



Australian
Human Rights
Commission

People with Disability and Employment

Submission to the Royal Commission into Violence, Abuse, Neglect
and Exploitation of People with Disability

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to provide this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).
2. The Royal Commission provides an important opportunity to prevent and redress violence, abuse, neglect and exploitation of people with disability. More generally, the Royal Commission has the potential to play a key role in upholding the equality, dignity and autonomy of people with disability and ensuring their full participation and inclusion in Australian society. Ultimately this will benefit all Australians, with and without disability.
3. The Commission is Australia's national human rights institution, with recognised independent status and roles in United Nations human rights fora. The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. The Commission welcomes the endorsement of a human rights-based approach in the Royal Commission's Terms of Reference. The Commission also welcomes the recognition in the Terms of Reference of the intersectional nature of discrimination and disadvantage.
5. The Commission is well placed to assist the Royal Commission by providing a human rights framework to guide the development of findings and recommendations within the Terms of Reference. Of particular note, the Commission conducted a national inquiry into discrimination against both people with disability and older workers in 2016: *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Willing to Work).¹ The findings and recommendations of the Willing to Work are referred to throughout this submission.
6. The Commission welcomes the selection of employment as the seventh topic of consideration for the Royal Commission. Securing and retaining employment can reduce experiences of violence, abuse, neglect and exploitation for people with disability. The creation of meaningful employment opportunities for people with disability in non-segregated settings at, or above, award wages is important for the promotion of social

and economic independence, security and autonomy, capacity building and skill development.

7. However, people with disability are employed and are seeking employment at substantially lower rates than people without disability.² The Commission is concerned that while the unemployment rate has remained steady for working-age people without disability (around 5% between 2003 and 2015), it has increased slightly for those with disability (from 8% to 10%) and for those with severe or profound disability (from 11% to 14%).³ People with disability are also more likely to be employed on a part-time basis than people without disability,⁴ and more likely to be underemployed.⁵ People with disability cite their disability or health as the main reason that they have difficulty in securing employment.⁶ Other reasons noted include lacking the necessary skills, education or experience, the high levels of competition for available jobs, or a lack of vacancies.⁷
8. Likewise, ensuring that the employment experiences of people with disability are free from violence, abuse, neglect and exploitation is crucial to improving social and economic outcomes for people with disability. Nearly half of all employed people with disability reported that they had experienced unfair treatment or discrimination by their employer due to their disability in the past 12 months.⁸ One in five employed people with disability also reported that they had avoided work due to their disability in the past 12 months.⁹ In 2018–19, almost half of the complaints (44%) received by the Commission under anti-discrimination laws related to disability discrimination, with over a third of these (36%) related to employment. An overview of the disability related complaints received by the Commission between 2013-2019 is provided in **Appendix A**.
9. The Commission is concerned about particularly poor employment outcomes for people with disability across intersections of gender, age and Aboriginal and Torres Strait Islander status:
 - Women and girls with disability experience particularly low rates of employment (45.9%).¹⁰ Women with disability work part-time at almost double (58%) the rate of men with disability (31%).¹¹ Women with disability (52%) are also significantly more likely than women without disability (39%) to have experienced workplace sexual harassment in the last 5 years.¹²
 - Young people with disability (aged 15–24) are more than twice as likely as those aged 25–64 to be unemployed.¹³ They are also three times as likely to be underemployed compared to older people with disability.¹⁴

- In 2012, the unemployment rate of Aboriginal and Torres Strait Islander people with disability was three times higher than the rate for all people with disability.¹⁵ The gap between labour force participation of Aboriginal and Torres Strait Islander people with disability (35%), and all people with disability (53.6%), is therefore much wider compared to the same gap for people without disability.¹⁶
10. The fact that Australia's employment framework allows people with disability to be paid as little as \$89 per week (\$2.34 per hour for full-time employees) is also concerning.¹⁷
 11. This submission addresses the Royal Commission's Employment Issues Paper, released on 12 May 2020 (Issues Paper).¹⁸ The submission focuses on issues raised by questions one, two, five, six, and eight of the Issues Paper. The Commission has previously made submissions to the Royal Commission in relation to inclusive education and the criminal justice system.¹⁹
 12. In considering how people with disability experience violence, abuse, neglect and exploitation in the employment context, this submission will focus in particular on experiences of financial and economic abuse, violations of dignity, economic advantage being taken of people with disability, and improper use of labour or employment.
 13. The Commission notes that this submission does not explicitly consider the experiences of people with disability who work outside the traditional definition of employment. These include on-demand workers, 'gig' workers, independent contractors, and workers misclassified as independent contractors under sham contracting arrangements. However, the recommendations and principles outlined in this submission are equally applicable to those working outside the traditional definition of employment. People with disability are more likely than others to work in the 'gig economy', and significantly more likely to report that this work is essential for meeting basic needs.²⁰ The Commission also notes that much of the data relating to workforce participation of people with disability is defined according to the traditional definition of employment. In order to build a comprehensive understanding of the employment experiences of people with disability it is important that data is collected on a disaggregated basis beyond this traditional definition. The Commission calls on the Royal Commission to ensure that its inquiry into the employment experiences of people with disability is inclusive of these workers and their human rights, regardless of whether a formal employment relationship exists under the *Fair Work Act 2009* (Cth).

14. This submission provides: an overview of Australia's international and domestic human rights frameworks relevant to the employment of people with disability; a brief overview of Australia's supports and programs for people with disability in employment in Australia; an overview of how people with disability may experience violence, abuse, neglect and exploitation in employment settings; and an analysis of how Australia implements its international human rights obligations in the context of disability employment. The Commission would be happy to appear before the Royal Commission and to provide further clarification on its submission or other issues of interest to the Royal Commission.

2 Summary of recommendations

15. **Recommendation 1: The Australian Government undertake a comprehensive review of ADEs against the requirements of international human rights law, including Article 27 of the CRPD, as recommended by the CRPD Committee.**
16. **Recommendation 2: The Australian Government undertake a comprehensive review of the Supported Wage System against the requirements of Article 7(a) of ICESCR and Article 27 of the CRPD, including a review of the adequacy of wages in supporting people with disability to fully and effectively participate in society.**
17. **Recommendation 3: The Australian Government publicly evaluate the effectiveness of the Supported Wage System in achieving its objective of enabling people with disability to obtain employment in a manner that is consistent with human rights practice and international obligations.**
18. **Recommendation 4: The Australian Government amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.**
19. **Recommendation 5: The Australian Government amend the Disability Discrimination Act to introduce a positive duty to promote substantive equality and eliminate discrimination.**
20. **Recommendation 6: The Australian Government amend the Disability Discrimination Act to clarify that a failure to make reasonable adjustments, except when it would impose unjustifiable hardship,**

constitutes unlawful discrimination under the Disability Discrimination Act.

- 21. Recommendation 7: The Australian Government amend the Fair Work Act to clarify the definition of 'disability', and align it with the definition contained in the Disability Discrimination Act.**
- 22. Recommendation 8: That a review of the 21 day time limit in the Fair Work Act in relation to making a general protections, unfair dismissal or unlawful termination claim is undertaken in order to assess whether it is meeting its objectives of promoting efficiency and effectiveness while also ensuring access to justice.**
- 23. Recommendation 9: The Australian Government amend section 65 of the Fair Work Act so that an employer is required to provide written reasons for the grant or refusal of a request for flexible work arrangements within a reasonable period of time (for example, 21 days) and specifically provide that a request for flexible work arrangements cannot be refused without providing the employee with a reasonable opportunity to discuss the request.**
- 24. Recommendation 10: The Australian Government ensure that the National Disability Agreement and the next National Disability Strategy are appropriately resourced, and include measurable goals and robust monitoring, reporting, evaluation, governance and accountability requirements, including by implementing the recommendations made by the UNSW Review and the Productivity Commission.**
- 25. Recommendation 11: The Australian Government publish an evaluation framework for the Disability Employment Services program, including measures that demonstrate how Disability Employment Services assist the Australian Government to fulfil its international human rights obligations under Article 27(1) of the CRPD.**
- 26. Recommendation 12: The Australian Government provide an update and timeline for finalising and implementing a Disability Employment Framework, including details of how the measurement of other diversity characteristics (eg age, gender, and race) will be incorporated.**
- 27. Recommendation 13: To improve access to reasonable workplace adjustments for people with disability, the Australian Government:**
 - expand the Employment Assistance Fund to support work experience and internships, to enable greater job readiness for people with disability**

- **increase the funding available through the Employment Assistance Fund for Auslan interpreting and captioning**
 - **change the process for obtaining funding for reasonable adjustments so that adjustments are paid for directly by JobAccess.**
- 28. Recommendation 14: The Australian Government develop a campaign to increase employee and employer awareness of government supports available through Disability Employment Services, JobAccess, the Employee Assistance Fund and the National Disability Recruitment Coordinator.**
- 29. Recommendation 15: To support continuing workforce participation and to improve access to workplace adjustments for people with chronic health conditions, the Australian Government:**
- **expand the Employment Assistance Fund to include training for managers and co-workers about employees with chronic health conditions**
 - **develop information and resources provided by JobAccess that specifically address workplace adjustments for employees with chronic health conditions**
 - **review the current EAF guidelines to ensure they do not exclude people with chronic health conditions from accessing workplace adjustments.**
- 30. Recommendation 16: The Australian Government ensure NDIS participants have effective access to technical and vocational guidance, placement services and vocational and continuing training, consistent with Australia's obligations under Article 27(1)(d) of the CRPD, to develop and support an 'aspiration to work'.**
- 31. Recommendation 17: The Australian Government assess the specific impact of NDIS reforms on participants' employment participation, in consultation with people with disability and their carers, against the obligations contained in Article 27(1) of the CRPD.**
- 32. Recommendation 18: The Australian Government continue to prioritise educational attainment in developing and reforming Australian disability policy, and ensure the connection between educational attainment and employment is a key factor in the development of disability policy.**
- 33. Recommendation 19: The Australian Government collect and make publicly available national data regarding post-school employment**

outcomes for students with disability, and measure the effectiveness of its school-to-work transition programs against its obligations under international human rights law.

- 34. Recommendation 20: The Australian Government evaluate the effectiveness of the DES Eligible School Leavers program against its international human rights obligations, including whether the eligibility criteria of the DES Eligible School Leavers program should be expanded to allow more students with disability in their final years of high school to access employment transition support.**
- 35. Recommendation 21: The Australian Government allocate funding to enable a collaboration between state and Commonwealth education authorities and relevant agencies to develop guidance materials for teaching staff about supporting students with disability to transition from school to work.**
- 36. Recommendation 22: That the NDIS Participant Employment Strategy 2019–2022 be amended to include clear goals for transition to work supports for young people with disability in 2021 and 2022.**

3 International and domestic human rights framework

37. This section outlines the international and domestic human rights instruments relevant to people with disability and employment.

3.1 Convention of the Rights of Persons with Disabilities

38. Australia has ratified, and is therefore legally bound by, a range of international instruments that recognise the human rights of people with disability in the employment context.
39. Of particular relevance is Australia's ratification of the *Convention on the Rights of Persons with Disabilities* (CRPD) in July 2008,²¹ and the Optional Protocol to the CRPD in 2009.²² The CRPD is the principal international instrument recognising the human rights of people with disability.
40. The implementation of the CRPD is monitored by the Committee on the Rights of Persons with Disabilities (CRPD Committee). The CRPD Committee consists of 18 'experts' of 'high moral standing and recognized competence and experience in the field covered by the [CRPD]'.²³ The implementation of

the other human rights treaties identified below is similarly monitored by their respective treaty bodies. For countries like Australia that have ratified relevant Optional Protocols to these treaties, the treaty bodies can receive complaints from individuals about breaches of human rights obligations and make authoritative determinations.²⁴ Treaty bodies also have the functions of issuing General Comments on the meaning of the treaty obligations and Concluding Observations on periodic reports provided to them by States Parties. The CRPD and other human rights treaties should be viewed in light of their monitoring bodies' jurisprudence and commentary.²⁵

41. The rights of people with disability in the employment context that are recognised under international human rights law are underpinned by the general principles set out in Article 3 of the CRPD, including:

- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
- non-discrimination, equality of opportunity and gender equality
- full and effective participation and inclusion in society
- respect for difference and acceptance of people with disability as part of human diversity and humanity
- accessibility, and
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

3.2 Other international human rights law instruments

42. Other instruments that are binding on Australia also contain provisions relevant to people with disability, including the:

- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*²⁶
- *International Covenant on Civil and Political Rights (ICCPR)*²⁷
- *Convention on the Rights of the Child*²⁸
- *Convention on the Elimination of All Forms of Discrimination Against Women*²⁹ and
- *International Convention on the Elimination of All Forms of Racial Discrimination*.³⁰

43. Certain conventions and recommendations of the International Labour Organization (ILO) are also relevant.³¹

3.3 Disability Discrimination Act 1992 (Cth)

44. The *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) makes disability discrimination unlawful and promotes equal rights, equal opportunity and equal access for people with disability, including in relation to employment. The Disability Discrimination Act complements other anti-discrimination laws operating at the Federal, state and territory levels.

