discrimination Commissioner (Tas)

# Background

## The Tasmanian situation

Almost one quarter (24.6 per cent) of Tasmania’s population has a disability making it the jurisdiction with the highest prevalence of disability in Australia.[[1]](#footnote-1) This is, in part, due to the older age profile of the Tasmanian population. Approximately fifty-five per cent of Tasmanians aged 65 years and older have disability.[[2]](#footnote-2)

Approximately 75,300 Tasmanians between the ages of 0 and 64 have a reported disability. Of these, approximately:

* 8,200 have profound core-activity limitation;
* 13,100 have a severe core-activity limitation;
* 12,700 have a moderate core-activity limitation;
* 22,400 have a mild core-activity limitation; and
* 51,000 have a schooling or employment restriction.[[3]](#footnote-3)

Of those who have a reported disability and are aged 15 years and over, 17.7 per cent are wage or salary earners and a further 3.4 per cent derive their income from business.[[4]](#footnote-4) The majority, however—62.3 per cent—are reliant on a government pension or allowance as their primary source of income.[[5]](#footnote-5)

The workforce participation rate for those with a reported disability aged 15–64 years and living in households is 45.8 per cent, compared with 81.3 per cent for those with no reported disability. The unemployment rate for those with a reported disability is 14.9 per cent compared with around 6.6 per cent for the population as a whole.[[6]](#footnote-6) This is the highest unemployment rate for people with disability across all states and territories.

Low employment rates mean the majority of Tasmanians with a reported disability have low income, with over 37 per cent reporting gross income in the lowest income bracket compared to 14.6 per cent for those with no reported disability, and over 60 per cent of people with a reported disability reporting their household income in the two lowest income brackets.[[7]](#footnote-7)

There are many factors contributing to the low employment rates of people with disability in Tasmania. These include lack of support from employers, slow implementation of national disability standards, and failure to provide people with disability with adequate opportunities to gain meaningful work. The failure to respond appropriately to workplace injury also remains a significant barrier to ongoing labor force participation.

The following sections examines these and related issues.

# Barriers to employment

## Overarching issues

There are a number of issues that are not directly referred to in the Issues Paper[[8]](#footnote-8) that are important considerations for this national inquiry.

* quotas and preferential contracting;
* targets;
* sources of barriers to employment;
* need to focus on proactive rather than reactive approaches;
* impact of workplace culture on disclosure of disability;
* government approaches to public sector workplace adjustment funding.

### Quotas and preferential contracting

Australia has shown a general reluctance to adopt quota systems to achieve equal opportunity for members of various identified equality seeking groups. Similarly, there has been little or no use of government contracting capacity to encourage improved employment outcomes for equality seeking groups in the non-government sector. The continuing low levels of employment of people with disability in both government and non-government sectors suggests consideration should be given to implementing quotas and/or preferential contracting.

A possible approach would be to implement quotas for government (federal, state and territory) employment in the first instance and then extend it to larger private for-profit and non-profit organisations that are contracted by governments. An alternative to extending quotas to the non-government sector would be to require entities seeking to contact with government, whether to provide facilities, services or equipment, to demonstrate progress towards improved levels of employment of people with disability or compliance with equal employment standards. The latter reflects the approach taken under the Canadian *Equal Employment Act 1995* that is discussed in more detail below under ‘Limits of current legislation’.

### Targets

Targets are a softer option than quotas and, because of this, are arguably less likely to be effective in achieving real and continuing improvement in access to equal employment opportunity for people with disability.

### Sources of barriers to employment

There are arguably three sources of the barriers to employment of people with disability.

The first is the attitudinal barrier: both conscious and unconscious views about people with disability strongly influence the likelihood of a person with disability being seriously considered for employment. Attitudes are also likely to shape the aspirations of people with disabilities as they move through the education system and into their adulthood.

The second is the systemic barriers associated with inaccessible buildings, information and technologies include information technology. These have effect through unconscious but systemic practices that perpetuate the use of inaccessible buildings for work places, inaccessible information provision mechanisms for work place and employment information, and inaccessible technologies as work tools. It should be noted that it is not uncommon for organisations to only consider the accessibility of their work premises when they are concerned about members of the public visiting. This indicates a lack of awareness that a person with disability may well seek to become not just a visitor, but an employee.

The third is the impact of lower educational opportunities for people with disability. This can include not only limited access to in-school learning, but also reduced opportunities to participate equally in work experience or work placement opportunities in both compulsory and tertiary level education.

Each of these sources is likely to require a different approach and different strategies.

### Proactive rather than reactive approaches

There is a need to proactively address workplace accessibility as thoroughly as possible to minimise the need for individual accommodations and then the need for an effective, responsive and portable individual accommodation policy and procedure to implement as needed. This is discussed in a little more detail under ‘Barriers in education’ below.

### Impact of workplace culture on disclosure of disability

A common question from employers is about whether or not a person with disability is required to disclose their disability and why a person would be reluctant to do this.

The experience seen through numerous enquiries and complaints suggests that disclosure to an existing or prospective employer is a matter of significant concern to many people with disability. There is a perceived if not actual high risk that the employer will not respond appropriately and the disclosure will result in either being excluded from a recruitment process or existing employment being placed in jeopardy.

Unless and until employers consistently demonstrate they are ready, willing and able to respond appropriately to the disclosure of disability, people with disability will continue to be reluctant to disclose. This has the effect of reducing the likelihood of a person seeking and obtaining necessary workplace adjustments.

### Government employment and access to funds for workplace adjustments

It may be useful for this national inquiry to examine the approaches taken within public services to the process for and provision of workplace adjustments (both in recruitment and employment). A question to consider is whether having a centralised process and budget for workplace adjustments might reduce the chances that individual managers might effectively exclude someone out of concern their own budget will have to meet costs.

## Inquiry 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?

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

Accessing meaningful employment opportunities remains a significant barrier for people with disability, particularly in Tasmania.

Limited progress has been made in addressing systemic and procedural barriers to employment:

* Many workplace locations remain inaccessible.
* Selection criteria continue to include discriminatory elements.
* Job advertisements are in many instances non-inclusive.
* Work place adjustment programs continue to be under-utilised.

Increasing the employment levels of people with disability requires:

* flexible recruitment processes;
* tailoring of jobs to individual capabilities and needs (including the provision of reasonable adjustments and assistive technologies);
* flexible working hours and conditions; and
* adaptable work options that are able to be changed over time according to the person’s disability.[[9]](#footnote-9)

For these strategies to be effective, there is also a need for:

* effective training for all people involved in recruitment to ensure they understand the way in which inappropriate recruitment practices can creates barriers to employment and employment opportunities;
* the development and implementation of effective workplace adjustment policies and procedures; awareness of the availability of funding to support workplace adjustments; and
* further and continuing improvements to accessibility of communications, information technology, and physical environments of workplaces.

Full implementation of the National Disability Insurance Scheme (NDIS) may act to shift some of the intractable problems associated with employment of people with disability through reform in the way in which disability employment assistance is provided.

Changes to disability income support arrangements and the Federal Government’s current review of employment support for people with disability are also likely to drive changes in the approach to addressing barriers to employment for people with disability, including the development of a more individually focussed approach.[[10]](#footnote-10)

These changes are, however, unlikely to be sufficient unless there is a significant change in awareness about disability and to the attitudes and behaviours of employers to the recruitment of people with disability.

While many organisations strive for a diverse workforce, the reality is that most fall short of this ambition particularly when it comes to hiring and retaining people with an illness or disability.

The culture of many organisations continues to undervalue diversity and exclude from the workforce those who are perceived as ‘different’, including those with disability. This is due to a range of factors, including the following:[[11]](#footnote-11)

* A perception that employing people with disability may involve higher costs to the organisation, including the need to make expensive adjustments.
* Assumptions that people with disability are less capable of performing satisfactorily, especially in pressured working environments that are short on resources, and may require extra support to do their job.
* A lack of confidence in (and awareness of the needs of) people with disability, including a fear the employee might be easily offended and/or behave inappropriately and/or underperform.
* A tendency for hiring managers to focus on the ‘type’ of disability rather than the particulars of an individual’s condition, work capacity and support needs.
* A lack of interest and direction from senior management and hiring managers to making a commitment to the employment of people with disability.
* The existence of recruitment hurdles, such as (potentially discriminatory) job requirements and conditions and recruitment processes that are not accessible in both communication and physical terms.
* No real understanding of the arrangements and funding attached to supporting the placement of people with disability in employment.
* A lack of commitment, funding and/or administrative flexibility to allow for the creation of specific roles for people with disability by combining unfulfilled or under-resourced work tasks.

At the same time, there is low recognition of the fact workers with disability can be more effective, loyal and reliable; often have low rates of absenteeism and can be more innovative in looking for ways around problems because of their day-to-day experience of doing so in a broad range of circumstances.

It is important that, as a matter of priority, focussed effort is directed at changing the perceptions of employers and shifting negative or uninformed attitudes towards employing people with disability.

This effort must begin at the highest leadership levels of organisations. Of particular importance is leadership establishing an expectation that people with disability will be recruited and recognising the benefits of diversity is adopted as a core value.

The Productivity Commission has suggested the Federal Government pursue greater engagement with lead businesses and business groups to develop a national corporate disability employment strategy. According to the Productivity Commission:[[12]](#footnote-12)

A possible strategy is greater engagement by government with lead businesses and business groups, with the goal of formulating a broader corporate disability employment strategy run by business (a kind of job compact). This would be a low cost measure for government. Businesses often are willing to participate in social programs if it aligns with their business interests, helps bolster the community’s view of them, and increases cohesion and morale in their workforce.

This strategy could be run along similar lines to that adopted by the Male Champions of Change process implemented to promote increased representation of women in senior corporate positions.

At the same time, a greater effort is required to ensure all Australian government agencies remove barriers in recruitment processes that have the potential impede the recruitment of people with disability. To assist in addressing these concerns, each jurisdiction should be required to develop a Disability Employment Strategy to increase employment opportunities for people with disability, including improved efforts to retain people who sustain workplace injury.