45. The Disability Discrimination Act prohibits direct and indirect discrimination. 'Direct' discrimination occurs when a person with disability is treated less favourably than a person without disability in the same or similar circumstances. 'Indirect' discrimination occurs when a condition, requirement or practice that applies to everyone disadvantages people with disability, and the condition, requirement or practice is not reasonable in the circumstances.

³²

46. The Disability Discrimination Act makes discrimination unlawful in all areas and at all stages of employment.³³ The provisions preventing discrimination in employment are explicitly intended to give effect to Australia's obligations under the CRPD.³⁴ In particular, it is unlawful for an employer to discriminate on the ground of a person's disability:

- in offering employment, including the processes of determining who should be offered employment
- in the terms or conditions of employment
- by denying or limiting opportunities for promotion, transfer or training, or to other benefits associated with employment
- by dismissing the employee or
- by subjecting the employee to any other detriment.³⁵

47. Employers also have an obligation to provide reasonable adjustments to ensure that people with disability are not treated unfavourably or disadvantaged because of their disability.³⁶ This is consistent with Australia's obligations under Article 27(1)(i) of the CRPD to provide 'reasonable accommodation'. Examples of reasonable adjustments may include changes

to work hours, providing necessary and appropriate equipment, or providing work materials in an accessible format.

48. An adjustment will not be reasonable if it would impose an unjustifiable hardship on an employer.³⁷ In those circumstances, discrimination on the basis of failing to provide a reasonable adjustment will not be unlawful.³⁸
49. Similarly, it is not unlawful for an employer to refuse to employ or promote a person, or to dismiss a person, on the basis of their disability if they are unable to carry out the 'inherent requirements' of the particular work, even with reasonable adjustments.³⁹
50. A person can lodge a complaint of unlawful discrimination on the ground of disability with the Commission.⁴⁰ Where the complaint cannot be resolved by conciliation, the complainant may choose to pursue the matter in the Federal Circuit Court or the Federal Court of Australia, where an enforceable remedy may be granted.⁴¹ An overview of the complaints received by the Commission in relation to employment between January 2013 and November 2019 is provided in **Appendix A**.
51. Part 5.3 of this submission explores the Commission's concerns in relation to the operation of the Disability Discrimination Act.

3.4 Fair Work Act 2009 (Cth)

52. Since 2009, the *Fair Work Act 2009* (Cth) (Fair Work Act) has been the primary source of rights and responsibilities for employers and employees in Australia. It governs the employee/employer relationship, provides for minimum entitlements through the National Employment Standards, enables fair working practices, and proscribes discrimination against employees.

(a) The general protections regime

53. The general protections regime under the Fair Work Act enables people with disability to seek redress if 'adverse action' is taken against them in the employment context.
54. The general protections regime covers discrimination against employees and prospective employees. This includes full time, part time and casual employees, probationary employees, apprentices and trainees, and fixed term employees.⁴²
55. Section 351(1) of the Fair Work Act provides that an employer must not take adverse action against an employee, or prospective employee, because of

their 'physical or mental disability' (or any other protected attribute such as age, race or sex).

56. Adverse action by an employer could include any of the following:

- dismissing an employee
- injuring an employee in their employment
- altering the position of the employee to the employee's prejudice
- discriminating between one employee and other employees
- refusing to employ a prospective employee or
- discriminating against a prospective employee in the terms and conditions of the employment offered.⁴³

57. However, section 351(1) does not apply to action that is not unlawful under any anti-discrimination law that is in force in the place where the action is taken, including the Disability Discrimination Act.⁴⁴ This means section 351(1) of the Fair Work Act simply provides an alternative avenue for the redress of disability discrimination in the circumstances covered by the Disability Discrimination Act and other state and territory anti-discrimination laws.⁴⁵

(b) Unfair dismissal and unlawful termination

58. In addition to the general protections regime, the Fair Work Act provides protections to all employees (including people with disability) from unfair dismissal⁴⁶ and unlawful termination.⁴⁷ People with disability are included in these protections. Whether these protections apply to people with disability on an equal basis with others in practice, as required by Article 27(1) of the CRPD and Articles 6 and 7 of the ICESCR, is examined at part 160 of this submission.

(c) Fair and equal pay

59. Section 284 of the Fair Work Act requires the Fair Work Commission to provide a safety net of fair minimum wages, including wages for employees with disability.

3.5 National Disability Strategy

60. Following Australia's ratification of the CRPD, in 2011 the Commonwealth, state and territory governments developed the *National Disability Strategy 2010-2020* (NDS), a national strategic plan to implement the CRPD.

61. The NDS aims to ensure that the principles underpinning the CRPD are 'incorporated into policies and programs affecting people with disability, their families and carers'.⁴⁸ The NDS has six foundational policy areas. The three that are most relevant to this submission are:

- inclusive and accessible communities: the physical environment including public transport; parks, buildings and housing; digital information and communications technologies; civic life including social, sporting, recreational and cultural life
- economic security: jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing
- learning and skills: early childhood education and care, schools, further education, vocational education; transitions from education to employment; lifelong learning.⁴⁹

62. The NDS is being reviewed this year. It is critical that the new NDS provides for data collection and public reporting in relation to the employment experiences of people with disability. The data should be collected in a manner that allows it to be disaggregated in relation to gender, ethnicity, location and other factors which impact on policy design.

63. The Commonwealth and a number of state and territory governments are currently working together to establish a National Disability Data Asset (NDDA). The NDDA is an 18-month pilot designed to 'improve outcomes for people with disability, their families and carers, by sharing de-identified data to better understand the life experiences and outcomes of people with disability in Australia'⁵⁰ Employment data could be collected as part of an expansion of the NDDA.

4 Australia's human rights obligations to people with disability in employment

64. Every human right that is recognised under international law, including those borne exclusively by people with disability, imposes tripartite obligations on

States.⁵¹ In particular, States Parties to human rights treaties are obliged to *respect, protect, and fulfil* each recognised right. The obligation to *respect* rights requires Australia, including public sector employers, to refrain from violating those rights. The obligation to *protect* rights requires Australia to ensure that those rights are not violated by third parties, including private employers.⁵² The obligation to *fulfil* rights requires states to take steps to facilitate, promote and provide for the enjoyment of those rights. Having ratified the CRPD and the other treaties identified in the previous section, Australia bears these obligations.

65. Australia's obligations under the CRPD,⁵³ and under international law generally,⁵⁴ extend to all elements of Australia's federal system, without limitation or exception in state or territory jurisdictions.
66. The content of Australia's obligations under the CRPD are set out in general terms in Article 4. At the highest level, these obligations are to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.⁵⁵ Article 4(1) elaborates upon the content of States Parties' general obligations under the CRPD by providing that they must:
- a. adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD
 - b. take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against people with disability
 - c. take into account the protection and promotion of the human rights of people with disability in all policies and programmes
 - d. refrain from engaging in any act or practice that is inconsistent with the CRPD and ensure that public authorities and institutions act in conformity with the CRPD
 - e. take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise
 - f. undertake or promote research and development of goods, services, equipment and facilities that are universally designed (that is, usable by all people and which require the minimum possible adaptation and the least cost to meet the specific needs of people

with disability), promote their availability and use, and promote universal design in the development of standards and guidelines

- g. undertake or promote research and development of, and promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for people with disability, giving priority to technologies at an affordable cost
- h. provide accessible information to people with disability about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities
- i. promote the training of professionals and staff working with people with disability in the rights recognised in the CRPD so as to better provide the assistance and services guaranteed by those rights.

67. The general obligations set out in Article 4 of the CRPD are consistent with the obligations imposed by other international human rights law instruments on States Parties.⁵⁶

68. The following section examines Australia's specific human rights obligations as they apply to people with disability in the context of employment.

4.1 The right to work on an equal basis with others

69. Article 27 of the CRPD explicitly recognises the rights of people with disability in the context of work and employment. The central proposition made by Article 27(1) of the CRPD is that people with disability have a right to work, on an equal basis with others. Similar rights are recognised in ICESCR at Article 6 (right to work) and Article 7 (right to the enjoyment of just and favourable conditions of work). Those provisions of ICESCR apply to 'everyone', including people with disability.

70. The CRPD Committee has noted that Article 27 'implies an obligation on the part of States Parties to create an enabling and conducive environment for employment, including in the private sector'.⁵⁷ It has also taken the view that the right to work on an equal basis with others includes the right of people with disability to 'retain' their employment on an equal basis with others.⁵⁸ Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has commented that the right to work under ICESCR 'affirms the obligation of

States parties to assure individuals their right ... not to be deprived of work unfairly'.⁵⁹ This is relevant to Australia's Fair Work Act, discussed at part 160 below.

71. Article 27(1) of the CRPD explicitly recognises that the right to work on an equal basis with others includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to people with disability. An 'open' labour market can be contrasted with sheltered employment, such as that offered by Australian Disability Enterprises (ADEs), where jobs and wages are allocated specifically on the basis of disability. The CRPD Committee has repeatedly expressed concerns about the ineffectiveness of sheltered employment in promoting employment of people with disability in the open labour market, as discussed at part 5.1 of this submission.⁶⁰
72. Article 27(1) of the CRPD explicitly sets out the content of States Parties' obligations in relation to the right of persons with disability to work. It provides that States Parties must safeguard and promote the realisation of the right to work by taking appropriate steps, including through legislation, to:
- a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.⁶¹
 - b. Protect the rights of people with disability, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.⁶² This is particularly relevant to ADEs, discussed at part 5.1 of this submission, and the Supported Wage System, discussed at part 109.
 - c. Ensure that people with disability are able to exercise their labour and trade union rights on an equal basis with others.⁶³ This includes persons employed in ADEs,⁶⁴ as discussed at part 5.1(a) of this submission.
 - d. Enable people with disability to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training.⁶⁵

- e. Promote employment opportunities and career advancement for people with disability in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.⁶⁶ This is particularly problematic in relation to ADEs, as discussed at part 5.1 of this submission.
- f. Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.⁶⁷
- g. Employ people with disability in the public sector.⁶⁸
- h. Promote the employment of people with disability in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.⁶⁹
- i. Ensure that reasonable accommodation is provided to people with disability in the workplace.⁷⁰ The CRPD defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.⁷¹ Reasonable accommodation under international human rights law is considered in further detail in part 4.3 of this submission. The denial of reasonable accommodation constitutes a form of discrimination under the CRPD, which is reflected in Australia's anti-discrimination laws as discussed at parts 3.3 and 5.3(e) of this submission.⁷²
- j. Promote the acquisition by people with disability of work experience in the open labour market.⁷³ Acquiring work in the open labour market is central to the right to work, on an equal basis with others. The low rate of participation in the open labour market by people with disability who are employed in ADEs is problematic in that regard, as discussed at part 5.1 of this submission.
- k. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for people with disability.⁷⁴

73. Article 27(2) of the CRPD strengthens the obligations contained in Article 8 of the ICCPR by requiring Australia to ensure that persons with disabilities are

not subject to slavery or servitude, and that they are protected from forced or compulsory labour.⁷⁵

74. In its Concluding Observations on Australia, the CRPD Committee has recommended a range of measures that Australia must implement to give effect to its obligations under Article 27. In particular, the CRPD Committee has recommended that Australia:

- a. Take measures to reform the Disability Employment Services and develop a national disability employment strategy that incorporates the recommendations from the Willing to Work Report and contains targeted gender-sensitive measures.⁷⁶
- b. Undertake a comprehensive review of ADEs to ensure that they adhere to Article 27 of the CRPD and provide services to enable people with disability to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value.⁷⁷
- c. Implement measures to address systemic and structural barriers experienced by people with disability, particularly by women with disabilities, Aboriginal and Torres Strait Islander people with disability, people with disability from culturally and linguistically diverse backgrounds and refugee and asylum-seeking people with disability.⁷⁸
- d. Immediately discontinue the use of the Business Services Wage Assessment Tool.⁷⁹
- e. Ensure that the Supported Wage System is modified to secure correct assessment of the wages of persons in supported employment, including ADEs.⁸⁰
- f. Adopt initiatives to increase employment participation by women with disabilities by addressing the specific underlying structural barriers to their workforce participation.⁸¹

4.2 Rights relating to accessibility, inclusion and independence

75. Article 9 of the CRPD imposes an obligation on Australia to take appropriate measures to ensure people with disability access, on an equal basis with

others, to the physical environment, to information and communication technologies and systems and to other facilities and services open or provided to the public. Article 9 specifies that those measures apply to workplaces and entail the identification and elimination of obstacles and barriers to accessibility. In relation to States Parties' obligations under Article 9, the CRPD Committee has commented that:

Persons with disabilities cannot effectively enjoy their work and employment rights, as described in article 27 of the [CRPD], if the workplace itself is not accessible. Workplaces therefore have to be accessible, as is explicitly indicated in article 9, paragraph 1 (a). A refusal to adapt the workplace constitutes a prohibited act of disability-based discrimination. Besides the physical accessibility of the workplace, persons with disabilities need accessible transport and support services to get to their workplaces. All information pertaining to work, advertisements of job offers, selection processes and communication at the workplace that is part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. All trade union and labour rights must also be accessible, as must training opportunities and job qualifications ...⁸²

76. Article 9(1) of the CRPD explicitly recognises that accessibility is intended to enable people with disability to live independently and participate fully in all aspects of life, including employment.
77. Article 19 recognises the equal right of all people with disability to live in the community, with choices equal to others. It imposes an obligation on Australia to take effective and appropriate measures to facilitate full enjoyment by people with disability of this right and their full inclusion and participation in the community. That obligation includes ensuring that people with disability have access to a range of support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.⁸³ Those support services extend to the employment context.⁸⁴
78. The CRPD Committee has commented that '[t]he existence of individualized support services, including personal assistance, often is a precondition for effective enjoyment of the right to work and employment'.⁸⁵ It has also recognised that 'people with disability should also become employers, managers or trainers in disability-specific support services', and thus, implementing Article 19 will 'help to phase out sheltered employment', like ADEs.⁸⁶

79. Additionally, the CRPD recognises the role of habilitation and rehabilitation⁸⁷ in enabling people with disability to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. Article 26(1) of the CRPD imposes an obligation on Australia to take effective and appropriate measures to enable that level of independence, ability, inclusion and participation. Australia is obligated to ‘organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of [amongst others] ... employment’.⁸⁸ Those services and programs must begin at the earliest possible stage, must be based on a multidisciplinary assessment of individual needs and strengths, and must support participation and inclusion in the community and all aspects of society.⁸⁹

4.3 Rights to non-discrimination and equality

80. Rights relating to non-discrimination and equality are central to the CRPD and to international human rights law generally.⁹⁰ As the CRPD Committee has commented, ‘[p]romoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization.’⁹¹

81. Discrimination is defined in Article 2 of the CRPD to mean ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field ... including denial of reasonable accommodation’.⁹²

82. Affirmative action measures to accelerate or achieve de facto equality of people with disabilities are expressly excluded from that definition,⁹³ but must not result in the perpetuation of ‘isolation, segregation, stereotyping, stigmatization or otherwise discrimination against persons with disabilities’.⁹⁴

83. Rights to non-discrimination and equality for people with disability in the employment context are recognised in numerous ways under international human rights law, in addition to Article 27(1). For example:

- a. The general obligation clause in Article 4(1) of the CRPD requires Australia to ‘ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’.

- b. Article 5(1) of the CRPD recognises that all persons, including people with disability, are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. Similar discrimination provisions also exist elsewhere in international human rights law.⁹⁵ The CRPD Committee has commented that ‘equality under the law refers to the right to use the law for personal benefit’.⁹⁶ Consequently, Australia ‘must eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights’.⁹⁷ This is of relevance to Australia’s legislative regimes which purport to uphold the rights of people with disability, considered at parts 5.3 and 5.4 of this submission.
- c. Article 5(2) of the CRPD requires Australia to prohibit all discrimination on the basis of disability and guarantee to people with disability equal and effective legal protection against discrimination on all grounds. The CRPD Committee has confirmed that ‘the duty to prohibit “all discrimination” includes all forms of discrimination’, including direct discrimination, indirect discrimination, the denial of reasonable accommodation, and harassment.⁹⁸ Additionally, Article 5(2) requires Australia to ‘enact specific and comprehensive anti-discrimination legislation’ so as to secure equal and effective legal protection against discrimination.⁹⁹
- d. Article 5(3) of the CRPD requires Australia to take all appropriate steps to ensure that reasonable accommodation is provided to people with disability. Article 27(1)(i) contains a similar provision specific to the workplace. The CRPD Committee has commented that ‘reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise [their] rights’.¹⁰⁰

84. Although many international human rights instruments beyond the CRPD do not explicitly specify ‘disability’ as an attribute that is to be protected from discrimination, ‘disability’ has been authoritatively interpreted to be an ‘other status’ of the sort that is protected.¹⁰¹ Such an interpretation is consistent with the principle that human rights treaties are ‘living instruments’ that must be interpreted in light of present day conditions.¹⁰² Consequently, many of the relevant non-discrimination and equality rights that are recognised under the CRPD are also recognised elsewhere in international human rights law.¹⁰³

85. Ultimately, Australia ‘must ensure that there is no discrimination on the grounds of disability in connection to work and employment’.¹⁰⁴
86. The CRPD Committee has confirmed that ‘[t]he effective enjoyment of the rights to equality and non-discrimination calls for the adoption of enforcement measures’.¹⁰⁵ This includes measures to ensure that rights contained in the CRPD are actionable in domestic courts, that there is access to justice for all persons who have experienced discrimination, and that effective, proportionate and dissuasive sanctions and remedies are available in the event of a breach.¹⁰⁶
87. Article 13 of the CRPD is relevant in that regard, as it requires Australia to ensure effective access to justice for people with disability on an equal basis with others. The legal right to pursue claims through associations, organisations or other legal entities that have a legitimate interest in the realisation of the right to equality is also required.¹⁰⁷ These obligations are particularly relevant to Australia’s various legislative regimes, which purport to provide avenues for redress to people with disability who have been discriminated against in the employment context, as discussed at parts 5.3 and 160 of this submission.

5 Implementing Australia’s human rights obligations

88. This section discusses Australia’s obligations to people with disability in employment in accordance with Article 27 of the CRPD. It analyses the extent to which Australia respects, protects and fulfils the right to equal work, accessibility, inclusion and independence, and non-discrimination and equality for people with disability. This helps to identify not only what is expected of Australia under international law, but also what strategies could be adopted to fulfil these obligations.

5.1 Australian Disability Enterprises

89. This section addresses the Commission’s concerns that ADEs fail to uphold the human rights of people with disability. This section responds to questions one, two and six of the Issues Paper.
90. ADEs are commercial organisations that provide sheltered (rather than open) employment to people with disabilities. ADEs employ approximately 20,000

people with moderate to severe disabilities to perform work such as packaging, assembly, production, recycling, screen printing, garden maintenance, cleaning and food services.¹⁰⁸

91. ADEs are government funded and subsidised through the Department of Social Services. Accordingly, ADEs must be certified against the National Standards for Disability Services under the *Disability Services Act 1986* (Cth). Failing to meet certification requirements may lead to a loss of funding.
92. People with disability who are employed in ADEs very rarely advance into open employment. For example, in 2014, only 0.8% of ADE employees moved into open employment.¹⁰⁹ ADEs therefore segregate people with disability from the general labour market.
93. As outlined in section 5.2 below the current disability employment framework allows employers to pay employees with disability as little as \$89 per week (\$2.34 per hour for full-time employees).¹¹⁰

(a) ADEs and the right to work on an equal basis with others under Article 27

94. Article 27(1) of the CRPD recognises that the right to work on an equal basis with others includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to people with disability. An 'open' labour market can be contrasted with sheltered employment, like that offered by ADEs, where jobs and wages are allocated specifically on the basis of disability.
95. The CRPD Committee has repeatedly expressed concerns about the ineffectiveness of sheltered employment in promoting the participation of people with disability in the open labour market.¹¹¹ Such concerns have been expressed explicitly in relation to ADEs in Australia.¹¹² In its most recent Concluding Observations on Australia, the CRPD Committee stated that it was concerned about both '[t]he low labour force participation of people with disability' and 'the ongoing segregation of people with disability employed through Australian Disability Enterprises and the fact that such persons receive a sub-minimum wage'.¹¹³
96. The CRPD Committee's concerns regarding sheltered employment (like ADEs) in the context of Article 27 of the CRPD are shared by the CESCR. For example, the CESCR has commented that the 'right of everyone to the opportunity to gain [their] living by work which [they] freely [choose or accept]' in article 6(1) of ICESCR 'is not realized where the only real

opportunity open to [people with disability] is to work in so-called “sheltered” facilities under sub-standard conditions’.¹¹⁴

97. Employees of ADEs are typically subject to conditions of employment that fall short of the standards applied to employees without a disability. For example, ADE employees typically earn less than the minimum wage applied to employees without a disability, as discussed at part 109 of this submission.
98. This is inconsistent with Australia’s obligation to ensure that people with disability receive just and favourable conditions of work on an equal basis with others.¹¹⁵ Article 27(1)(b) requires Australia to protect the rights of people with disability, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal pay for work of equal value. This requires that the amount a person is paid is not impacted by the mere presence or absence of a disability. Legislative regimes that lower the minimum wage because of a person’s disability, regardless of their work’s objective value, are inconsistent with the CRPD.¹¹⁶ That view is reinforced by the CESCR, which has commented in relation to an equivalent provision in ICESCR¹¹⁷ that persons with disability ‘must not suffer wage discrimination due to a perceived reduced capacity of work’.¹¹⁸ The application of the Supported Wage System in ADEs is problematic in this regard, and is discussed further at part 5.2 of this submission.
99. Furthermore, Article 27(1)(e) of the CRPD requires Australia to promote employment opportunities and career advancement for people with disability in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment. Similarly, Article 27(1)(j) requires Australia to promote the acquisition by people with disability of work experience in the open labour market. The ongoing maintenance of ADEs is inconsistent with those obligations, given that people with disability who are employed in ADEs have a job but rarely advance their careers into the open labour market.
100. The CRPD Committee has also expressed concerns that people with disability cannot establish a representative trade union in the open labour market because of their low representation, which may conflict with the right provided by Article 27(1)(c) of the CRPD to exercise trade union rights on an equal basis with others.¹¹⁹
101. Accordingly, Australia’s ongoing maintenance and promotion of ADEs is inconsistent with its obligations regarding the right of people with disability to work on an equal basis with others under Article 27 of the CRPD.
102. To satisfy its obligations under Article 27 of the CRPD, Australia must strengthen its efforts to support the transition of all people with disability

who are currently employed in ADEs into formal, open labour market employment.¹²⁰ That process must include a dedicated action plan, timetable, and budget.¹²¹ Australia must also ensure that people with disability are not subject to financial disincentives that prevent them from entering or transitioning into the open labour market.¹²²

(b) ADEs and rights relating to accessibility, inclusion and independence

103. Article 19 of the CRPD recognises the equal right of all people with disability to full inclusion and participation in the community, with choices equal to others. The frequent segregation of people with disability in ADEs from the open labour market is inconsistent with this right.

104. The failure of ADEs to effectively transition people with disability into the open labour market is also inconsistent with Australia's obligations regarding rights to accessibility, inclusion and independence. Creating an inclusive labour market in accordance with the CRPD entails creating employment opportunities in accessible workplaces, phasing out ADEs through immediately enforceable exit strategies and timelines, and creating incentives for employment in the mainstream labour market.¹²³

(c) ADEs and rights to non-discrimination and equality

105. Furthermore, the ongoing operation of ADEs is inconsistent with Australia's obligations relating to non-discrimination and equality. Under Article 27(1), Australia is obligated to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment. The reference to 'all forms of employment' confirms that the obligation to prohibit discrimination extends to discrimination in the context of sheltered employment, such as employment with ADEs.

106. To the extent that the remuneration of ADE employees is calculated on the basis of their status as a person with a disability, Australia's ongoing support of ADEs is inconsistent with its obligations to respect, protect and fulfil non-discrimination and equality rights.

107. In order to ensure reasonable accommodation as required by Article 5(3), and to achieve or accelerate de facto equality in the work environment as required by Article 5(4), the CRPD Committee has commented that States Parties should:

[f]acilitate the transition away from segregated work environments for persons with disabilities and support their engagement in the open labour market, and in

the meantime also ensure the immediate applicability of labour rights to those settings.¹²⁴

108. The CRPD Committee has specifically expressed its concerns about ‘the ongoing segregation of people with disability employed through Australian Disability Enterprises and the fact that such persons receive a sub-minimum wage’.¹²⁵ In considering ADEs in 2019, it recommended that Australia:

Undertake a comprehensive review of Australian Disability Enterprises to ensure that they adhere to article 27 of the Convention and provide services to enable people with disability to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value.¹²⁶

109. ***Recommendation 1: The Australian Government undertake a comprehensive review of ADEs against the requirements of international human rights law, including Article 27 of the CRPD, as recommended by the CRPD Committee.***

5.2 Supported Wage System

110. This section addresses the Commission’s concerns that the Supported Wage System (SWS) may limit Australia’s ability to fulfil its international human rights obligations. This section responds to questions one, two, six and eight of the Issues Paper.