Key strategies should include:

* improved understanding of rights and responsibilities under discrimination law;
* action to address harmful stereotypes and misconceptions about disability;
* actions to identify discriminatory practices;
* ensuring effective legal standards are adopted and implemented; and
* identification of key performance indicators and enhanced monitoring of progress toward improved employment outcomes for people with disability.

## Discrimination in recruitment practices

Recruitment practices often favour candidates without disability because of aspects of the actual process that create barriers to the recruitment process and/or the inclusion of requirements that create barriers to employment. The provision of recruitment information only in inaccessible formats creates a barrier in the recruitment process itself. A selection criteria requiring an applicant to hold a driver’s licence creates a barrier to employment.

Discriminatory practices in recruitment affect people with the full range of disability, but most particularly people with visible disability, those who require a workplace adjustment and people whose past (and sometimes present) disability resulted in worker’s compensation being claimed. The way in which discriminatory practices manifest often differ between these groups, but all have the effect of excluding people from equal employment opportunities.

A review by the Tasmanian Office of the State Service Commissioner in 2012 into the recruitment of people with disability into the State service, found that agencies advertising positions often included a number of requirements that created barriers to people with disability. This included:

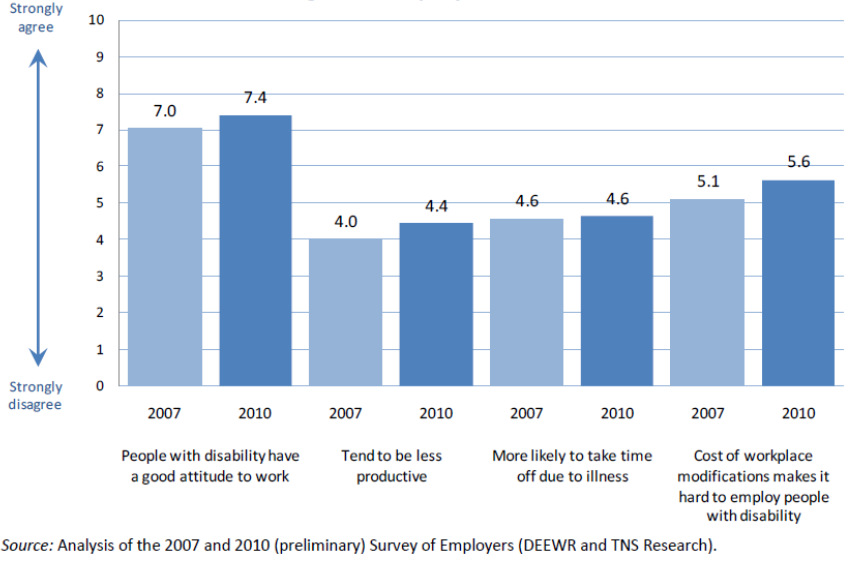
* statements of duties not reflecting the inherent requirements of the job;
* statements of duties specifying how outcomes are to be achieved rather than what is to be accomplished; and
* the specification of a requirement of a type less likely to be met by a person with disability.

The most common characteristics causing concern were:

* specified hours of work (whether the number or the span of hours);
* health and fitness standards;
* the requirement to hold a specific education qualification; and
* the requirement to hold a driver’s licence (and similar).

Research on employer attitudes and perceptions conducted in 2011 by the (then) Department of Education, Employment and Workplace Relations show a consistent pattern over time in relation to hiring manager attitudes toward the recruitment of people with disability.[[13]](#footnote-13)

While most consider people with disability have a good attitude toward work, there is still a perception among those responsible for recruitment that people with disability are less productive; more likely to take time off work; and cost more money to employ.

Hiring manager attitudes research by DEEWR 2007 and 2010

Discriminatory practices at the recruitment stage are a significant source of complaint to Equal Opportunity Tasmania.

Case examples

Z alleged he was unsuccessful in his application to work because of his vision impairment despite being cleared by a medical professional to undertake required tasks and having successfully demonstrated his ability to do the job in previous employment.

D alleged she was told by a prospective employer she was unsuccessful in her application for a job after a referee advised of a previous worker’s compensation claim.

W alleged disability discrimination because he was not offered a position after disclosing in a pre-employment psychometric test that he had taken medication for a psychological condition.

J alleged he was told he was not successful in getting a job he applied for because he had previously made worker’s compensation claims.

P alleged she was not offered employment because of a back injury he alleges would not prevent him from doing the required work.

K alleged that, after being initially told he was successful in securing a position, he was told he was not suitable after a medical assessment disclosed he had a spinal fusion. K alleged this action was discriminatory as his injury would not have prevented him from performing the job for which he was applying.

S alleged he was required to undergo psychometric testing as part of his application for a position. He indicated, through completing the test, he had, at one stage, had suicidal thoughts. He was later informed he had ‘failed’ the test and would not be considered suitable for employment. S alleged disclosure of past suicidal thoughts contributed to him not getting the job.

G alleged he participated in an induction program for a new position and was to also have a medical examination. The medical examination was cancelled and he was told he was no longer required because he has depression and was seen as a risk.

E alleged he applied for a position within a government agency. On the application form he advised he would require a workplace adjustment to enable him to complete the required tasks. The contact officer for the position asked him why he was even applying and told him he would not get the job.

It is clear from these and other experiences that greater effort is required to ensure that employers adopt more inclusive recruitment practices. This should include:

* review (by person with appropriate expertise) of job requirements to ensure they reflect the inherent requirements of the job;
* review of recruitment processes, including communication, pre-recruitment and pre-employment testing to identify any potentially discriminatory barriers and ensure all potential restrictions on equality of opportunity are removed;
* training of all selection panel members to ensure they understand the employer’s obligation to consider all applicants on their merit and not exclude a person based on conscious or unconscious beliefs or perceptions about disability, and they understand the process for considering adjustments both in the recruitment process and in the workplace;
* separation of consideration of recruitment process adjustment and workplace adjustment from the selection panel’s consideration of candidate merit;
* a clear EEO statement in all job advertisements;
* provision of communication supports at interview;
* inclusion of people with disability on selection panels;
* use of inclusive interviewing techniques; and
* development of workplace diversity plans.

## Understanding inherent requirements

An increased emphasis on understanding the inherent requirements of a position may act to remove unnecessary requirements imposed on job seekers.

Job characteristics include:

* duties to be performed, that is, what the incumbent is expected to accomplish;
* skills, qualifications and personal qualities required to accomplish what is expected;
* level of responsibility associated with those duties;
* essential requirements for the performance of those duties;
* hours of work, location, special equipment to be operated, etc.

Non-essential criteria should not be included as part of the job description and the focus should be on what needs to be done, rather than how or when the work should be done or what level of education previous incumbents have had. Such requirements represent real barriers to the recruitment of people with disability, and they are so widespread they contribute to discriminatory recruitment practices.

The production of good practice guides may assist in this regard. Such guides should cover all stages of the recruitment and selection processes.

## The role of government and government-funded institutions

Government bodies have an important role to play in demonstrating best practice and should be central to any renewed efforts to improve employment levels for people with disability.

A core objective of the Tasmanian Government’s *Disability Framework for Action*, for example, is to increase employment opportunities for people with disability as a key to improving their economic security and personal wellbeing. Areas for action identified in the *Disability Framework for Action* include:[[14]](#footnote-14)

* raising awareness of the capacity and contribution of people with disability as workers and volunteers, including providing information and assistance to employers to support workforce participation;
* strengthening the support system for the transition from school into post school education, training or employment for people with disability; and
* facilitating social enterprise as a means of raising employment and enterprise opportunities in the private and community sector for people with disability.

Unfortunately, however, in Tasmania and other jurisdictions the level of Government recruitment of people with disability is well below expectation and relies far too heavily on individual managers who may have little understanding of how to meet the obligation to provide equal employment opportunity for people with disability, or support to do so.

The Tasmanian Government has in place a number of programs aimed at improving the levels of employment of people with disability in the State Government sector. These include the following:[[15]](#footnote-15)

* **The People with Disabilities Employment Register**: the Register is a joint arrangement between the State Government and Disability Employment Service providers. It provides an additional entry point for recruiting people with disability into the State service. It applies only to fixed-term vacancies of up to 12 months duration with a classification up to General Stream Band 4 or equivalent.[[16]](#footnote-16)
* **Graduate Program for People with Disabilities**: This program was established in 2010 to assist agencies with costs related to appointing a person with disability.[[17]](#footnote-17)
* **Learning and Development**: training aimed at increasing awareness and building confidence in managing and working with people with disability has been developed for state service employees and is part of the State Government’s general learning and development programs.
* **Australian Government Employment Assistance Fund**: information is available online to State Government Agencies about the fund.[[18]](#footnote-18)
* **Willing and Able Mentoring Program**: this program matches tertiary students with disability to a mentor in an organisation and area in which the student hopes to establish a career. The State Government works in collaboration with the University of Tasmania in this program.

Despite this, investigations into the diversity of the Tasmanian public sector have consistently shown low levels of employment of people with disability.[[19]](#footnote-19)

* The Graduate Program for People with Disabilities is under-subscribed.
* Only 0.5 per cent of vacancies are filled by people with disability.
* Use of the People with Disabilities fixed-term employment register is low.
* Few employees are undertaking specific disability-related training.

Agencies advised they filled 1,910 permanent vacancies in the State Service in 2009–10, with three of these filled by people with disability (one full-time and two part-time vacancies). This represented less than 0.2 per cent of all permanent vacancies filled. Similarly, agencies advised there were 2,082 fixed-term vacancies filled in 2009-10, with 18 of these filled by people with disability (four full-time and 14 part-time vacancies). This represented less than 0.9 per cent of all fixed-term vacancies. It is presumed the disability status of these 21 people had been disclosed at recruitment.

More recently, a survey of Tasmanian State Service employees and officers reported that 3.2 per cent of respondents indicated they have an ongoing disability, 66 per cent of whom reported requiring a workplace adjustment or other accommodation.[[20]](#footnote-20) However, the majority of survey respondents (88.19 per cent) indicated disability was not a barrier to success in their organisation.