111. The SWS aims to ‘enable people whose work productivity is reduced as a result of their disability to obtain employment’.¹²⁷ The SWS was designed to apply to employees with disability working in ‘open employment’, but is also one of the wage assessment tools used for employees of ADEs under the *Supported Employment Service Award 2020 (SES Award)*, an industrial instrument that sets minimum pay and conditions for employees in ADEs.¹²⁸

112. Where an employee with disability is assessed by a qualified assessor as being unable to work at full productive capacity compared to other employees, the SWS permits an employer to pay a pro-rata amount of the applicable minimum wage based on the employee’s productivity.¹²⁹ For example, someone assessed as having a work capacity of 70% compared with other employees can be paid 70% of the applicable minimum wage.¹³⁰ Section 47 of the Disability Discrimination Act explicitly excludes productivity-based wages determined in accordance with an order or award of a relevant court or tribunal, such as the SWS, from being considered unlawful discrimination.¹³¹

113. The SWS is part of Australia's industrial relations framework, and is facilitated by section 284 of the Fair Work Act which permits the Fair Work Commission to set fair minimum wages for employees with disability. People with disability who are paid an SWS wage otherwise retain the same employment conditions as their fellow employees under the relevant industrial instrument.¹³²
114. The SWS has effectively replaced the Business Services Wage Assessment Tool (BSWAT), a previous method of calculating a supported wage that combined a productivity assessment with a competency assessment.¹³³ In December 2012, the Full Court of the Federal Court in *Nojin v Commonwealth* [2012] FCAFC 192 found the BSWAT indirectly discriminated against ADE employees with intellectual disabilities under the Disability Discrimination Act.¹³⁴ Since May 2014, the BSWAT has been phased out in favour of the SWS regime.¹³⁵
115. The Commission acknowledges that the SWS provides a less discriminatory solution than the BSWAT, and that the SWS is widely accepted in the disability sector as a tool designed to incentivise employers to employ people with disability.¹³⁶
116. However, the Commission remains concerned about the discriminatory nature of the SWS. No other employees in Australia are permitted to be paid below-minimum hourly or weekly wages based on the profitability or viability of their own labour. The concept of determining the extent of a person's human rights based on work capacity or productivity has been considered by the CRPD Committee as a 'remnant of the medical approach to disability, superseded by the human rights-based approach'.¹³⁷
117. When capacity and productivity criteria are applied through the SWS and other wage assessment tools to restrict access to human rights such as the right to equal pay, the Commission is concerned that this imposes a discriminatory limit on the exercise of a person's right to work on an equal basis with others under Article 27(1)(b) of the CRPD.
118. Further, as noted in *Willing to Work*, the Commission has heard concerns from individuals and organisations about the adequacy of wages paid to people with disability through the SWS.¹³⁸ The SWS allows employers to pay employees with disability as little as \$89 per week (\$2.34 per hour for full-time employees), or 12.5% of the minimum wage for those employees in ADEs covered by the SES Award.¹³⁹
119. The issue of wage adequacy was also raised in submissions to the Commission regarding the Commonwealth's application for an exemption

under the Disability Discrimination Act for the BSWAT, and in the Department of Social Services review of the Disability Employment Framework.¹⁴⁰ Indeed, the CESCR has commented that persons with disability 'must not suffer wage discrimination due to a perceived reduced capacity for work'.¹⁴¹

120. The Commission is therefore concerned that inadequate wages under the SWS may contravene Article 7(a) of ICESCR, which requires Australia to ensure fair wages, equal remuneration for work of equal value, and a decent living for themselves and their families without discrimination of any kind.¹⁴² Australia's ability to ensure people with disability can fully and effectively participate in society, as required by Article 3 of the CRPD, may also be at risk if people with disability are unable to earn a living wage. In turn, an unliveable wage may expose people with disability to abuse and exploitation in other aspects of their lives.

121. In October 2019 the CRPD Committee encouraged the Australian Government to enable people with disability to transition into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value.¹⁴³ The Commission echoes this recommendation and calls on the Australian Government to ensure that the SWS does not contravene Australia's obligations under ICESCR and the CRPD.

122. ***Recommendation 2: The Australian Government undertake a comprehensive review of the Supported Wage System against the requirements of Article 7(a) of ICESCR and Article 27 of the CRPD, including a review of the adequacy of wages in supporting people with disability to fully and effectively participate in society.***

123. The Commission also acknowledges that, if the SWS is achieving its stated aims of enabling people with disability to secure employment, then there is a tension between Australia's obligations to ensure non-discrimination and fair pay, and Australia's obligations to create an enabling environment for employment of people with disability and provide a right to work.¹⁴⁴

124. However, the Commission is concerned that the Australian Government has not demonstrated that the SWS achieves its objectives. There is little publicly available information on the number of people with disability under the SWS, their average wage, whether they have obtained sustained employment, or how the SWS impacts the standard of living of people with disability. Further, through the Willing to Work inquiry, the Commission heard that the SWS does not provide sufficient opportunities for

employees to transition to a full wage, however there is limited data available to test these assertions.¹⁴⁵

125. There has been limited oversight of the operation of the SWS in ADEs, as part of the Fair Work Commission's four yearly review of the SES Award in consultation with industry and unions.¹⁴⁶ However, the four yearly reviews will cease after 2020, and in any case did not require the Fair Work Commission to consider the human rights or discrimination implications of SWS in ADEs.¹⁴⁷ For these reasons, the Commission calls on the Australian Government to ensure its evaluation of the SWS includes both open employment and ADEs.

126. ***Recommendation 3: The Australian Government publicly evaluate the effectiveness of the Supported Wage System in achieving its objective of enabling people with disability to obtain employment in a manner that is consistent with human rights practice and international obligations.***

5.3 Access to justice under the *Disability Discrimination Act 1992 (Cth)*

127. This section addresses the Commission's concerns about several aspects of the Disability Discrimination Act which may limit its effectiveness in protecting the human rights of people with disability. This section responds to questions five and eight of the Issues Paper.

(a) Limited standing to bring discrimination complaints

128. If a person experiences discrimination in employment under the Disability Discrimination Act, the onus is on that person to bring a complaint or court action to enforce their rights. Further, while organisations or persons other than an affected person can make anti-discrimination complaints to the Commission, only a person on whose behalf the complaint was lodged has standing to bring anti-discrimination proceedings to court if the complaint does not resolve at the Commission.¹⁴⁸

129. This complaints-based model was highlighted in *Willing to Work* as a significant limitation on access to justice for people with disability.¹⁴⁹ The Commission is concerned that the complexity of the current model may limit Australia's ability to effectively implement its obligations under Article 5(1) of the CRPD to eliminate barriers to gaining access to all of the protections of the law, and under Article 13 to provide access to justice.¹⁵⁰

130. Improving the ability of organisations to bring court proceedings on behalf of an affected person may assist Australia in complying with these

obligations. Reforms to anti-discrimination standing requirements were recommended by the Productivity Commission in its 2004 review of the Disability Discrimination Act (2004 Productivity Commission Review),¹⁵¹ by the Commission in its submission to the Attorney-General's 2011 Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (Consolidation Discussion Paper Submission) and in the Willing to Work.¹⁵²

131. The Commission is also currently conducting a major project, *Free and Equal: An Australian conversation on human rights* (National Conversation).¹⁵³ The purpose of the National Conversation is to develop a framework that will guide government action and community partnerships to fully realise human rights and advance equality in Australia.

132. Through the National Conversation the Commission is considering the question of how the complaints process (including the court stage) under federal anti-discrimination laws could be reformed to promote access to justice.¹⁵⁴ Submissions have highlighted how clarifying standing in federal discrimination law would promote greater access to justice:

In many cases, organisations are better placed than individuals to make complaints regarding discrimination, particularly in the case of systemic discrimination. Organisations may also be better resourced to absorb the costs risks that are associated with pursuing discrimination complaints in court. This is particularly the case when the discriminator is a large corporation, and there is a significant difference between the resources of the complainant and alleged discriminator. Extending the rules of standing would assist to place greater focus on systemic discrimination issues and limit the risks and burden that litigation ... places on individuals.¹⁵⁵

133. More recently, the Commission has considered the issue of standing in its Respect@Work report and recommended that the *Australian Human Rights Commission Act 1986* (Cth) be amended to allow representative groups to bring representative claims to court.¹⁵⁶ The Commission reiterates this recommendation.

134. The issue of standing will be further explored in the National Conversation report due to be published later this year.

135. ***Recommendation 4: The Australian Government amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.***

(b) Introducing a positive duty

136. The Disability Discrimination Act relies on a remedial model of anti-discrimination law. Although it is unlawful for employers to discriminate against employees with disability, no criminal or civil penalties attach to that unlawful act. Rather, the person who has been discriminated against must bring a complaint and prove the discrimination occurred.
137. The Commission is concerned that this model does little to address systemic discrimination or enable systemic reductions in discrimination in Australia. As a result, this model fails to guarantee to people with disability equal and effective legal protection against discrimination on all grounds, as required by Article 5(2) of the CRPD, and access to justice as required by Article 13 of the CRPD.
138. A more proactive model of anti-discrimination law, both in the Disability Discrimination Act and in other federal anti-discrimination laws, could address these concerns. One approach would be to create a positive duty to promote substantive equality or prevent discrimination. This has been previously recommended by the Commission in its Consolidation Discussion Paper Submission,¹⁵⁷ its submission to the Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* (Cth) (2008 SDA Inquiry Submission),¹⁵⁸ in *Willing to Work*,¹⁵⁹ and most recently in the Commission's *Respect@Work* report.¹⁶⁰ The Commission reiterates this recommendation.
139. A positive duty exists in the UK and Victorian anti-discrimination jurisdictions. In the UK, key public authorities and private bodies carrying out a public function have a general duty under the *Equality Act 2010* (UK) to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity and good relations between different groups.¹⁶¹ The UK Equality and Human Rights Commission requires organisations to publicly demonstrate their compliance and set measurable goals, and may seek compliance through improvement notices or court orders.¹⁶²
140. In Victoria, section 15 of the *Equal Opportunity Act 2010* (Vic) contains a positive duty requiring all organisations covered by that Act—including government, business, employers, and service providers—to take measures to eliminate discrimination, sexual harassment and victimisation. Similarly to the UK, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has the power to investigate non-compliance, and seek orders from the Victorian Civil and Administrative Tribunal (VCAT) to compel evidence for its investigations. After an investigation has been conducted, VEOHRC may

require entities to take certain actions to comply with the positive duty, refer a matter to VCAT or the Attorney-General, or report on the matter to Parliament.

141. Recent assessments of the Victorian approach highlight that section 15 lacks a statutory provision for enforcement in the event of a breach of the positive duty.¹⁶³ They also highlight that no cases have successfully been brought in VCAT or a court alleging a breach of the positive duty.¹⁶⁴ Other analyses have asserted that the positive duty would be easier to comply with and enforce if the legislation prescribed actions that organisations must take to demonstrate compliance.¹⁶⁵ Accordingly, the Commission echoes the comments of the CRPD Committee in recommending that enforceability be a key consideration when reforming the Disability Discrimination Act and other federal discrimination laws.¹⁶⁶
142. The introduction and operation of a positive duty will be further explored in the National Conversation report due to be published later this year.
143. ***Recommendation 5: The Australian Government amend the Disability Discrimination Act to introduce a positive duty to promote substantive equality and eliminate discrimination.***

(c) Weaknesses of comparator test

144. To prove that direct discrimination has occurred, section 5(1) of the Disability Discrimination Act requires a comparison to be made between the way in which a person with a particular disability is treated and the way in which a person without that disability would have been treated, in circumstances that are materially the same.
145. The Commission is concerned that the comparator test results in uncertainty and impracticality for people with disability, as noted by the Attorney-General's Department:

In many cases, there will not be a suitable comparator for the complainant, and courts have therefore relied on identifying a hypothetical comparator, and reconstructing how the discriminator might have treated them. Cases regularly turn on a particular judge's view as to what the material circumstances were, and how the discriminator might have treated a hypothetical person without the protected attribute in those circumstances. Results are unpredictable and have created significant uncertainty.¹⁶⁷

146. At its highest, the comparator test may limit Australia's ability to effectively implement its obligations under Articles 5(1) and 13 of the CRPD, particularly with regard to Australia's duty to eliminate barriers that may prevent people with disability from gaining access to all of the protections of the law.
147. This concern was shared by the NSW Law Reform Commission in its 1999 review of the *Anti-Discrimination Act 1977 (NSW)*,¹⁶⁸ the 2004 Productivity Commission Review,¹⁶⁹ the 2008 SDA Inquiry,¹⁷⁰ and in the Consolidation Discussion Paper.¹⁷¹
148. Several jurisdictions have already incorporated alternatives to the comparator test in their legislation.¹⁷² The Commission's suggested approach, echoing the recommendation of the Senate Committee in the 2008 SDA Inquiry and the Exposure Draft of the Human Rights and Anti-Discrimination Bill,¹⁷³ is to adopt the definition in section 8(2) of the *Discrimination Act 1991 (ACT)*:
- A person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.
149. This approach is preferable because it provides for a clearer test that is less likely to lead to subjective assessments regarding who is an appropriate comparator.
150. The formulation of the comparator test will be further explored in the National Conversation report due to be published later this year.

(d) Intersectional complaints

151. As discussed at paragraph 9 of this submission, the Commission is deeply concerned about the experiences of people with disability across intersections such as race, gender and age in employment, and commends the Royal Commission's consideration of these intersections.
152. A person with disability who has experienced intersectional discrimination (discrimination on the basis of a combination of attributes) may make a complaint to the Commission. In practice, the Commission will consider the complaint holistically and treat it as a single complaint. However, if the matter is not settled at the Commission and the person wishes to bring court proceedings, they are required to prove that discrimination occurred in relation to each attribute. This requires the person to satisfy different tests

for different attributes under the various anti-discrimination laws, applying different elements of proof.

153. In *Willing to Work*, the Commission found this creates difficulties for individuals who have experienced intersectional discrimination.¹⁷⁴ The Commission's National Conversation discussion paper has raised concerns that treating a single intersectional discrimination claim as a number of separate claims is burdensome and ineffective.¹⁷⁵ The Commission is concerned that this treatment of intersectional claims under the Disability Discrimination Act may limit the ability of people with disability to obtain the equal protection and equal benefit of the law, as is required by Article 5(1) of the CRPD.

154. The Commission has previously expressed support for an intersectional approach to federal discrimination laws, which would create a comprehensive and clear jurisdiction while avoiding the creation of new obligations.¹⁷⁶ Such an approach has been implemented in the UK, where the *Equality Act 2010* (UK) uses the concept of 'combined discrimination':

A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.¹⁷⁷

155. Similarly, the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) proposed that direct discrimination, (including harassment) and indirect discrimination include situations of intersectional discrimination where the discrimination relates to 'a particular combination of two or more protected attributes'.¹⁷⁸

156. The approach to claims of intersectional discrimination will be further explored in the National Conversation report due to be published later this year.

(e) Effective provision of reasonable adjustments

157. Under Articles 5(3) and 27(1)(i) of the CRPD, Australia is required to ensure that reasonable accommodation (referred to as 'reasonable adjustments' in the Disability Discrimination Act) is provided to people with disability in the workplace. However, the decision of the Full Court of the Federal Court in the matter of *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 (*Sklavos*) may have undermined the operation of the reasonable adjustments provisions of the Disability Discrimination Act, and

thus may limit Australia's ability to effectively implement Articles 5(3) and 27(1)(i) of the CRPD.

158. *Sklavos* dealt with a complaint of direct discrimination under section 5(2) of the Disability Discrimination Act, on the basis that the Australasian College of Dermatologists had failed to make reasonable adjustments. The court in *Sklavos* held that an aggrieved person must prove that their disability itself was one of the reasons that another person failed make reasonable adjustments.¹⁷⁹ For example, a person who requires flexible working hours because of a psychological disability must prove that their employer's failure to accommodate those hours was because they have a psychological disability.

159. The Commission shares the view of the Public Interest Advocacy Centre and People with Disability Australia that the decision in *Sklavos* has made it unduly onerous for a person with disability to successfully prove their discrimination complaint, and may contradict the purpose of the requirement to make reasonable adjustments.¹⁸⁰ The Commission recommends that the Australian Government make amendments to the Act which clarify that failing to make reasonable adjustments is in itself discrimination, and that it is not necessary for the complainant's disability to be a causative factor in the refusal to make reasonable adjustments.¹⁸¹

160. ***Recommendation 6: The Australian Government amend the Disability Discrimination Act to clarify that a failure to make reasonable adjustments, except when it would impose unjustifiable hardship, constitutes unlawful discrimination under the Disability Discrimination Act.***

5.4 Access to justice under the *Fair Work Act 2009* (Cth)

161. This section addresses the Commission's concerns about several aspects of the Fair Work Act which may limit its effectiveness in protecting the human rights of people with disability. This section responds to questions five and eight of the Issues Paper.

(a) Unclear definition of disability

162. The protected attribute of 'physical or mental disability' is not defined in the Fair Work Act. The courts and the Fair Work Commission have interpreted the meaning of a 'physical or mental disability' inconsistently.

163. For example, the Federal Circuit Court of Australia has applied the expansive definition of 'disability' contained in section 4 of the Disability

Discrimination Act in considering a claim under section 351 of the Fair Work Act.¹⁸² By contrast, other cases have been decided on the basis that the definition of 'disability' in the Disability Discrimination Act is of limited or no relevance when interpreting 'physical or mental disability' under section 351.¹⁸³ Other cases still have interpreted the term 'physical or mental disability' by incorrectly using the restrictive definition of 'employee with a disability', which is defined in section 12 of the Fair Work Act to only include some employees who qualify for a disability support pension.¹⁸⁴

164. The CESCR has commented that failure to protect workers against unfair dismissal is a violation of the State's obligation to take all necessary measures to safeguard persons from infringements of the right to work.¹⁸⁵ Accordingly, the Commission is concerned that the inconsistent application of the unfair dismissal jurisdiction to people with disability may restrict their human rights to equal work under Article 27(1) of the CRPD and Articles 6 and 7 of ICESCR. Further, the Commission is concerned that this inconsistency limits access to justice for people with disability, as required under Article 13 of the CRPD.

165. ***Recommendation 7: The Australian Government amend the Fair Work Act to clarify the definition of 'disability', and align it with the definition contained in the Disability Discrimination Act.***

(b) Strict time limits

166. The Fair Work Act provides people with disability with access to an effective remedy in certain circumstances following a dismissal from employment. Such a remedy can be pursued under the general protections, unfair dismissal or unlawful termination provisions of the Fair Work Act.

167. However, applicants must bring their complaints within 21 calendar days from the date that the dismissal or termination takes effect.¹⁸⁶

168. In *Willing to Work*, the Commission found this time limit can be too short for employees with disability who have experienced discrimination,¹⁸⁷ and may prevent some people with disability from accessing an effective remedy under the Fair Work Act.¹⁸⁸ The Commission is concerned that this may contravene Australia's obligations under Articles 5(1) and 13 of the CRPD, by limiting the ability of people with disability to effectively access justice and enjoy their rights to equality before the law.¹⁸⁹

169. The Fair Work Act empowers the Fair Work Commission to extend the 21 day time limit if it is satisfied that there are exceptional circumstances.¹⁹⁰

At times, the Fair Work Commission has found that an applicant's disability gives rise to exceptional circumstances justifying an extension.¹⁹¹ However, the need to establish exceptional circumstances is itself onerous for applicants, especially when unrepresented, and can be prohibitive to accessing justice.¹⁹²

170. ***Recommendation 8: That a review of the 21 day time limit in the Fair Work Act in relation to making a general protections, unfair dismissal or unlawful termination claim is undertaken in order to assess whether it is meeting its objectives of promoting efficiency and effectiveness while also ensuring access to justice.***

(c) Limits on access to flexible working arrangements

171. Under the National Employment Standards contained in the Fair Work Act, employees with disability have a right to submit a request to their employer for a change in their working arrangements.¹⁹³ Flexible working arrangements of this sort may include changes in hours of work, patterns of work or the location of work.
172. However, this provision only applies to employees who have had continuous employment for 12 months, or to long term casual employees who have a reasonable expectation of continuing employment with their employer on a regular and systematic basis.¹⁹⁴
173. Section 65(5) of the Fair Work Act provides that employers can only refuse an employee's request for a flexible working arrangement on 'reasonable business grounds'.¹⁹⁵ However, the Fair Work Act explicitly prevents the Fair Work Commission from dealing with a dispute or making orders about whether an employer had 'reasonable business grounds' for refusing an employee's request.¹⁹⁶
174. As the Commission observed in *Willing to Work*, stakeholders have expressed concerns that the right to request flexible working arrangements 'lacks teeth' in that employees have no recourse under the Fair Work Act if an employer's refusal was not on 'reasonable business grounds'.¹⁹⁷ The Commission is concerned that weak enforceability of section 65 may limit the rights of people with disability to effectively enjoy their human rights to equality and non-discrimination, as provided for in Articles 4(1), 5(1) and 27(1) of the CRPD.
175. Additionally, the current provisions of the Fair Work Act do not require employers to consult with employees before refusing a request for flexible

working arrangements. Amending the Fair Work Act to include such a requirement was recommended by a panel convened by the Australian Government in 2012 to evaluate the legislation.¹⁹⁸ Requiring employers to discuss a requested flexible working arrangement with the employee before refusing the request is consistent with procedural fairness. Doing so would also ensure that due consideration is afforded to requests for arrangements that enable employees with a disability to participate more fully in the labour market.

176. Section 76 of the Fair Work Act (extending unpaid parental leave beyond 12 months) provides a useful model for consulting with employees about work arrangements. Where an employee requests an extension of unpaid parental leave beyond 12 months the following steps apply:

- the employee must make the request in writing¹⁹⁹
- the employer must provide a written response within 21 days of receiving the request²⁰⁰
- a refusal can only be made on 'reasonable business grounds'²⁰¹
- the employer cannot refuse the request without the employer providing the employee a reasonable opportunity to discuss the request.²⁰²

177. ***Recommendation 9: The Australian Government amend section 65 of the Fair Work Act so that an employer is required to provide written reasons for the grant or refusal of a request for flexible work arrangements within a reasonable period of time (for example, 21 days) and specifically provide that a request for flexible work arrangements cannot be refused without providing the employee with a reasonable opportunity to discuss the request.***

5.5 Effectiveness of National Disability Strategy

178. This section briefly addresses how the NDS may be insufficient to support the Australian Government to fulfil its obligations under international human rights law. This section responds to questions two, five and eight of the Issues Paper.

179. The Commission is concerned that the NDS has not equipped Australia to adequately fulfil its obligations under the CRPD in relation to the employment of people with disability. The Commission notes that a comprehensive review of the NDS is currently being undertaken, and a new version of the NDS will be developed for beyond 2020.

180. In 2017, a Senate Standing Committee review concluded that the introduction of the NDS has failed to address decreasing rates of employment for people with disability.²⁰³ In particular, it noted the failure of the NDS to include workplaces and employers in its focus on accessible spaces which, as submitted by the Australian Blindness Forum:

has had an enormous effect on the employment rates of people with disability. The absence of accessible workplaces, transport, materials and communication services all restrict people with disability from participating in employment and thereby significantly reducing their income. Significant accessibility barriers for economic participation through employment include lack of physical access to many places of employment, discriminatory hiring practices, and lack of public transport options, and lack of quiet spaces for autism.²⁰⁴

181. The Commission is concerned that this gap may constrain Australia's ability to fulfil its obligations under Article 9(1)(a) of the CRPD, which requires it to ensure that people with disability have equal access to workplaces. In turn, this may limit the enjoyment by people with disability of the right to enjoy the other rights contained in Article 27 of the CRPD. The Commission calls on the Australian Government to ensure workplace accessibility is explicitly included in the next version of the NDS.

182. An independent review of the NDS by the University of New South Wales, commissioned by the Department of Social Services in 2018, found that the implementation of the NDS had been uneven and lacked a systematic approach (UNSW Review).²⁰⁵ The UNSW Review made several recommendations for reforms to be incorporated into the next version of the NDS.²⁰⁶

183. Similarly, the Productivity Commission's 2019 review of the National Disability Agreement (NDA) made several recommendations for the next version of the NDS.²⁰⁷ These included the creation of a new National Disability Agreement to explicitly articulate how the Australian Government intends to fulfil commitments under the CRPD, and clearer performance indicators and accountability mechanisms.²⁰⁸ The NDA is a 'high-level agreement between the Australian, state and territory Governments that commenced in 2009'.²⁰⁹ It delineates responsibilities for disability policy and sits under the Intergovernmental Agreement on Federal Financial Relations. It precedes the NDS and NDIS and as a result is outdated.