At the national level, the number of people officially disclosing disability in the Australian Public Service has steadily declined from 4.8 per cent in 1999 to a low of 3.3 per cent in 2011, increasing slightly to 3.5 per cent in 2015.[[21]](#footnote-21)

Separations from the Australian Public Service through retrenchment are also higher for people with disability than for the rest of the Service (46.4 per cent compared with 41.4 per cent).[[22]](#footnote-22) Comparative figures for the recent staffing reductions in the Tasmanian State Service are not yet available.

Of particular concern are figures showing 60 per cent of Agencies do not have a formal whole-of-agency strategy in place to support the employment of people with disability.[[23]](#footnote-23)

It is imperative, therefore, that state, territory and federal governments show leadership in removing workplace barriers that negatively affect the opportunity for people with disability to find and retain employment.

As outlined in earlier comments, each jurisdiction should be required to develop a whole-of-Government Disability Employment Strategy to increase employment opportunities for people with disability, including improved efforts to retain those who sustain workplace injury.

## Underuse of employment assistance programs

Australian Government funding for adjustments that may not otherwise be made because of ‘unjustifiable hardship’ have the capacity to contribute toward increasing employment opportunities for people with disability.

There are several government programs aimed at assisting people with disability find employment.[[24]](#footnote-24) These include the following:

* **Disability Employment Services:** provides specialist employment assistance to find and keep employment in the open labour market and is able to provide support to employers. As at March 2015 there were 170,000 participants in the DES program.
* **Job Active:** provides services to all job seekers to assist in meeting mutual obligation requirements. As at February 2015, 221,759 of Job Active’s 828,852 clients were identified as having a disability.
* **Australian Disability Enterprises:** provides supported employment for people with disability with ongoing assistance requirements.

At the same time there is a broad range of support for employers to assist them employ a person with a disability, including the following:[[25]](#footnote-25)

* **Employment Assistance Fund:** provides assistance to pay for special equipment, modifications and services required by a person with disability to do their job.
* **JobAccess:** free website and telephone information service providing advice to employers and people with disability, including assistance available through Employment Assistance Fund.
* **Supported Wage system:** allows employers to pay a productivity based wage to people whose work productivity is reduced because of disability.
* **Wage Subsidy Scheme:** provides funds to employers to employ people with disability in open employment at award wages.
* **National Disability Recruitment Co-ordinator:** aims to develop agreements with large employers to increase their employment of people with disability.
* **Job in Jeopardy Assistance:** provides assistance to people in the workforce who are at risk of losing their job due to the impact of injury, disability or health condition.

Use of these programs, however, is variable:[[26]](#footnote-26)

* In 2013–14, the Employment Assistance Fund received 4,080 applications for assistance and provided assistance to 2,787 people with disability.
* For the same period, the Wage Subsidy scheme supported 16,023 job placements, with only 6,838 of these positions reaching a 26-week outcome.
* The National Disability Recruitment Co-ordinator negotiated 53 new agreements projected to create approximately 700 job vacancies by the end of 2014–15.
* Between March 2010 and 31 August 2014, 5,283 people received Job in Jeopardy assistance, of whom 3,406 remained in their jobs after assistance was provided.

Underuse of employment assistance programs in particular represents a significant missed opportunity for many employers. In Tasmania, recent work with State Government agency staff with carriage of employments aspects of the *Disability Framework for Action* indicates a very low level of awareness of the assistance, including financial assistance, available to support the employment of people with disability and to make necessary workplace adjustments.

The Federal Department of Social Services indicates a number of recurring themes are evident in relation to the employment of people with disability:[[27]](#footnote-27)

* lack of awareness of government supports available, including ongoing support once a person is placed in a job;
* need for greater emphasis on training and job satisfaction and suitability over job placement;
* need to relax prescribed administrative requirements of employment services to create a system which is flexible and meets individual and changing needs; and
* misconceptions about employing people with disability.

The Federal Department of Social Services is currently conducting a review of the disability employment system, with a view to developing a new National Disability Employment Framework. The release of a detailed options paper is expected in the first half of 2016.[[28]](#footnote-28)

## Return to work from injury and illness

Maintaining attachment to the workforce is critically important to those who are injured or ill whilst employed.

Unfortunately, however, discriminatory treatment following a period in receipt of worker’s compensation or sick leave remains all too common.

In Tasmania, for example, a recent report by the Auditor-General into the cost and management of absenteeism in the Tasmanian State service related to personal leave (which includes both sick and carer’s leave) indicated that personal leave is inconsistently and under-managed across the service.[[29]](#footnote-29)

Of critical concern to the Auditor-General was the approach taken by Agencies to the management of staff back to work following long-term absence.

Early support and contact is essential to assisting people return to work from significant injury. Where long-term absences are not actively managed, the employee’s engagement with the employing organisation is reduced and this may lead to longer absences or disconnection from the labour force entirely.

This should include regular contact with employees who have been injured or have taken extended sick leave, and structured return-to-work arrangements that enable their work to be managed to suit their particular situation.

It is evident from a significant number of complaints and enquiries received by Equal Opportunity Tasmania, that the response by employers is negative and often results in a loss of employment.

Case examples

G alleged discrimination on the basis of disability when she was treated less favourably after returning to work after absence while in receipt of worker’s compensation. This included a significant change to her roles and functions and ongoing bullying and harassment.

G alleged he was bullied and harassed at work and then subjected to harsh comments whilst in receipt of worker’s compensation. He eventually resigned.

L is a casual employee who required time off work due to illness. L alleged she rang her employer after she had recovered to say she was fine to go back on the roster. No-one called her back and she is worried she no longer has a job.

G alleged he sustained a workplace injury and was receiving worker’s compensation for a period of several months. On return to work, his working hours were reduced.

B was seeking a graduated return to work after recovering from a mental illness. She contacted EOT as she alleged she was having difficulties in negotiating adjustments.

X was concerned that putting in a worker’s compensation claim could disadvantage future employment in the industry.

T alleges she was injured at work at a major retail outlet, suffering significant damage to her shoulder. She had 2-years of treatment and was then given clearance to return to work with restrictions. T was moved to a job that required her to stand for lengthy periods. This contributed to her developing severe osteo-arthritis in her knees. T sought workplace adjustments, including using a stool to sit during her shift and introduction of variety in tasks. After consultation with the company’s HR department, T’s employment was suspended and then terminated on the basis she was unable to safely carry out the inherent requirements of her pre-injury duties and accommodating her requirements would cause unjustifiable hardship for the company.

M had worked for approximately 10 years with a residential care service provider. Before commencing employment he injured his back. M alleged this injury was exacerbated when he was required to work from a different location doubling his travel time, and required to undertake work that posed a greater risk to his back. After some months he returned to his previous position. His manager then asked him to undergo a physical assessment to determine if he could fulfil the tasks associated with his position. The assessing doctor recommended a number of restrictions. Despite this, M was advised he would be transferred back to the position he considered would exacerbate his back injury. His employment was eventually terminated.

L alleged she was forced to resign after taking sick leave for depression.

P alleged he sought a workplace adjustment to accommodate a permanent physical disability caused by his work. Assistance was provided, but on the basis he was physically relocated away from his work colleagues. Following this, P was placed on the redeployment list.

A alleged she was injured at work and claimed worker’s compensation. After she was given full clearance A returned to work but the number of shifts she was allocated was cut.

D alleged he suffered a subarachnoid haemorrhage and had to take time of work as a result. When he was cleared to return to work full-time he was told that his position was no longer available. His employment was then ended.

N was a public servant. After being injured at work, N took leave and received worker’s compensation. N alleged that on return to work her manager was making life difficult for her as ‘pay back’ for her compensation claim.

After returning to work following a worker’s compensation claim, M alleged her employer was bullying her. She believed his behaviour was related to her compensation claim.

W alleged he was made redundant because his new manager considered he was obese. W had been performing the role effectively for some time. His manager offered to assist him with an application for a disability pension.

E alleged her employment was terminated due to a workplace injury.

Following a diagnosis of multiple sclerosis, E alleged he was demoted and is now in risk of losing his job.

C has an acquired brain injury. Affects of this injury include C angering quickly and venting his frustration by talking to himself. He also tends to talk to co-workers whilst doing his work in a commercial kitchen. His employee was made aware of C’s disability and its effects by C’s employment service provider at the time of his appointment. C alleged that after 3 months in the position, C’s employer told him to be quiet and an argument ensued resulting C losing his job. C’s employer told him his employment had been terminated because C had been abusive.

X is diabetic. X alleged that after one of his insulin needles in its secure container dropped out of his bag he was given a ‘first and final notice’ by his employer.

L has asthma. L was an apprentice in the fisheries industry. L alleged that, despite having told the company of his condition before commencing employment, he was required to work in circumstances where he was not able to access ventolin and when he did have an attack he was not believed and his access to medication was restricted. Medical certificates L provided to his employer for related conditions were not honoured.

J alleged his employer is used a previous shoulder injury against him in relation to pay rates and tasks assigned to him.

B worked as a volunteer at a large hospital. She had done so for 14 years. She alleged she was told she had lost her position because she uses a crutch as a mobility aid. She was also told that no-one with a disability would be given a position because occupational health and safety rules would not allow it.

S had been working in his position for more than 30 years. He had told management he has had seizures, but had not had any for some years. S alleged that, after having a seizure at work and taking a period of sick leave, he was transferred from his substantive position despite medical advice indicating he was fit to return to work with limited restrictions.

R has Asperger Syndrome and was employed with his parents through an assisted employment arrangement. His parents were allegedly told their agency license would not be renewed if they continued to offer him employment. He believes it was because of his disability.

F alleged her worker’s compensation assessment process included false information about an imputed mental illness.

B was injured at work and received worker’s compensation. After a period of recuperation his doctor gave him a medical certificate certifying he was fit to work with some restrictions. B alleged his managed yelled at him saying ‘what good are you going to be?’

While the establishment of processes to facilitate a return to work must be the immediate focus, arrangements to maintain employment in the longer term are also critical. There is evidence in current and past complaints of a pattern of completing a return-to-work program and then terminating the employment. This suggests some employers do not have the same attitude to compliance with their obligations under discrimination law as they do to their obligations under worker’s compensation law.