184. The Commission supports the recommendations made by the UNSW Review and the Productivity Commission to improve the implementation, resourcing, monitoring and evaluation of the next NDS.²¹⁰ As noted above, a comprehensive review of the NDS is currently underway. The *National*

Disability Strategy – Position Paper also discusses the importance of reporting and data collection and specifically seeks input on how these should be incorporated in the new NDS.²¹¹

185. ***Recommendation 10: The Australian Government ensure that the National Disability Agreement and the next National Disability Strategy are appropriately resourced, and include measurable goals and robust monitoring, reporting, evaluation, governance and accountability requirements, including by implementing the recommendations made by the UNSW Review and the Productivity Commission.***

5.6 Effectiveness of Department of Social Services employment supports

186. This section addresses the effectiveness of various disability employment programs and supports offered by the Australian Government's Department of Social Services in protecting the human rights of people with disability. These include Disability Employment Services, JobAccess and the Employment Assistance Fund. This section responds to questions two, five, six and eight of the Issues Paper.

(a) Disability Employment Services

187. Introduced in 2010, Disability Employment Services (DES) assist people with disability to find and retain employment in the open labour market, and support their employers. DES offers two streams of services administered through private DES providers, many of which are for-profit companies:

- Employment Support Services assist people with permanent disability to find work where they require ongoing support in the workplace.
- Disability Management Services assist other people with disability who have less intensive workplace needs.

188. In July 2018, acknowledging that 'DES is underperforming in achieving longer-term employment outcomes while participation rates for people with disability remain static', the Australian Government implemented significant reforms to DES.²¹² These reforms aimed to improve participant choice and control, enable competition and incentivisation in the provider market, and trialled an expanded DES offering for students in their last year of school.²¹³

189. So far, there is little evidence of the impact of these reforms. Australian disability rights groups have criticised the reforms, citing a lack of

consultation with people with disability, funding cuts unfairly impacting people with intellectual disability, and a potential disincentive for DES providers to assist jobseekers with high support needs.²¹⁴ There is some evidence that the focus on increased participant choice and control in the reforms is not necessarily translating into better outcomes for people with disability.²¹⁵ Concerns have also been raised by DES participants about the poor quality of DES services even after the implementation of the 2018 reforms.²¹⁶

190. The Commission is also concerned about the cost effectiveness of the program. As at 2016, the Australian Government was spending approximately \$800 million each year on DES.²¹⁷ However, as at June 2017, only 4.3% of Australians with disability participated in DES.²¹⁸ Of participants who commenced with DES and found employment in 2018–2019, 72% were no longer employed six months later.²¹⁹ That rate has decreased by 10% since 2016–17.²²⁰ Data on the success and cost effectiveness of DES post-2018 reforms is limited.

191. While the Department of Social Services publishes detailed monthly reports on caseload, participant employment outcomes and provider performance, the Australian National Audit Office review in June 2020 found that there is no ‘evaluation framework to effectively measure DES program performance or the success of the DES reforms’.²²¹ The CRPD Committee has also expressed concerns about the lack of clear measures to reform DES, and recommends that the Australian Government take measures to further reform the DES.²²²

192. In response, the Department of Social Services has agreed to develop an evaluation framework that includes program-level performance metrics to enable evaluation of the DES reforms in achieving their intended purposes.²²³

193. In the meantime, the Commission is concerned that the absence of safeguards may expose people with disability to exploitation. It is also concerned about the Australian Government’s ability to demonstrate fulfilment of its obligations to promote effective access to placement services, employment opportunities, career advancement, and the acquisition of open employment by people with disability as required by Article 27(1) of the CRPD.

194. ***Recommendation 11: The Australian Government publish an evaluation framework for the Disability Employment Services program, including measures that demonstrate how Disability Employment Services assist the Australian Government to fulfil its international human rights obligations under Article 27(1) of the CRPD.***

195. In 2015, the Australian Government committed to implementing a new Disability Employment Framework in early 2016, to review and improve employment outcomes for people with disability.²²⁴ However, no Disability Employment Framework has been released, despite the Australian Government referring to the existence of the framework in its 2018 combined second and third periodic reports to the CRPD Committee.²²⁵
196. In its submission to the CRPD Committee in 2019, the Commission expressed its concern that the status of this framework remains unclear, and that its development may have halted. The CRPD Committee shared these concerns, and recommended that the Australian Government develop a national disability employment strategy that incorporates recommendations from Willing to Work and contains targeted gender-sensitive measures.²²⁶
197. ***Recommendation 12: The Australian Government provide an update and timeline for finalising and implementing a Disability Employment Framework, including details of how the measurement of other diversity characteristics (eg age, gender, and race) will be incorporated.***

(b) JobAccess and the Employment Assistance Fund

198. JobAccess is an information service provided by the Australian Government that provides online and telephone advice to people with disability and their employers on employment-related matters.
199. The Employment Assistance Fund (EAF) operates through JobAccess. The EAF reimburses employers for the cost of reasonable adjustments for people with disability who are in employment or looking for work and who meet the EAF guidelines.²²⁷
200. Generally, JobAccess and the EAF receive positive feedback from employers and people with disability.²²⁸ However, the Commission has heard that many employers are not aware of JobAccess and the EAF, the process for making an application, the employee assessment process, or where to go for advice on disability employment.²²⁹ The Department of Social Services has also acknowledged calls for JobAccess and the EAF to be more widely publicised.²³⁰ Further promotion of JobAccess and the EAF may assist the Australian Government in promoting the employment of people with disability in the private sector, as required by Article 27(1)(h) of the CRPD.
201. Those employers who are aware of EAF report concerns of insufficient funding, particularly for Auslan interpreting and captioning.²³¹ They also raise concerns about the EAF's inflexible, reactive funding model. For example,

employers must pay for the adjustments themselves and be reimbursed by the EAF, cannot usually seek funding at the job search or interview stage, and are limited to using funds for specific adjustments that are not always responsive to an employer's requirements.²³² Further, in *Willing to Work*, the Commission also found that a lack of EAF funding for reasonable adjustments to facilitate work experience and internships can hinder access to important pathways to employment for young people with disability.²³³

202. Overall, the Commission is concerned that, despite making several recommendations in *Willing to Work* for reforms to JobAccess and the EAF, none of those recommendations were reflected in the latest version of the EAF Guidelines, issued in January 2018. Accordingly, the Commission reiterates those recommendations.

203. ***Recommendation 13: To improve access to reasonable workplace adjustments for people with disability, the Australian Government:***

- ***expand the Employment Assistance Fund to support work experience and internships, to enable greater job readiness for people with disability***
- ***increase the funding available through the Employment Assistance Fund for Auslan interpreting and captioning***
- ***change the process for obtaining funding for reasonable adjustments so that adjustments are paid for directly by JobAccess.***

204. ***Recommendation 14: The Australian Government develop a campaign to increase employee and employer awareness of government supports available through Disability Employment Services, JobAccess, the Employee Assistance Fund and the National Disability Recruitment Coordinator.***

205. *Willing to Work* also identified chronic health conditions as a key gap in the advice and funding provided by EAF and JobAccess.²³⁴ The Australian Institute of Health and Welfare estimates that 54% of people aged 55–64 years old have one or more chronic health conditions, compared with 21% of people aged 25–34 years.²³⁵ People with chronic conditions are also less likely to be in employment than those without a chronic condition.²³⁶ The cost of lost workforce participation due to chronic conditions is projected to exceed \$60 billion in foregone gross domestic product (GDP) by 2030.²³⁷

206. Failing to provide reasonable accommodation for and prevent discrimination against people with chronic health conditions may contravene Australia's obligations under Article 27(1) of the CRPD. Accordingly, the Commission encourages the Australian Government to consider how

JobAccess and the EAF could better facilitate access to workplace adjustments for people with a chronic health condition.

207. ***Recommendation 15: To support continuing workforce participation and to improve access to workplace adjustments for people with chronic health conditions, the Australian Government:***

- ***expand the Employment Assistance Fund to include training for managers and co-workers about employees with chronic health conditions***
- ***develop information and resources provided by JobAccess that specifically address workplace adjustments for employees with chronic health conditions***
- ***review the current EAF guidelines to ensure they do not exclude people with chronic health conditions from accessing workplace adjustments.***

5.7 Effectiveness of National Disability Insurance Scheme employment supports

208. This section addresses the effectiveness of the Australian Government's employment supports offered to National Disability Insurance Scheme (NDIS) participants. These include DES, JobAccess and the EAF. This section responds to questions two, six and eight of the Issues Paper.

209. Australia's NDIS provides funding and supports to help people with disability pursue their goals, increase their independence and improve social participation. Improving economic and employment outcomes for participants is a key objective of the NDIS.²³⁸ Approximately 170,000 of the NDIS's 300,000 participants are of working age (between 15 and 64 years of age).²³⁹

210. The NDIS funds a range of employment supports for participants who have employment goals in their NDIS plan. For example, this can include training to learn how to commute to work or develop basic work skills, personal care for those who need it at work, and employment-related counselling or group support.²⁴⁰ The NDIS generally provides these supports where a participant's employer or other employment services (such as DES) cannot meet their needs, or to complement or supplement existing employment supports.²⁴¹ Since 2015, the rate of working age participants with a work-related goal in their NDIS plan has nearly doubled to 31%.²⁴²

211. However, there remain challenges in obtaining quality employment outcomes for NDIS participants. Participants, their carers and families have reported ongoing perceptions from employers that it is too hard to employ NDIS participants, that people with disability can only perform limited tasks or hours, and that the effect of these perceptions result in stigma and under-employment.²⁴³
212. To address these challenges, the NDIS Participant Employment Strategy 2019-2022 (Participant Employment Strategy) was published in November 2019.²⁴⁴ It sets out the Australian Government's strategy for supporting NDIS participants to find and maintain meaningful employment. It also presents a clear economic imperative for improving employment participation for NDIS participants.²⁴⁵
213. The Commission welcomes the Participant Employment Strategy, and its ultimate goal of increasing workforce participation of working age participants from 24% to 30% by June 2023.²⁴⁶ In particular, the Commission welcomes the Participant Employment Strategy's commitment that employment goals and supports will be included in NDIS plans for all participants who have an 'aspiration to work', with a target of 40% of working age participants including work goals in their plans by 2023.
214. The Commission encourages the Australian Government to ensure participants are provided with appropriate supports to develop an 'aspiration to work'. Ensuring NDIS participants have effective access to technical and vocational guidance, placement services and vocational and continuing training, as well as focusing on the ultimate goal of obtaining employment, is consistent with Australia's obligations under Article 27(1)(d) of the CRPD.
215. The Commission also encourages the Australian Government to ensure robust accountability measures are in place to measure the effectiveness of the Participant Employment Strategy, and publicly report annual progress against its goals. As part of this process, data in relation to the nature of the work participants are engaged in (for example, full-time or part-time) and the wages they are receiving (for example, any reduction under the SWS) should be captured. We note that employment related data is currently reported through the NDIS' quarterly reports.²⁴⁷
216. ***Recommendation 16: The Australian Government ensure NDIS participants have effective access to technical and vocational guidance, placement services and vocational and continuing training, consistent with Australia's obligations under Article 27(1)(d) of the CRPD, to develop and support an 'aspiration to work'.***

217. A suite of NDIS reforms introduced by the Australian Government since 2018 also aim to improve employment outcomes for NDIS participants. Funding for employment supports has moved from a participant's capacity building budget into their core budget, with the aim of increasing flexibility.²⁴⁸ Joint planning approaches, longer plans if a participant's needs are stable, and the ability for participants to see draft plan summaries have also been implemented to improve participant agency and transparency.²⁴⁹

218. Nevertheless, the December 2019 independent review of the NDIS by David Tune AO PSM found that:

the pressure of rolling the scheme out across Australia has directly impacted the NDIA's ability to provide a consistent, effective and high quality service delivery offering ... it will still take a number of years before the NDIS is delivering consistent positive experiences for people with disability.²⁵⁰

219. The Commission encourages the Australian Government to assess the impact of these reforms on participants' employment participation, in consultation with people with disability and their carers, to ensure that the reforms improve Australia's ability to comply with its obligations under Article 27(1) of the CRPD.

220. ***Recommendation 17: The Australian Government assess the specific impact of NDIS reforms on participants' employment participation, in consultation with people with disability and their carers, against the obligations contained in Article 27(1) of the CRPD.***

5.8 Young people with disability and work

221. This section addresses the importance of educational attainment and transition to work supports as key enablers of sustainable employment outcomes for people with disability. This section will briefly discuss existing supports, and how they interact with the Australian Government's human rights obligations. This section responds to questions two, six and eight of the Issues Paper.

(a) Importance of educational attainment

222. There are many factors influencing how a person with disability can participate in employment. The Commission wishes to highlight in particular the role of education as a fundamental human right, which must be realised

for young people with disability to successfully transition into open employment and realise their potential.²⁵¹

223. The CRPD Committee's General Comment on the right to inclusive education, explored further in the Commission's previous submission on the same topic, states:

Quality inclusive education must prepare people with disability for work life through the acquisition of the knowledge, skills and confidence necessary for participation in the open labour market and in an open, inclusive and accessible work environment (art. 27) ... Full participation in political and public life is enhanced through the realization of the right to inclusive education.²⁵²

224. The Australian Government has acknowledged there is considerable work ahead to ensure students with disability are able to achieve optimal educational outcomes.²⁵³ People with disability in Australia have lower rates of attainment of both secondary and tertiary education. 33% of people aged over 15 with disability have completed high school, compared to 84% of people without disability.²⁵⁴ Students with disability report poor educational experiences, including limited choice of school, discrimination, bullying, limited or no funding for support and resources, inadequately trained staff and a culture of low expectations.²⁵⁵ These issues mean that students with disability are more likely to leave school without the necessary support, skills and confidence to participate in further employment.²⁵⁶

225. Available evidence clearly establishes the link between educational attainment and employment outcomes.²⁵⁷ Enhanced educational outcomes for people with disability also increase the contribution of people with disability to the economy.²⁵⁸ The Productivity Commission has found that 'better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community'.²⁵⁹ In contrast, under-education leads to unemployment, lower levels of health, social isolation and a lifetime of disadvantage.²⁶⁰

226. Under Article 24 of the CRPD, the Australian Government is obliged to ensure that people with disability have equal access to education, freedom from discrimination in education, and access to reasonable accommodation. This includes access to tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.

227. ***Recommendation 18: The Australian Government continue to prioritise educational attainment in developing and reforming Australian***

disability policy, and ensure the connection between educational attainment and employment is a key factor in the development of disability policy.

(b) Importance of transition to work

228. The transition from school to employment is a key factor determining the employment outcomes and participation of young people with disability.²⁶¹ Article 27(1)(d) of the CRPD requires Australia to enable people with disability – including young people – to have effective access to general technical and vocational guidance programmes and placement services. The CRPD Committee has also acknowledged that services which facilitate the transition of young people to adulthood, including support with starting employment and continuing into higher education, are crucial in supporting independent living as required by Article 9(1) of the CRPD.²⁶²
229. This is reflected in the NDS, which identifies improved pathways for students with disability from school to further education, employment and lifelong learning as a policy area.²⁶³ It requires the government to identify and establish best practice for transition planning and support through all stages of learning and from education to employment.²⁶⁴
230. The importance of the school-to-work transition is also highlighted in the NDIS Participant Employment Strategy 2019–2022. The Strategy requires the Australian Government to focus on employment-related supports for participants aged 14–25.²⁶⁵ These include the development of a new engagement initiative for students and their families to expand their understanding of NDIS supports as a pathway to work.²⁶⁶ These also include the development of a new engagement strategy to build the confidence of employers to employ NDIS participants, by promoting the education-to-employment pathway and transition supports.²⁶⁷
231. However, the effectiveness of Australia’s vocational transition programs for young people remains unclear. Young people with disability in Australia experience substantially greater difficulties in transitioning from school to work than their peers, are more likely to not enter the labour force at all, and less likely to make a ‘successful’ transition to employment after leaving school.²⁶⁸
232. The Commission is also concerned that there is a lack of recent data about post-secondary transitions for people with disability. The Nationally Consistent Collection of Data on School Students with Disability only collects

data about students while they are in school, rather than their employment outcomes post-school.²⁶⁹

233. As recommended by the Commission in *Willing to Work*, there is a need for further qualitative and longitudinal research on post-school transitions for students with disability in order to inform policy and practice in this area.

234. Examining the transition from education to employment is currently the focus of one of the test cases being examined as part of the NDDA pilot (see part 3.5 above).²⁷⁰

235. ***Recommendation 19: The Australian Government collect and make publicly available national data regarding post-school employment outcomes for students with disability, and measure the effectiveness of its school-to-work transition programs against its obligations under international human rights law.***

(c) Effectiveness of DES Eligible School Leavers program

236. The DES Eligible School Leavers program (DES-ESL) aims to assist students with significant disability to transition from school to post-school open employment.²⁷¹ DES-ESL is available in limited circumstances to certain students with a 'significant disability' who meet the criteria set out in the DES Eligible School Leaver Guidelines.²⁷²

237. As identified by the Commission in *Willing to Work*, stakeholders have raised concerns that the DES-ESL program excludes students who do not meet the definition of 'significant disability'. The Commission is aware that a change in DES contracts has limited the ability of DES to offer effective school to work transitions and young people can 'fall through the cracks'.²⁷³

238. The DES-ESL program also excludes students who work more than eight hours per week while they are still at school.²⁷⁴ This effectively requires students to choose between developing valuable skills through part-time work, or accessing DES-ESL support in finding post-secondary work. There is evidence that paid employment or work experience in school may improve post-school employment outcomes for young people with disability.²⁷⁵ Accordingly, measures to ensure that school students with disability are afforded opportunities to participate in work experience and paid work should be created.

239. Finally, the DES-ESL program does not support students to find part-time or casual employment: its only focus is on full-time employment.²⁷⁶

Particularly given increasing rates of workforce casualisation,²⁷⁷ this may unnecessarily limit employment opportunities for young people. This also fails to acknowledge that part-time or casual employment may be the most appropriate starting point for a young person with disability to transition out of school.

240. Although the Commission recommended in *Willing to Work* that these limitations be eased to improve access to the program, updates to the DES-ESL Guidelines in September 2018 did not adopt these recommendations.²⁷⁸

241. Overall, the Commission is concerned that these limitations on the DES-ESL program may have a negative impact on the Australian Government's ability to promote open employment, provide effective access to vocational programs, and enable full participation in society for young people with disability as required under Article 27(1) of the CRPD.

242. ***Recommendation 20: The Australian Government evaluate the effectiveness of the DES Eligible School Leavers program against its international human rights obligations, including whether the eligibility criteria of the DES Eligible School Leavers program should be expanded to allow more students with disability in their final years of high school to access employment transition support.***

(d) Effectiveness of in-school programs

243. Most states and territories also have their own in-school and post-school programs aimed at assisting with post-school transition. The NSW-based Transition to Work program has been identified as the most successful example of a transition to work program. However, evaluations indicate low rates of take-up and low employment outcomes.²⁷⁹

244. The Commission reiterates its recommendations in *Willing to Work* that the Australian Government collaborate with state and territory governments to ensure all schools and teachers across Australia are empowered to support students with disability.²⁸⁰

245. ***Recommendation 21: The Australian Government allocate funding to enable a collaboration between state and Commonwealth education authorities and relevant agencies to develop guidance materials for teaching staff about supporting students with disability to transition from school to work.***

(e) Effectiveness of NDIS supports

246. In addition to general NDIS supports, NDIS participants who are in their final two years of secondary school and are ineligible for DES programs can access the School Leaver Employment Supports program (SLES). The SLES aims to build confidence and readiness to transition into a DES program, rather than to obtain paid employment.²⁸¹
247. The NDIS Participant Employment Strategy 2019–2022 committed to achieving a range of transition-to-work goals for the NDIS program by the end of 2020. These include providing further information to NDIS participants about school-to-work employment transition supports, a greater focus on employment related supports for participants aged 14–25, and developing a new engagement strategy and supports to promote the school-to-work pathway and build employer confidence to employ NDIS participants.²⁸²
248. The Commission commends these goals, but is concerned that the Strategy is generally silent on transition to work supports post-2020.
249. ***Recommendation 22: That the NDIS Participant Employment Strategy 2019–2022 be amended to include clear goals for transition to work supports for young people with disability in 2021 and 2022.***

6 Appendix A: Overview of Disability Discrimination Act Complaints in the area of employment (2013-2019)

1. Complaints received by the Commission in the area of employment are consistently one of, if not the highest area of complaints received under the Disability Discrimination Act. Furthermore, complaints under the Disability Discrimination Act overwhelmingly constitute the highest percentage of all complaints received by the Commission, making up 44% of all complaints in 2018²⁸³.
2. Complaints received by the Commission may be resolved by conciliation or court decision. The most recent reported employment complaints resolved via conciliation in 2018 predominantly related to disability discrimination caused by a failure to provide adequate workplace adjustments (i.e. equipment and working hours), allegedly mistaken conclusions or assumptions that the complainant was not able to perform the inherent requirements of the role, and general discrimination and unfavourable treatment by employers and co-workers as a result of the complainant's disability.²⁸⁴

Table 1: Disability Discrimination Act complaints received in the area of employment (2013-2019)

	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Number of complaints	337	302	331	311	319	317
Percentage of all Disability Discrimination Act complaints	33%	34%	35%	33%	37%*	36%**

*Annual report figure was 30% (Annual Report 2017-18, Table 27: Disability Discrimination Act – Complaints received by area).

**Annual report figure was 27% (Annual Report 2018-19, Table 17: Disability Discrimination Act – Complaints received by area).

The discrepancy with the Annual report figures is likely due to one complaint occasionally fitting under more than one 'area'.

¹ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Report, 2016) <https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf>.

² In 2018 only 47.8% of working age people with disability are employed, compared with 80.3% of people without disability, and 53.4 per cent of people with disability 'participated in the labour force' (meaning they were employed or seeking employment), compared with 84.1 per cent of people without disability: Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings 2018* (Catalogue No 4430.0, 24 October 2019).

³ Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/employment-rate-and-type>>.

⁴ In Australia, for people with disability of working age (15-64 years), only 28.3% are employed on a full-time basis, compared with 54.8% of people without disability. Nearly half (44%) are employed on a part-time basis, compared with 32% of people without disability: Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2018* (Catalogue No. 4430.0, 24 October 2019); Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/employment-rate-and-type>>.

⁵ A person is considered 'underemployed' if they are employed, work no more than 34 hours per week, would like to work more hours, and could start working more hours if offered a job in the next 4 weeks. Eleven percent of people with disability are underemployed, compared to 8% of people without disability. Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/underemployment>>.

- ⁶Neary 44% of people with disability report their 'own ill health or disability' as the main barrier to employment, compared to 1.7% of people without disability. Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/employment-participation-needs-and-challenges/difficulty-finding-work>>.
- ⁷ Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/employment-participation-needs-and-challenges/difficulty-finding-work>>.
- ⁸ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2018* (Catalogue No. 4430.0, 24 October 2019).
- ⁹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2018* (Catalogue No. 4430.0, 24 October 2019).
- ¹⁰ Of people with disability, men were more likely to be in the labour force (56.1%) compared to women (50.7%). Men were also more likely to be employed (49.9% of men compared with 45.9% of women). Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings 2018* (Catalogue No 4430.0, 24 October 2019).
- ¹¹ Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/employment-rate-and-type>>.
- ¹² Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018) 180 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>>.
- ¹³ Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/unemployment/unemployment-rate>>.
- ¹⁴ Young people with disability aged 15-24 years (29%) are significantly more likely to be underemployed, compared to young people without disability (19%), and other people with disability aged 25-64 years (9%). Australian Institute of Health and Welfare, *People with Disability in Australia* (Cat No DIS 72, September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/employment/underemployment>>.
- ¹⁵ Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander People with a Disability, 2012* (Catalogue No 4433.0.55.055, 18 April 2017) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4433.0.55.005Main+Features12012?OpenDocument>>. More recent data is not available because the recent ABS Survey of Disability, Ageing and Carers does not disaggregate data for people with disability who identify as Aboriginal and Torres Strait Islander, culturally or linguistically diverse, or as refugees or people seeking asylum. See CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [49(c)].
- ¹⁶ Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander People with a Disability, 2012* (Catalogue No 4433.0.55.055, 18 April 2017) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4433.0.55.005Main+Features12012?OpenDocument>>.