A strong theme in the complaints received by my office is the lack of willingness on the part of some employers to ensure that support needs are met and that appropriate adjustments are provided to facilitate ongoing employment. This is despite a number of the required adjustments being minimal in nature and/or cost. It appears that problems arise because of, among other things:

* lack of awareness of the employer’s obligation to consider workplace adjustments;
* lack of process for properly considering a workplace adjustment requests;
* lack of awareness of programs available to assist with the cost of making a workplace adjustment; and
* changes to management with little or not handover in terms of information about current employees with workplace adjustments in place.

Case examples

C alleged her employment was terminated after she developed an allergic reaction that triggered the recurrence of a longer-term medical condition. Whilst the allergy was resolved, the longer-term condition remained and she was transferred to a temporary position. The company advised it was not able to find her suitable alternative employment and her employment would be terminated. This was despite the fact other employees had been relocated into positions that were not available to her. It appears C was not consulted about options for workplace adjustments or alternative roles.

S was relocated to a new position within her organisation. She made a complaint in which she alleged that in doing so her employer refused to take account of the adjustments she required to her work arrangements to accommodate her disability. These adjustments had been in place for some time. She alleged she was threatened because she raised her need for these adjustment and was then required to participate in a review of her work and performance.

P requires the use of a toilet frame. P alleges that for 3 years she has been asking her employer to make one available at her place of employment, but it has not been provided.

A was moved to a position by her employer that required a larger amount of computer work, report writing, etc, that aggravated an earlier injury. She alleged she was placed in the position so she would be identified as surplus to requirements.

There is no disability parking at R’s workplace, which means she has to compete with other employees for parking. R cannot walk even short distances due to her disability. At times R has been forced to double park. This has led to confrontations with others. She alleged she raised the situation with management and was told to park her car on the street some distance away and walk. She is too unwell to do that.

A worked for 10 years at an aged-care facility. A alleged that following a car accident A was placed in an area which did not accommodate her needs relating to recovery from the accident. She asked to be moved to another area but this was refused. A resigned.

K’s partner alleged he was injured at work. This was disputed by his manager and the recommendations of his rehabilitation provider were ignored. As a result K’s partner suffered a further injury.

S’s daughter works at a large multi-national fast food chain where she must wear gloves when preparing food. She has recently been diagnosed with an allergy to latex and petro-chemical products that make her hands itch and the skin peel and bleed. A copy of a letter from her medical practitioner was given to management and they were asked if they could assist by supplying latex-free gloves or give her other duties. S alleged the employer had done nothing.

## Flexible workplace practices

Flexible working conditions are an essential precondition to the successful and ongoing employment of people with disabilities.

It is clear, however, that in many cases access to flexible work arrangements remain aspirational for people with disability.

Case examples

L alleged his request to work permanent part-time to enable him to better manage his depression was rejected.

H alleged her contract was not renewed after she disclosed she had recently been diagnosed with multiple sclerosis and sought reduced working hours while she worked with her doctor to identify how to minimise the impacts of the condition on her day-to-day life and work.

Consultations undertaken by the Federal Department of Social Services as part of the development of a new National Disability Employment Framework received strong support for the principle of building employment assistance around career planning.[[30]](#footnote-30)

Options such as part-time work; working from home and other flexible work arrangements that support the capabilities of job seekers were supported, as was the need for a career planning process that adjusts to the episodic nature of mental illness.

It is important, however, that any proposal to change work arrangements is mutually agreed with the employee. Unfortunately, there are many instances where proposals to reduce working hours or otherwise alter working arrangements on the basis of a person’s illness or disability are not voluntary and there is no effective consultation.

Case examples

H alleged his hours were reduced to part time because he has multiple sclerosis. H is concerned his employment is going to be terminated.

M alleged he was being bullied into signing an agreement to convert him employment status from permanent to casual because he has leukaemia.

A alleged bullying and harassment by his employer. A was told he shouldn’t have got the job because of his history of mental illness. Since this incident, A’s hours of work have been cut and he has been allocated tasks he does not have expertise to complete.

## Interaction with support systems

Several factors discourage people with disability from entering the workforce. Those with high medical costs, for example, may lose access to low-cost or subsidised medical services and products available to them if they are in receipt of a Disability Support Pension.

Some people with disability may have to choose between the continued receipt of a social security income and support and paid employment. It is not always clear that entering the labour force represents a net positive gain, particularly in situations where medical and other costs are high.

Further research into the interaction between paid employment and funding support provided under disability support programs (including transitioning in and out of the workforce) is critical to fully understanding the impediments to those who wish to work doing so.[[31]](#footnote-31)

It may be that some improvements result from recent changes to the income support system, including:

* adjustment to the level of income that can be earned by people before losing access to the Disability Support Pension;
* lifting of restrictions on the number of hours worked;
* clearer guidelines about re-qualification for the Disability Support Pension; and
* review of the way in which allowances are made available.[[32]](#footnote-32)

For some people with disability lack of access to regular, reliable and sufficient support to get ready for work and get to work on time are an absolute bar to obtaining or maintaining employment. This can include the problem of having to rely on limited taxi services due to lack of other forms of accessible public transport.

## Mental health services

Around 230,000 people receiving a Disability Support Pension in 2010 recorded a psychiatric or psychological condition as their primary disability, making these conditions the single most common form of disability for men and the second most common for women.[[33]](#footnote-33)

Whilst many mental health conditions persist throughout a person’s lifetime, many respond well to appropriate treatment and supports and the episodic nature of some illnesses require a different approach to those with permanent and static conditions.

The National Mental Health Commission (NMHC) estimates around 37.6 per cent of people with mental illness (and 67.3 per cent of people with severe mental illness) are not in the labour force and that those will mental health difficulties have lower high school completion rates and experience greater levels of poverty.[[34]](#footnote-34)

It is also apparent from the complaints received by this office and discussions in training and community forums that a diagnosis of a mental illness can often poses a risk to ongoing employment for those in paid employment. There appears to be an all-too-common view that others in the workplace have a right to know about a colleague’s mental illness, to talk about it to others, and that such illness is not compatible with ongoing employment.

Case examples

P alleged disability discrimination in employment following the termination of his employment. P alleged his employment was terminated after he was diagnosed with clinical depression.

F alleged she was unfairly treated in her employment and subsequently dismissed following her diagnosis with depression.

S alleged his position was made redundant following a period of sick leave due to stress associated with an increased workload and mental fatigue.

In addition to enormous social impacts, the estimated economic cost of mental illness ranges up to nearly $30 billion per year, with a further $12 billion in costs arising from lost productivity and job turnover:[[35]](#footnote-35)

The cost of mental ill-health for the individuals concerned, employers and society at large are enormous… Most of these costs do not occur within the health sector. Mental illness is responsible for a very significant loss of potential labour supply, high rates of unemployment, and high incidence of sickness absence and reduced productivity at work. In particular, mental illness causes too many young people to leave the labour market, or never really enter it, through early moves onto disability benefit. Today, between one-third and one-half of all new disability benefit claims are for reasons of mental ill-health, and among young adults that proportion goes up to over 70 per cent.

Re-focussing the mental health system is a priority for mental health advocates, in part to achieve better economic and social outcomes for those with mental illness.

Structural reforms announced by the Australian Government in November 2015 may go some way toward addressing concerns by re-orienting mental health services toward a more holistic approach to mental health care, including more focussed attention on improving employment rates.

It is imperative that action is taken to improve awareness of the impact of mental illness on employees and strategies are developed to improve the retention rate of those who are subject to a mental health diagnosis. This must include much greater awareness among managers and supervisors of how to effectively and appropriately discuss mental illness and possible workplace adjustments, and among all workers of the impacts of mental illness and the need to be supportive of work colleagues with mental health problems and avoid prejudiced attitudes.

## Barriers in education

Barriers in education are one of the key reasons the economic and social participation rates of Australians with disability are low.

Better access to education and training is critical to increasing the prospects of people with disability gaining full employment and realising other human rights.

In Tasmania, the overwhelming majority of school-aged children with disability attend a mainstream (public) school.[[36]](#footnote-36)

While there have been notable improvements in the access of young people with disability to educational services, failure to provide reasonable adjustments to assist that participation has contributed in large part to comparatively low levels of completion rates by students with disability in all levels of education and training.[[37]](#footnote-37)

While the number of Australians aged 15–64 years (including those with a disability) completing high school has increased over the past decade or so, the increase for people with disability from 30 per cent in 2003 to 36 per cent in 2012 remains well below the proportion of people without a disability completing high school (60 per cent in 2012).[[38]](#footnote-38) In Tasmania, where high school completion rates are generally lower than the national level, the proportion of people with disability completing high school is even lower (26.9 per cent).[[39]](#footnote-39)

In addition, a much smaller proportion of people with disability go on to complete a bachelor degree or higher qualification than those without a disability (15 per cent compared with 26 per cent).[[40]](#footnote-40) Again, the situation in Tasmania is even more challenging, with only 13 per cent of Tasmanians with a disability completing a bachelor degree or higher qualification compared with 19 per cent of those without a disability.[[41]](#footnote-41)

The *Disability Standards for Education 2005* (Cth) came into force in August 2005 and set out obligations under the DDA with regard to access to education for people with disability.

Limited awareness of the Standards and lack of clarity around key themes have, however, contributed to poor compliance. This is exacerbated by the failure to adopt strong compliance mechanisms.[[42]](#footnote-42)

While there were variations in complaints and trends, a number of key issues have been identified in complaints of disability discrimination made to Australian Human Rights Authorities (AHRA).[[43]](#footnote-43) These include:

* failure to provide reasonable accommodation or adjustments to support students with disability;[[44]](#footnote-44)
* exclusion, reduced attendance patterns and suspension and expulsion;[[45]](#footnote-45)
* a significant number of complaints relate to students with intellectual, learning and behavioural disabilities;
* a large number of complaints were about the tertiary sector; these appeared to centre on adjustments/reasonable accommodation for exams and coursework.

Survey results from the Tasmanian Disability Education Reform Lobby’s *Parent Satisfaction Survey* in 2014 confirm these issues.[[46]](#footnote-46) Key findings from the survey include that 65% of parents believed the support their child received in Tasmanian schools was inappropriate and a significant number of students (33.6%) identified having received no support or adjustments for their education.

The survey report made a number of recommendations, including better use of available personalised learning and support tools to identify and address support needs and adjustments; and increased training and professional development for teaching staff to improve their understanding of legal obligations under the *Disability Standards for Education*. The more recent report of the Ministerial Taskforce on Improved Support for Students with Disability[[47]](#footnote-47) set out recommendations including the need to ensure all school are disability responsive and ready, the need for continuous improvement through high-quality teaching and learning, improved partnerships between schools and families of students with disability, a focus on inclusive education practices, and greater monitoring and accountability in relation to compliance with Standards.

The Taskforce reported:

Achieving compliance with the required inclusive education approach requires both proactive and reactive capacities and strategies. For all schools to be ready and responsive to the needs of students with disability, the following is needed:

* All schools and school systems need to audit current facilities and processes to pro-actively identify and remove systemic barriers to inclusive education.
* All staff must be aware of their legal obligations to meet the Disability Standards for Education and be provided with the skills and tools to understand and implement those obligations.
* Everyone involved in the delivery of education needs to maintain a level of understanding of the diversity of disability and maintain an attitude of inclusion and respect.
* All schools need to develop and maintain clear plans, processes and strategies to ensure inclusive practices in all stages of education, beginning with the provision of information to prospective students and their families, through enrolment, curriculum development and delivery, school events and activities, discipline, and for every significant education transition point.
* Schools need to ensure they develop and maintain structures that support implementation of inclusive education plans and strategies in their school community. This will result in a better match between student needs and school responses. This requires schools and specialist educational supports to work together with students and their families.
* All staff regardless of their position have a role in creating an inclusive school community. Each staff member needs to clearly understand and demonstrate awareness of how their work and interactions support students and their families to feel welcome and included and meet the educational needs of the students.[[48]](#footnote-48)

Improved school to work transition planning for young people with disability is also critical to promoting improved employment outcomes.[[49]](#footnote-49) To be effective this must start early and engage both teachers and families. It should also be combined with improved options for work experience, school-based apprenticeships and part-time work whilst the young person is in their final school years.

A similar ‘disability ready and responsive’ approach is needed in employment. Employer responses to disability is often too little, too late driven by lack of understanding and a sense of a crisis to be avoided. Achieving workplaces that are ‘disability ready and responsive’ would mean the removal of systemic barriers to employment up front and appropriate awareness, policies and procedures to ensure the prospective or continued employment of a person with disability is achieved with as little fuss as any other employee.

# Data

3. What other data or information is available on employment discrimination against Australians with disability?

Tasmania’s discrimination law provides legal protection against discrimination in employment on the basis of disability.

The following provides an overview of enquiries and complaints related to disability discrimination received by Equal Opportunity Tasmania over the past 3 financial years.

## Disability discrimination enquiry data

A significant proportion of the enquiries received by the office relate to disability discrimination and around one third of enquiries received about disability discrimination relate to discrimination in the area of employment.

Table 1: Disability discrimination enquiries

|  |  |  |  |
| --- | --- | --- | --- |
|  | **2012–13** | **2013–14** | **2014–15** |
| Enquiries received about disability discrimination | 184 | 235 | 228 |
| Enquiries received about disability discrimination in area of employment | 63 | 75 | 61 |
| Enquiries received about disability discrimination in the area of employment x contact mode | | | |
| Telephone | 53 | 55 | 44 |
| In person | 5 | 6 | 6 |
| Electronic (email, web etc.) | 5 | 14 | 10 |
| In writing |  |  | 1 |
| NRS |  |  |  |
| TTY |  |  |  |

## Disability complaint data

In 2014–15, disability discrimination was alleged in over half (50.7 per cent) of complaints received under the Act and the vast majority of those complaints related to either employment or the provision of facilities, goods and services.

In 2014–15, 39 per cent of all disability discrimination complaints raised employment issues. This included allegations of complainants being unsuccessful in gaining employment because of disability, failure of employers to make appropriate adjustments to accommodate a person’s disability and/or loss of job or reduced working hours due to an illness or disability.

Table 2: Disability discrimination complaints

|  |  |  |  |
| --- | --- | --- | --- |
|  | **2012–13** | **2013–14** | **2014–15** |
| Number of complaints received about disability discrimination | 72 | 90 | 72 |
| Percentage of all complaints | 45.3% | 49.7% | 50.7% |
| Number of complaints received about disability discrimination in the area of employment | 27 | 32 | 28 |
| **In relation to complaints received about disability discrimination in employment - the stage of employment the complaint relates to** | | | |
| While looking for employment | 4 |  | 3 |
| During employment | 20 | 18 | 23 |
| End of employment/Termination | 13 | 5 | 11 |
| Number of complaints about disability discrimination in employment finalised in period | 19 | 33 | 48 |
| **Outcomes of complaints about disability discrimination in employment finalised in period** | | | |
| Conciliated | 9 | 14 | 17 |
| Terminated - No reasonable prospect of conciliation/Referred to tribunal | 3 | 10 | 6 |
| Terminated/Dismissed - other grounds such as no substance | 5 | 7 | 24 |
| Withdrawn | 2 | 2 | 1 |
| Deemed does not wish to pursue/Lost contact |  |  |  |

## Complainant demographics

Table 3 provides information on the demographic profile of complainants for the last three financial years.

It is evident from the information provided that people with physical disability and/or a mental health or psychosocial condition are greater risk of discrimination in employment, are more likely to complain about such discrimination or have better access to the support needed to make and pursue a complaint.

The data also suggests the level of complaint from Aboriginal people and/or Torres Strait Islanders and people of non-English speaking background is below the level at which they are represented in the general community. This is likely to reflect issues with make a formal legal complaint rather than a lower level of problem.

Whilst complainants are spread across all age ranges, those in the 40–49 year old age bracket appear to be particularly at risk or more willing and able to make a complaint.

Table 3: Complainant demographics

|  | 2012–13 | 2013–14 | 2014–15 |
| --- | --- | --- | --- |
| Gender | | | |
| Female | 10 | 23 | 17 |
| Male | 17 | 9 | 10 |
| X (Indeterminate/intersex/unspecified) |  |  | 1 |
| Unknown |  |  |  |
| **Type of disability** | | | |
| Physical disability | 13 | 8 | 8 |
| A mobility aid is used, eg, walking frame/ wheelchair |  |  |  |
| Physical disfigurement |  |  |  |
| Presence in the body of organisms causing disease – HIV/AIDS |  |  |  |
| Presence in the body of organisms causing organisms – other | 2 | 11 | 8 |
| Mental Health/Psychosocial | 11 | 18 | 18 |
| Neurological disability, eg, epilepsy | 1 | 4 | 4 |
| Intellectual disability |  |  |  |
| Learning disability |  |  | 1 |
| Sensory disability – hearing impaired |  |  |  |
| Sensory disability – deaf |  |  |  |
| Sensory disability – vision impaired | 1 | 2 |  |
| Sensory disability – blind |  |  |  |
| Work related injury |  |  |  |
| Medical condition, eg, diabetes | 1 |  |  |
| Acquired Brain Injury | 1 | 1 | 1 |
| Unknown |  |  |  |
| **Country of birth** | | | |
| Born in Australia | 27 | 32 | 28 |
| Born outside Australia |  |  |  |
| Unknown |  |  |  |
| How well does the person speak English? | | | |
| Not at all |  |  |  |
| Not well |  |  |  |
| Well |  |  |  |
| Very well |  |  |  |
| Unknown |  |  |  |
| **Aboriginal or Torres Strait Islander descent** | | | |
| Aboriginal |  |  |  |
| Torres Strait Islander |  |  |  |
| Both |  |  |  |
| No | 27 | 32 | 28 |
| Unknown |  |  |  |
| **Age group** | | | |
| 13-17 |  |  |  |
| 20-29 | 1 | 1 | 1 |
| 30-39 | 8 | 3 | 1 |
| 40-49 | 6 | 18 | 18 |
| 50-59 | 8 | 8 | 4 |
| 60-65 |  | 1 | 2 |
| 66-75 | 3 | 1 |  |
| 75+ | 1 |  |  |
| Unknown |  |  | 2 |
| **Employment status** | | | |
| Full-time | 14 | 9 | 11 |
| Part-time | 3 | 2 | 1 |
| Contract | 1 | 3 | 1 |
| Casual | 4 | 2 | 10 |
| Unemployed | 5 |  | 1 |
| Unknown |  |  |  |

## Respondents

Table 4 provides a breakdown of the industry sector and the size of the organisation identified by complainants. This relates for the most part to the employing organisation against which the complaint has been made. Whilst complaints are spread across a range of industry groups, those providing health care and social assistance (such as hospitals, nursing and residential care and child care services) are responsible for a significant number of the complaints received in each of the years recorded.

Whilst this may in large part be due to the size of the industry sector, it is also reflective of the fact that a significant proportion of those employed in this sector are low-skilled and often engage in part-time or casual employment, thereby having less secure workforce attachment.

Table 4: Respondent demographics

|  | 2012–13 | 2013–14 | 2014–15 |
| --- | --- | --- | --- |
| **Industry group** | | | |
| Accommodation and Food Services | 2 |  |  |
| Administrative and Support Services |  |  |  |
| Agriculture, Forestry and Fishing | 2 |  |  |
| Arts and Recreation Services | 3 | 3 |  |
| Construction |  |  |  |
| Education and Training |  | 1 | 2 |
| Electricity, Gas, Water and Waste Services | 1 |  | 1 |
| Financial and Insurance Services | 1 | 1 |  |
| Health Care and Social Assistance | 10 | 12 | 12 |
| Information Media and Telecommunications |  | 1 |  |
| Manufacturing | 1 | 1 | 1 |
| Mining | 2 |  |  |
| Private household |  |  |  |
| Professional, Scientific and Technical Services |  | 4 |  |
| Public Administration and Safety | 3 | 4 | 6 |
| Rental, Hiring and Real Estate Services |  |  | 3 |
| Retail Trade | 1 | 2 | 2 |
| Transport, Postal and Warehousing | 1 | 1 |  |
| Wholesale Trade |  |  |  |
| Unknown |  | 2 | 1 |
| **Size of organisation** | | | |
| 1 to 19 | 8 | 8 | 4 |
| 20 to 99 | 4 | 9 | 5 |
| 100 to 499 | 8 | 6 | 12 |
| 500 and over | 7 | 7 | 6 |
| Unknown |  | 2 | 1 |
| **Type of organisation** | | | |
| Employer | 27 | 31 | 27 |
| Recruitment company /service |  | 1 | 1 |

# International best practice

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

Bodies such as the Organisation for Economic Co-operation and Development (OECD) point to globally consistent poor employment outcomes for people with disability, exacerbated during periods of economic downturn and driven in part by low levels of public spending on employment support and vocational rehabilitation.[[50]](#footnote-50)

Even with this, the participation rate for people with disability in Australia is low by international standards. Estimates provided by the Productivity Commission suggest Australia would need to improve its employment rate of people with disability by more than 5 percentage points to reach the OECD average.[[51]](#footnote-51)

Active measures such as disability employment quota schemes have been in existence in many European and Asian countries, including Japan, for some time with mixed success.[[52]](#footnote-52)

Among the key policy challenges is the need to strengthen employer involvement in long-term sickness absences, including more active assessment of adjustments needed to working conditions to accommodate the consequence of health problems. This will be particularly important as the impact of population ageing takes fuller effect.