- ¹⁷ Australian Government, Fair Work Ombudsman, 'Employees with disability pay rates' (Web Page) <<https://www.fairwork.gov.au/pay/minimum-wages/employees-with-disability-pay-rates>>.
- ¹⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Employment Issues Paper* (May 2020) <<https://disability.royalcommission.gov.au/system/files/2020-07/Issues%20Paper%20-%20Employment.pdf>>.
- ¹⁹ Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *People with Disability and the Criminal Justice System* (20 March 2020) <<https://humanrights.gov.au/our-work/legal/submission/submission-people-disability-and-criminal-justice-system-2020>>; and Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Inclusive Education for People with Disability* (19 December 2019) <https://humanrights.gov.au/sites/default/files/ahrc_20191219_submission_disabilityrc_education.pdf>.
- ²⁰ Professor Paula McDonald et al *Digital Platform Work in Australia – Preliminary findings from a national survey* (June 2019) 3, 31 <https://research.qut.edu.au/centre-for-decent-work-and-industry/wp-content/uploads/sites/35/2019/06/Report-of-Survey-Findings_18-June-2019_PUBLISHED.pdf>.
- ²¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
- ²² *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).
- ²³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 34.
- ²⁴ United Nations Human Rights Committee, *General Comment No 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33 (5 November 2008) at [13].
- ²⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), article 31.
- ²⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
- ²⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ²⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
- ²⁹ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
- ³⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
- ³¹ See for example: *Convention (No. 159) Concerning Vocational Rehabilitation and Employment (Disabled Persons)*, opened for signature 20 June 1983, 1401 UNTS 23439 (entered into force 20 June 1985).
- ³² *Disability Discrimination Act 1992* (Cth) s 6.
- ³³ *Disability Discrimination Act 1992* (Cth) s 15.
- ³⁴ *Disability Discrimination Act 1992* (Cth) s 12(8)(ba).

³⁵ *Disability Discrimination Act 1992* (Cth) s 15.

³⁶ *Disability Discrimination Act 1992* (Cth) ss 4, 5(2), 6(2), 11.

³⁷ *Disability Discrimination Act 1992* (Cth) ss 11, 21B. Section 11 provides that in determining whether a reasonable adjustment would impose unjustifiable hardship on an employer, all relevant circumstances of the particular case must be taken into account, including the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned; the effect of the disability of any person concerned; the financial circumstances, and the estimated amount of expenditure required to be made, by the employer; the availability of financial and other assistance to the employer; and any relevant action plans given to the Commission under section 64.

³⁸ *Disability Discrimination Act 1992* (Cth) ss 11, 21B.

³⁹ *Disability Discrimination Act 1992* (Cth) s 21A.

⁴⁰ *Australian Human Rights Act 1986* (Cth) s 46P.

⁴¹ *Disability Discrimination Act 1992* (Cth) s 46PO. It is important to note that the Australian Human Rights Commission does not have the power to conduct systemic litigation or bring its own actions. It is up to individual parties to apply to the Federal Court for a remedy in their particular case. In some cases leave is required.

⁴² *Fair Work Act 2009* (Cth) s 335.

⁴³ *Fair Work Act 2009* (Cth) s 342.

⁴⁴ *Fair Work Act 2009* (Cth) ss 351(2)(a), 351(3).

⁴⁵ See, for example, *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424 at [113]; *Western Union Business Solutions (Australia) Pty Ltd v Robinson* (2019) 272 FCR 547 at [118]; *Cheng v Western Pursuits Trust T/A Vauxhall Inn* [2016] FCCA 3275 at [18] - [19]; *Morton v Commonwealth Scientific and Industrial Research Organisation (no 2)* [2019] FCA 1754 at [68] - [69].

⁴⁶ *Fair Work Act 2009* (Cth) pt 3-2.

⁴⁷ *Fair Work Act 2009* (Cth) ss 771-783.

⁴⁸ Council of Australian Governments, *National Disability Strategy 2010-2020*, 9 <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020>>.

⁴⁹ Council of Australian Governments, *National Disability Strategy 2010-2020*, 10 <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020>>.

⁵⁰ Australian Government, Department of Social Services 'The National Disability Data Asset' (Web Page, 19 August 2020) <<https://www.dss.gov.au/disability-and-carers-research-and-data/the-national-disability-data-asset>> .

⁵¹ See, for example, Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017) [47]-[68].

⁵² See also UN Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04 (2011).

⁵³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 4(5).

⁵⁴ See, for example, James Crawford, 'The conditions for international responsibility' in Crawford (ed), *Brownlie's Principles of Public International Law* (9th ed) (Oxford University Press 2019) 531.

- ⁵⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 4(1).
- ⁵⁶ See, for example, UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [7].
- ⁵⁷ *Groninger et al v Germany*, Communication No. 002/2010, UN Doc CRPD/C/D/2/2010 (7 July 2014) [6.2].
- ⁵⁸ *V.F.C v Spain*, Communication No. 034/2015, UN Doc CRPD/C/21/D/34/2015 (29 April 2019) [8.4].
- ⁵⁹ Committee on Economic, Social and Cultural Rights (CESCR Committee), *General Comment No. 18 on Article 6 The Right to Work*, UN Doc E/C.12/GC/18 (6 February 2006) [4]. See also Anthony Hallal and Marilyn Pittard, 'The rights of delivery workers in Australia's gig economy: employees, independent contractors and *Klooger v Foodora Australia*' (2019) 24(9) *Employment Law Bulletin* 118, 121.
- ⁶⁰ See, for example, CRPD Committee, *Concluding Observations on the initial report of Serbia*, UN Doc CRPD/C/SRB/CO/1 (23 May 2016) [55]-[56]; CRPD Committee, *Concluding Observations on the initial report of Slovakia*, UN Doc CRPD/C/SVK/CO/1 (17 May 2016) [73]-[74]; CRPD Committee, *Concluding Observations on the initial report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [49]-[50]; CRPD Committee, *Concluding Observations on the initial report of Mauritius*, UN Doc CRPD/C/MUS/CO/1 (30 September 2015) [37]-[38]; CRPD Committee, *Concluding Observations on the initial report of Bosnia and Herzegovina*, UN Doc CRPD/C/BIH/CO/1 (2 May 2017) [48]-[49]; CRPD Committee, *Concluding Observations on the initial report of Canada*, UN Doc CRPD/C/CAN/CO/1 (8 May 2017) [47]-[48].
- ⁶¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(a).
- ⁶² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(b).
- ⁶³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(c).
- ⁶⁴ Ilias Bantekas et al *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 784.
- ⁶⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(d).
- ⁶⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(e).
- ⁶⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(f).
- ⁶⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(g).
- ⁶⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(h).
- ⁷⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(i).
- ⁷¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

- ⁷² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2 (definition of 'discrimination on the basis of disability').
- ⁷³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(j).
- ⁷⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27(1)(k).
- ⁷⁵ See also Coomara Pyaneandee, *International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (Routledge, 2018) 163-164.
- ⁷⁶ CRPD Committee, *Concluding Observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [50(a)].
- ⁷⁷ CRPD Committee, *Concluding Observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [50(b)].
- ⁷⁸ CRPD Committee, *Concluding Observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [50(c)].
- ⁷⁹ CRPD Committee, *Concluding observations on the initial report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [50(a)].
- ⁸⁰ CRPD Committee, *Concluding observations on the initial report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [50(b)].
- ⁸¹ CRPD Committee, *Concluding observations on the initial report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [50(c)].
- ⁸² CRPD Committee, *General Comment No. 2 (2014) Article 9: Accessibility*, UN Doc CRPD/C/GC/2 (22 May 2014) [41].
- ⁸³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 19(b).
- ⁸⁴ CRPD Committee, *General Comment No. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017) [29].
- ⁸⁵ CRPD Committee, *General Comment No. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017) [91].
- ⁸⁶ CRPD Committee, *General Comment No. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017) [91].
- ⁸⁷ 'Rehabilitation' refers to an individual's return to a situation of independence, ability, inclusion and participation (for example, after the onset of a health condition), whereas 'habilitation' refers to bringing an individual to maximal independence in the first instance (for example, where a child is born with congenital impairments). See Ilias Bantekas et al *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 735.
- ⁸⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 26(1).
- ⁸⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 26(1).
- ⁹⁰ See, for example, CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [4]-[7].
- ⁹¹ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [12].

- ⁹² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.
- ⁹³ See also CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [28]-[29].
- ⁹⁴ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [29].
- ⁹⁵ See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.
- ⁹⁶ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [14].
- ⁹⁷ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [16].
- ⁹⁸ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [18(a)-(d)].
- ⁹⁹ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [22].
- ¹⁰⁰ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [24(b)].
- ¹⁰¹ See, for example, CESCR Committee, *General Comment No. 5: Persons with disabilities*, UN Doc E/1995/22 (9 December 1994) [5].
- ¹⁰² See, for example, *Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003) [10.3].
- ¹⁰³ See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2(2), 3.
- ¹⁰⁴ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [67]. See also *Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 5181 UNTS (entered into force 15 June 1960), *Convention (No. 159) concerning Vocational Rehabilitation and Employment (Disabled Persons)*, opened for signature 20 June 1983, 1401 UNTS 23439 (entered into force 20 June 1985).
- ¹⁰⁵ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [31].
- ¹⁰⁶ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [31(b)(f)].
- ¹⁰⁷ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) [31(d)].
- ¹⁰⁸ Australian Government, Department of Social Services, 'About Australian Disability Enterprises' (Web Page, 3 July 2020) <<https://www.dss.gov.au/disability-and-carers-programmes-services-for-people-with-disability/about-australian-disability-enterprises>>.
- ¹⁰⁹ See, for example, Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Report, 2016) 242 <https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report

[AHRC_ac.pdf](#)>; Australian Government Department of Social Services, *National Disability Employment Framework – Discussion Paper* (November 2015) 12
<<https://engage.dss.gov.au/disability-employment-framework-2/disability-employment-framework-discussion-paper>>.

¹¹⁰ Australian Government, Fair Work Ombudsman, 'Employees with disability pay rates' (Web Page) <<https://www.fairwork.gov.au/pay/minimum-wages/employees-with-disability-pay-rates>>.

¹¹¹ See, for example, CRPD Committee, *Concluding Observations on the initial report of Serbia*, UN Doc CRPD/C/SRB/CO/1 (23 May 2016) [55]-[56]; CRPD Committee, *Concluding Observations on the initial report of Slovakia*, UN Doc CRPD/C/SVK/CO/1 (17 May 2016) [73]-[74]; CRPD Committee, *Concluding Observations on the initial report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [49]-[50]; CRPD Committee, *Concluding Observations on the initial report of Mauritius*, UN Doc CRPD/C/MUS/CO/1 (30 September 2015) [37]-[38]; CRPD Committee, *Concluding Observations on the initial report of Bosnia and Herzegovina*, UN Doc CRPD/C/BIH/CO/1 (2 May 2017) [48]-[49]; CRPD Committee, *Concluding Observations on the initial report of Canada*, UN Doc CRPD/C/CAN/CO/1 (8 May 2017) [47]-[48]. See also Ilias Bantekas et al *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 775.

¹¹² CRPD Committee, *Concluding Observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [49]-[50].

¹¹³ CRPD Committee, *Concluding Observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) at [49(b)(c)].

¹¹⁴ CESCR Committee, *General Comment No. 5: Persons with disabilities*, UN Doc E/1995/22 (9 December 1994) [21].

¹¹⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27.

¹¹⁶ See, for example, CRPD Committee, *Concluding Observations on initial report of New Zealand*, UN Doc CRPD/C/NZL/CO/1 (31 October 2014) [57]-[58]. See also Ilias Bantekas et al *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 778.

¹¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 7(a)(i).

¹¹⁸ CESCR Committee, *General Comment No. 23 (2016) on the right to just and favourable conditions of work*, UN Doc E/C.12/GC/23 (27 April 2016) [47(c)].

¹¹⁹ CRPD Committee, *Concluding observations on the initial report of Serbia*, UN Doc CRPD/C/SRB/CO/1 (23 May 2016) [53].

¹²⁰ See, for example, CRPD Committee, *Concluding Observations on the initial report of Serbia*, UN Doc CRPD/C/SRB/CO/1 (23 May 2016) [56]; CRPD Committee, *Concluding Observations on the initial report of Slovakia*, UN Doc CRPD/C/SVK/CO/1 (17 May 2016) [74]; CRPD Committee, *Concluding Observations on the initial report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [49]-[50].

¹²¹ See, for example, CRPD Committee, *Concluding Observations on the initial report of Slovakia*, UN Doc CRPD/C/SVK/CO/1 (17 May 2016) [74].

¹²² See, for example, CRPD Committee, *Concluding Observations on the initial report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [49].

¹²³ See, for example, CRPD Committee, *Concluding Observations on the initial report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [50].

- ¹²⁴ CRPD Committee, *General Comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [67(a)].
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- ¹⁴¹ CESCR Committee, *General Comment No. 23 (2016) on the right to just and favourable conditions of work*, UN Doc E/C.12/GC/23 (27 April 2016) [47(c)].
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- ¹⁴³ CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [50(b)].
- ¹⁴⁴ See ICESCR article 6, article 7: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); CRPD article 9(1), article 19, article 27(1): *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); *Groninger et al v Germany*, Communication No. 002/2010, UN Doc CRPD/C/D/2/2010 (7 July 2014) [6.2].
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