Policy strategies identified by the OECD include:

* financial incentives for employers to prevent illness and retain jobs;
* more transparent reporting of dismissals following prolonged sick leave;
* increased resources for employment support and vocational rehabilitation services;
* improved funding rules for providers of sustainable employment and career pathways;
* increased work incentives for people with partially-reduced work capacity who are not treated as unemployed and expected to seek part-time work; and
* strengthened incentives for disability benefit recipients to move off benefits.

Models of social security that ensure people with disability maintain a level of support irrespective of their employment status recognise that there is often an inherent cost of disability that should not be an individual cost burden when a person achieves paid employment. The recognition of the continuing cost of disability and the need for government support to meet that cost exists in Australia for people who are blind, but for no other group of people with disability.

A key lesson from the longitudinal review of police practices across OECD countries was the need to strike the right balance between:

* adopting incentives to work driven by relatively low income support levels and stringent access to disability benefits; and
* the provision of sustained supports for people with disability to attain and retain employment; and
* greater efforts to integrate people with disability into the labour market.

Countries such as Sweden, Iceland, Estonia, Mexico and Switzerland where employment rates for people with disability were highest at the time of the OECD report, possessed both relatively generous and accessible disability benefits supplemented by broad and equitable employment support, with a strong focus on vocational rehabilitation.[[53]](#footnote-53)

It is important that a rights-based focus be maintained and, for those who are unable to access employment, a strong income safety net be provided.

## Models of compliance

Canada and other countries have legislation that requires larger employers to be proactive in achieving equal employment opportunity for equality seeking groups, including people with disability. This model has been adopted in Australia only in relation to equal opportunity for women.

There is no apparent reason for limiting such legislative program to gender equity and this is an approach that could usefully be explored and implemented in Australia. It should not, however, be limited to the Federal Government and larger employers. The compliance model should be applied or voluntarily adopted by all State and Territory Governments.

# Legal and Policy Framework

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?

6. What difficulties are there for employers in understanding and complying with legal obligations?

## Disability discrimination

Both direct and indirect discrimination on the basis of disability in relation to employment are unlawful under the Tasmanian *Anti-Discrimination Act 1998* (Tas).

Section 14(2) of the Tasmanian Act provides that direct discrimination takes place if a person (including a corporation or organisation):

… treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.

Section 15(1) provides that indirect discrimination takes place if:

… a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –

(a) share, or are believed to share, a prescribed attribute; or

(b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.

Sections 14(3) and 15(2) of the Tasmanian Act provide that it is not necessary that the person who discriminates is aware the practice or requirement is discriminatory.

The prohibition of discrimination in employment on the basis of disability under Tasmanian law is, however, subject to a number of exceptions. Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such the exception properly applies.

Section 45 of the Tasmanian Act provides that a person may discriminate against another person on the ground of disability in relation to employment if:

(a) the other person –

1. Is unable to carry out the inherent requirements of the employment; or
2. In order to carry out those inherent requirements would require services or facilities not reasonably required by a person without a disability, the provision of which would impose unjustifiable hardship on the person so discriminating; or

(b) the employment involves –

1. participation in a dramatic performance or other entertainment in a capacity for which a person with a particular disability is required for reasons of authenticity; or
2. participation as an artist’s or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular disability is required for reasons of authenticity; or
3. providing persons with a particular disability with services for the purpose of promoting their welfare if those services are most effectively provided by a person with the same disability.

Section 48 also provides that a person may discriminate on the basis of disability:

(a) in access to public places, if the provision of access would cause unjustifiable hardship; or

(b) in the provision of goods and services, if that would cause unjustifiable hardship.

Exceptions under the Tasmanian Act do not automatically place an action beyond the reach of discrimination law. A person can still make a complaint about those actions and when that happens a respondent wishing to take advantage of the exception will generally be required to prove the exception applies.

## *Fair Work Act 2009*

The *Fair Work Act 2009* (Cth) (FWA) protects employees or prospective employees against adverse action because of discriminatory practices related to physical or mental disability. This includes the refusal to hire a prospective employee based on their disability.

Provisions are also included in the FWA to provide employees with a disability who have worked with an employer for at least 12 months with the legal right to request flexible working arrangements. Employers must seriously consider the request, but have the capacity to refuse on reasonable business grounds. A decision to refuse a request make be referred to the Fair Work Commission for resolution and, if necessary, formal direction.

The extent to which these provisions are used by employees is, however, unclear and there does not appear to be a strong awareness rights and obligations in this area.

Greater awareness of legal rights and obligations and the inclusion of review provisions to enable those who are refused a request to have that refusal reviewed by FWA are strongly supported.

It is also noted in respect of these provisions, that the Full Bench of the Federal Court ‘indicated that anti-discrimination law meanings of “discriminates” play no special or central role in the interpretation of discrimination in the industrial context’.[[54]](#footnote-54) This approach raises the very real possibility, indeed probability, that concepts and interpretation of employment discrimination in the discrimination law context will diverge from those in the industrial law context. Such a divergence is arguably not helpful to ensure equal employment opportunity for people with disability.

Similarly, Chapman, Gaze and Love note the different interpretation of ‘disability’ being applied in industrial law under the FWA.[[55]](#footnote-55) This too is likely to give rise to unhelpful and inconsistent outcomes and may give false comfort to employers who are more focused on their obligations under industrial law than those in discrimination law. Unfortunately, along with false comfort will the continuation of discriminatory practices affect the employment opportunities of people with disability.

## Implementing existing national standards that support employment participation

Barriers to the successful employment of people with disability may be structural as well as cultural.

Access to accessible and affordable public transport, for example, is critical to enabling people with disability to work; as is the ability of people with disability to access the places where they work.

The *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (the Premises Standards), *Disability Standards for Education 2005* (Cth) (the Education Standards) and the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Transport Standards) are legally binding regulations established under the DDA setting out minimum levels of service delivery and facility access to be achieved.

Access to transport and to the premises in which people are employed is vital for full social inclusion. Until full accessibility is achieved, employment opportunities for people with disability will continue to be curtailed.

For Tasmanians who are wheelchair-reliant, for example, the availability of appropriate private and public transport options remain extremely limited. Accessible bus options are almost non-existent outside of urban areas and even within metropolitan areas, limited options are available.

Implementation of the Standards has been patchy and there is widespread concern about the extent to which progress has been made in implementing key commitments under the regulations.[[56]](#footnote-56)

Whilst primary responsibility for the Standards exists elsewhere in the Federal Government, it remains important that the AHRC continue to be engaged in the implementation and monitoring of the Standards, including identifying strategies to ensure that obligations are fully implemented and that identified timeframes are met.

## A Disability Standard for employment?

Persistent low employment rates for people with disability give rise to further consideration of developing mandatory disability employment standards under the DDA.

Whilst draft national standards on employment released by the AHRC in 1998 were not finalised due largely to the failure to achieve consensus among stakeholders on key provisions.

However, given the diversity of employment situations and wide-ranging variation in what may be required across different industry sectors, it may be more appropriate to consider the development of:

* sets of industry specific guidelines setting out good practice approaches; and
* a Standard to be met by all public sector employers.

The Australian Human Rights Commission has functions under the DDA regarding information and education programs for the purpose of promoting compliance with the DDA.

Some good practice factsheets have been prepared to assist employers understand their obligations under the DDA. However these are very general in coverage. Consideration should be given to developing further guidance for employees on how best to meet their obligations under disability discrimination law.

## Limits of current legislation

Positive action is a key measure for realising full and effective equality and overcoming past disadvantage. This is no more so than in relation to Australians with disability.

### Duty to make reasonable adjustments

The inclusion of an explicit duty to make reasonable adjustments in the *Disability Discrimination Act 1992* (Cth) sets the DDA apart from other Commonwealth human rights statutes and is critical to making progress towards achieving substantive equality for people with disability.

The way in which the duty has been cast in the DDA, however, makes it difficult to understand and limits the extent to which it imposes proactive obligations to ensure that disadvantages are removed. As currently drafted, the duty is embedded in the definitions of direct and indirect discrimination and provides a cause of action for a failure to make reasonable adjustments, rather than a requirement to promote equality and eliminate discrimination.

The introduction of a stand-alone provision to explicitly cast the duty to make adjustments as a positive duty would assist in addressing discrimination against Australians with disability and act as an incentive to employers to make workplace adjustments to facilitate ongoing participation of people with disability within the workforce.

It would also provide a platform for providing clearer guidance to employers and other obligation holders on how to develop approaches that comply with these obligations.

### Onus of proof

As with other discrimination laws in Australia the onus is on the complainant in disability discrimination cases to prove, in relation to indirect discrimination, that a requirement is unreasonable and, in relation to direct discrimination, that the basis for the less favourable treatment was (at least in part) the complainant’s actual or imputed protected attribute. This places a significant burden on complainants, one that they often cannot meet because they do not have access to the relevant information or materials.

This has the effect of meaning many respondents, including employers, are not required (except perhaps by an active investigation by the relevant discrimination authority) to demonstrate their valid non-discriminatory reason for action or that they had a valid reason for having in place conditions, practices or requirements that have a discriminatory effect. Without this requirement, many respondents continue to operate without taking pro-active steps to ensure their actions, practices and procedures are non-discriminatory.

Consideration should again be given to amendments to the relevant employment discrimination laws to provide for a shifting onus of proof. This would mean that once a complainant had established a prima facie case of less favourable treatment or effect, the onus to establish the basis for that treatment or effect would shift to the respondent. Such a shifting or ‘reverse onus’ has operated in industrial law in Australia for many decades, although it seems to have placed a relatively light burden on the respondents.[[57]](#footnote-57)

It should be noted that there are a number of laws in Australia that place a legal burden on a respondent/defendant. These are considered in detail in Chapter 11 of the Australian Law Reform Commission’s *Traditional Rights and Freedoms–Encroachments by Commonwealth Laws (ALRC Interim Report 127).*[[58]](#footnote-58)

A different approach has already been adopted in Europe and the UK. This approach began to develop in the late 1980s when the European Court of Justice recognised the burden of proof lying with the complainant was inadequate in the area of discrimination.[[59]](#footnote-59)

In *Case C-127/92 Enderby* [1983] ECR I-5535, the Court stated:

The question referred

13 It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

14 However, it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay.

In *Case 109/88, Danfoss* [1989] ECR 3199 (an equal pay case), the Court stated:

13 It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned . **They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory** .

14 Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed . The concern for effectiveness which thus underlies the directive means that **it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality** [**emphasis added**]

In December 1997, the EC adopted *Council Directive 97/80* in relation to the burden of proof in cases of sex discrimination:

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

This approach was extended to all grounds of discrimination by Council Directive 2000/78[[60]](#footnote-60):

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

### Targeted equal employment opportunity obligations

As noted earlier in this submission, Australia has not implemented a legislative framework setting out obligations to be pro-active in achieving equal employment obligations for people with disability.

Consideration should be given to implementing laws requiring all governments and large businesses to audit current policy and practices for their potential to create barriers to equal employment opportunity and to implement strategies to remove those barriers and achieve higher levels of employment for people with disability.

The legislative model that operates in Canada recognises that the following groups commonly experience barriers to employment opportunity:

* people with disability;
* women;
* Aboriginal peoples; and
* members of visible minorities.

The Canadian *Employment Equity Act 1995* requires all federally regulated employers over a particular size to implement proactive strategies to increase employment for members of these groups. It defines the groups as follows[[61]](#footnote-61):

***aboriginal peoples*** means persons who are Indians, Inuit or Métis;Aboriginal peoples

…

**members of visible minorities** means persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour;

…

**persons with disabilities** means persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

(a) consider themselves to be disadvantaged in employment by reason of that impairment, or

(b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace;

Section 5 of the Act sets out the obligations on those employers that are covered:

Employer’s duty

5  Every employer shall implement employment equity by

(a) identifying and eliminating employment barriers against persons in designated groups that result from the employer’s employment systems, policies and practices that are not authorized by law; and

(b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer’s workforce that reflects their representation in

(i) the Canadian workforce, or

(ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

The Canadian Human Rights Commission has a range of functions under the Act including enforcement of obligations imposed on employers in relation to[[62]](#footnote-62):

* implementing employment equity;
* collection of relevant information;
* review of systems, policies and practices;
* developing an employment equity plan that includes short-term numerical goals to respond to underrepresentation and longer-term goals for increasing representation;
* implementation of employment equity plans;
* review and monitoring of employment equity plans;
* provision of information to employees about the purpose of the plan and measures to be implemented;
* consultation with employee representatives;
* collection and maintenance of records.

Employment equity compliance officers appointed under the Act can, among other things, advise an employer of non-compliance and ‘attempt to negotiate a written undertaking from the employer to take specified measures to remedy the non-compliance’[[63]](#footnote-63), and the Commission can issue a direction to remedy non-compliance.[[64]](#footnote-64)

The limited coverage of the *Employment Equity Act* has been effectively extended through the Federal Contractors' Program (FCP), which requires provincially regulated employers with 100 or more employees and that are bidding on federal government contracts over a certain financial value to certify they will implement employment equity measures.[[65]](#footnote-65)

## Beyond legislation

Strong anti-discrimination legislation and legal protections aimed at enforcing fair work practices are important as a mechanism for sanctioning discrimination on the basis of disability and act as a normative statement that disability discrimination is not tolerated.

In and of themselves, however, they are not the solution.

Despite increased laws designed to address employment discrimination and provide workplace adjustments for qualified workers with disability, the employment rates of people with disability remain unacceptably high.

Disability-based stereotypes inform much discriminatory behaviour and strong action is needed to address ongoing prejudice against people with disability both in and beyond the workforce.

Whilst legal remedies are available to those who consider they have been discriminated against on the basis of disability, it is clear that many employers and those in the recruitment industry lack awareness of their legal obligations in respect of disability discrimination and broad strategies are required to promote attitudinal and cultural change across the community.[[66]](#footnote-66)

Just as there is a concerted campaign to break gender stereotypes through campaigns such as the Males Champions of Change process, there is also a need to engage employers and recruiting bodies to work against disability discrimination.

### Disability Action planning

The development of Disability Action Plans provides an opportunity for businesses to assess how accessible their workplace and recruitment practices are and identify strategies to increase employment of people with disability, including the identification of services and supports available to assist employees with disability.

Whilst many hundreds of organisations have registered Disability Action Plans with the Australian Human Rights Commission as part of their commitment to eliminating discrimination, many of these are dated. The Australian Human Rights Commission has, in the past, played an important role in encouraging organisations to develop Action Plans, however, there does not appear to have been a great focus in recent years on that area of work.

Whilst Disability Action Plans have historically aimed primarily at service provision and building access, extending them to include non-discriminatory employment practices may assist in reducing barriers to employment for people with disability.

A campaign to ensure that all ASX listed companies on other major stakeholder organisations have in place a Disability Action Plan that encompasses non-discriminatory employment practices would contribute toward leading cultural change in this area, as would the publication by the AHRC of updated guidance material to assist in this endeavour.

### The National Disability Insurance Scheme

Full roll out of the National Disability Insurance Scheme (NDIS), which is scheduled to begin in most states and territories from mid-2016, will impact significantly on the way in which people with disability are able to access supports to optimise social and economic participation.

Individualised support packages made available under the NDIS are expected to provide enhanced employment assistance to many people with disability either in or wishing to enter the labour force.

A major challenge in rolling out the NDIS will be to ensure that employment support provides the right kind of assistance to help people with disability attain and retain employment. The experience of many people of employment services to date has been standardised ‘one size fits all’ models of service and focus on short-term employment outcomes.[[67]](#footnote-67)

Figures released by the Australian Bureau of Statistics in September 2015 estimated that over half (50.7 per cent) of people with disability had unmet need for formal assistance, with those with higher levels of unmet need being less likely to participate in the labour force (35.8 per cent) and be more likely to live in low income households (53.5 per cent).[[68]](#footnote-68)

Not only do people with disability need access to specialist supports to enable them to participate fully in the workforce, there is also a need to ensure that mainstream services comply with their obligations to make reasonable adjustments to accommodate needs and are non-discriminatory. This includes, for example, housing, education and employment services, as well as organisations in their employment practices. Unless obstacles to accessing these services are removed, it is likely that people with disability will continue to experience high levels of exclusion.

Making the switch to consumer-centred services will represent a challenge and it is important that the principles of the social model of disability are maintained.

Increased support for people with disability to become active participants in the workforce will also need to be accompanied by a reduction in barriers to employment.[[69]](#footnote-69)

Employers need to have a greater focus on reducing barriers and making workplaces more accessible to workers with disability. Australian workplaces need employment policies that actively encourage people with disability to apply for job opportunities, and these need to be backed up by a commitment to creating an environment that support a person’s needs once they start works. This need to be more than just changes to the physical environment. Employers also need to foster a workplace culture that embraces and celebrates diversity.

# Intersectional discrimination

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

Discrimination on the basis of more than one attribute such as disability and age or gender or racial or ethnic background, has the potential to be both quantitatively and qualitatively different than that experienced by those who experience discrimination on each of these grounds alone.

It is clear from the data outlined earlier in this submission and in the background material provided for the review that women, for example, are often experience lower levels of workplace attachment that may be exacerbated by their experiences in the workplace later in life.

Similarly, the prejudice experienced by people with disability is also likely to differ where they have other characteristics that result in discrimination.

Gaps exist in the provision of specialised supports for at-risk population groups, such as Aboriginal and Torres Strait Islander people, those who identify as lesbian, gay, bisexual, transgender or intersex and people from culturally and linguistically diverse communities.

Specialist support, including culturally competent service delivery arrangements are needed to address intersectional impacts within these groups.

1. Australian Bureau of Statistics *2012 Survey of Disability, Ageing and Carers* (Cat No. 4433.0, 2012) Table 4. [↑](#footnote-ref-1)
2. Ibid Table 5.1. [↑](#footnote-ref-2)
3. Ibid Table 5.1. [↑](#footnote-ref-3)
4. Ibid State Tables for Tasmania Table 8.2. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. Ibid Table 9. [↑](#footnote-ref-6)
7. Ibid Table 8.2. [↑](#footnote-ref-7)
8. Australian Human Rights Commission, Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability: Issues paper: Employment discrimination against Australians with disability (2015). [↑](#footnote-ref-8)
9. AHRC National Disability Forum, Summary of Survey Results – 15 Sept 2014. [↑](#footnote-ref-9)
10. Australian Government, *National Disability Employment Framework – Consultation Report* (Department of Social Services, Canberra, September 2015). [↑](#footnote-ref-10)
11. Office of the State Service Commissioner, Tasmanian State Service Evaluation Report 2012: Recruitment of people with disability into the State Service (OSSC, 2012). [↑](#footnote-ref-11)
12. Productivity Commission, *Disability Care and Support* (Report No. 54, Canberra, 2011) 297. [↑](#footnote-ref-12)
13. Department of Education, Employment and Workplace Relations *Employer perspectives on recruiting people with disability and the role of Disability Employment Services* (DEEWR Employment Monitoring and Evaluation Branch, August 2011). [↑](#footnote-ref-13)
14. Tasmanian Government, *Disability Framework for Action 2013–17: A Tasmanian Government plan for people with disability* (Department of Premier and Cabinet, December 2012) 21. [↑](#footnote-ref-14)
15. Government of Tasmania, *Tasmanian State Service Annual Report 2013–14* (Department of Premier and Cabinet, October 2014). [↑](#footnote-ref-15)
16. Government of Tasmania, *Employment of people with disability* (not dated) Department of Premier and Cabinet <<http://www.dpac.tas.gov.au/divisions/ssmo/employment_policy/managing_diversity/disability_employment>>. [↑](#footnote-ref-16)
17. Government of Tasmania, *Graduate program for people with disabilities* (not dated) Department of Premier and Cabinet <<http://www.dpac.tas.gov.au/divisions/ssmo/employment_policy/managing_diversity/graduate_program_for_people_with_disabilities>>. [↑](#footnote-ref-17)
18. Government of Tasmania, *Disability Employment Resources* (not dated) Department of Premier and Cabinet <<http://www.dpac.tas.gov.au/divisions/ssmo/employment_policy/managing_diversity/resources>>. [↑](#footnote-ref-18)
19. Office of the State Service Commissioner, Tasmanian State Service Evaluation Report 2012: Recruitment of people with disability into the State Service (OSSC, 2012). [↑](#footnote-ref-19)
20. Department of Premier and Cabinet (Tas), *People Matters Survey 2015* (2015) results available at <<http://www.dpac.tas.gov.au/divisions/ssmo/people_matter_survey_2015/results>>. [↑](#footnote-ref-20)
21. Australian Public Service Commission, *State of the Service Report 2013–14* (online version) available at <<http://www.apsc.gov.au/about-the-apsc/parliamentary/state-of-the-service/state-of-the-service-2013-14/appendices/diversity>> and Australian Public Service Commission *State of the Service Report 2014-2015* web update Representation of people with disability (online version) available at <<http://stateoftheservice.apsc.gov.au/2015/09/aps-representation-of-people-with-disability/>>. [↑](#footnote-ref-21)
22. Australian Public Service Commission, *State of the Service Report 2013–14* (online version) available at <<http://www.apsc.gov.au/about-the-apsc/parliamentary/state-of-the-service/state-of-the-service-2013-14/appendices/diversity>>. [↑](#footnote-ref-22)
23. Australian Public Service Commission *State of the Service Report 2014–2015* web update Representation of people with disability (online version) available at <<http://stateoftheservice.apsc.gov.au/2015/09/aps-representation-of-people-with-disability/>> [↑](#footnote-ref-23)
24. Australian Government, *National Disability Employment Framework – Issues Paper* (Department of Social Services, May 2015). [↑](#footnote-ref-24)
25. Ibid 13. [↑](#footnote-ref-25)
26. Ibid, 13. [↑](#footnote-ref-26)
27. Ibid, 6. [↑](#footnote-ref-27)
28. Australian Government, *National Disability Employment Framework – Issues Paper* (Department of Social Security, May 2015). [↑](#footnote-ref-28)
29. Tasmanian Audit Office, *Absenteeism in the State Service* (Report No 1 of 2015–16, July 2015). [↑](#footnote-ref-29)
30. Australian Government, *National Disability Employment Framework – Consultation Report* (Department of Social Services, Canberra, September 2015) 8. [↑](#footnote-ref-30)
31. Productivity Commission, *Disability Care and Support* (Report No. 54, Canberra, 2011) 284. [↑](#footnote-ref-31)
32. Ibid 284–95. [↑](#footnote-ref-32)
33. Ibid, 280. [↑](#footnote-ref-33)
34. National Mental Health Commission, *National Review of Mental Health Programmes and Services* (NMHC, Sydney 2014) 21. [↑](#footnote-ref-34)
35. Organisation for Economic Cooperation and Development. *Sick on the Job? Myths and Realities about Mental Health and Work* (Paris: 2011) cited in National Mental Health Commission, *National Review of Mental Health Programmes and Services* (NMHC, Sydney 2014) 24. [↑](#footnote-ref-35)
36. Australian Institute of Health and Welfare, *Children with disabilities in Australia*, (AIHW, Canberra 2004). [↑](#footnote-ref-36)
37. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session* (2–13 September 2013), UN Doc CRPD/C/AUS/CO/1 (2013)   
    [45–46]. [↑](#footnote-ref-37)
38. Australian Bureau of Statistics *2012 Survey of Disability, Ageing and Carers* (Cat No. 4433.0, 2012) Table 7. [↑](#footnote-ref-38)
39. Australian Bureau of Statistics, above n 38, State Tables for Tasmania Table 7\_2. [↑](#footnote-ref-39)
40. Australian Bureau of Statistics, above n 38. [↑](#footnote-ref-40)
41. Australian Bureau of Statistics, above n 39. [↑](#footnote-ref-41)
42. See the Australian Human Rights Authorities’ submission to the Senate Standing Committee on Education and Employment, Inquiry into current levels of access and attainment for students with disability in the school system available at <<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Submissions>>. [↑](#footnote-ref-42)
43. Ibid 13–14. [↑](#footnote-ref-43)
44. For example, the sample of complaints reviewed by the Australian Human Rights Commission indicated the majority (58%) were about alleged lack of reasonable accommodation. The Tasmanian Anti-Discrimination Commissioner indicated the majority of complaints were about the nature and level of adjustment/assistance provided. The Victorian Equal Opportunity and Human Rights Commission data confirmed allegations are centred on non-provision of reasonable adjustments including exclusion from extra-curricular activities such as school camps and excursions. [↑](#footnote-ref-44)
45. Exclusion/suspension/expulsion was the second highest issue raised in the complaint sample reviewed by the Australian Human Rights Commission (21%); non-admission and suspension and expulsion were the second highest areas of complaint to the Tasmanian Anti-Discrimination Commissioner; data from the Victorian Equal Opportunity and Human Rights Commission confirmed reduced hours of school attendance as a key area of complaint. [↑](#footnote-ref-45)
46. Tasmanian Disability Education Reform Lobby, *2014 Parent Satisfaction Survey Results* (2014) <<http://www.tasmaniandisabilityeducationreformlobby.com/#!survey---petition-links/c1>> at 17 August 2015. [↑](#footnote-ref-46)
47. Ministerial Taskforce on Improved Support for Students with Disability, Improved Support for Students with Disability Ministerial Taskforce Report (2015) <<http://taskforcereport.blogspot.com.au/p/improved-support-for-students-with.html>>. [↑](#footnote-ref-47)
48. Ibid 19. [↑](#footnote-ref-48)
49. Australian Government, *National Disability Employment Framework – Consultation Report* (Department of Social Services, Canberra, September 2015) 10. [↑](#footnote-ref-49)
50. Organisation for Economic Co-operation and Development (OECD), *Sickness, Disability and Work: Breaking the Barriers* (OECD, November 2010). [↑](#footnote-ref-50)
51. Productivity Commission, *Disability Care and Support* (Report No. 54, Canberra, 2011) 272. [↑](#footnote-ref-51)
52. Vai Io Lo, ‘Promotion of the employment of persons with disabilities in Japan, the United States, and China: carrot, stick or both?’ (2012) 29(3) *Arizona Journal of International and Comparative Law*. [↑](#footnote-ref-52)
53. OECD, above n 50, 7. [↑](#footnote-ref-53)
54. Anna Chapman, Beth Gaze and Kathleen Love, ‘Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence’ (Paper presented at the Australian Labour Law Association Annual Conference 2012, Canberra, 16–17 November 2012) 8, citing *Australian Building and Construction Commissioner v McDonnell Dowell Constructors (Aust) Pty Ltd* [2012] FCAFC 93 (29 June 2012). [↑](#footnote-ref-54)
55. Ibid, 11. [↑](#footnote-ref-55)
56. For further information, see the submissions made by the Tasmanian Anti-Discrimination Commissioner to recent reviews of the Disability Transport Standards and the Premises Standards available at <<http://equalopportunity.tas.gov.au/policy_legal_submissions>>. [↑](#footnote-ref-56)
57. See, for example, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647. [↑](#footnote-ref-57)
58. Australia Law Reform Commission, *Traditional Rights and Freedoms–Encroachments by Commonwealth Laws (ALRC Interim Report 127)* (2015) <<http://www.alrc.gov.au/publications/alrc127>>. [↑](#footnote-ref-58)
59. See, *Case 109/88, Danfoss* [1989] ECR 3199; and *Case C-127/92 Enderby* [1983] ECR I-5535. [↑](#footnote-ref-59)
60. *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (2000) <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078&rid=10>>. [↑](#footnote-ref-60)
61. *Employment Equity Act* (SC 1996, c 44) s 3. [↑](#footnote-ref-61)
62. *Employment Equity Act* (SC 1996, c 44) s 22(1), referring to obligations set out in ss sections 5, 9 to 15 and 17. [↑](#footnote-ref-62)
63. *Employment Equity Act* (SC 1996, c 44) s 25(1). [↑](#footnote-ref-63)
64. *Employment Equity Act* (SC 1996, c 44) s 25(2). [↑](#footnote-ref-64)
65. Government of Canada, Labour Program *Federal Contractors Program* (2015) <<http://www.labour.gc.ca/eng/standards_equity/eq/emp/fcp/index.shtml>>. [↑](#footnote-ref-65)
66. See Australian Law Reform Commission, *Access all Ages – Older Workers and Commonwealth Laws* (ALRC Report No 20, March 2013) 80–81. [↑](#footnote-ref-66)
67. See Helen Dickenson, ‘Is Australia ready to give people with disability reach choice and control over services?’ (The Conversation, online version, 24 November 2015). [↑](#footnote-ref-67)
68. Australian Bureau of Statistics, *Unmet Need for Formal Assistance, 2012* (Cat. No. 4433.0.55.007, released 15 September 2015). [↑](#footnote-ref-68)
69. Megan Buntine, ‘Making it Work’ (online version) available at <<http://www.everyaustraliancounts.com.au/opinion/making-it-work>>. [↑](#footnote-ref-69)