



## Submission

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

December, 2015

The University of Melbourne's Hallmark Disability Research Initiative and the Hallmark Ageing Research Initiative provides this public submission to the Australian Human Rights Commission for the *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australian with Disability*.

This joint submission was prepared as an interdisciplinary initiative and has drawn on the expertise of academics from the Melbourne Law School (MLS), the Melbourne School of Population and Global Health (MSPGH) and the Centre for Workplace Leadership (CWL). This paper firstly focuses on the issues faced by people with disability in gaining and keeping employment and then focuses on the issues faced by older people in gaining and keeping employment. Lastly, it discusses the overlap in discrimination faced by both older people and people with disability.



Australian  
Human Rights  
Commission

**WILLING  
TO WORK**

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

## SUBMISSION FORM

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### FORM 3: Organisation

#### **About the organisation:**

The Hallmark Disability Research Initiative (**DRI**) was established at the University of Melbourne to meet the need for interdisciplinary disability research. Our aim is to help to co-ordinate interdisciplinary projects with the involvement of community partners and those with lived experience of disability. We develop high-quality applied research, policy and education programs and apply a human rights framework and disability positive approach to issues facing persons with disability.

#### **What is your role within your organisation?**

Academic Convener

#### **What is your experience of providing advocacy for Australians with disability?**

I am the Academic Convener of the Hallmark Disability Research Initiative (DRI). I coordinate the activities of the DRI and engage in rights-based disability research across many different disciplines. I am also the Director of the Disability Human Rights Clinic at Melbourne Law School, where I lead the students in a variety of projects aimed at securing the human rights of people with disabilities in Australia and abroad. I am an international human rights lawyer and I have worked with the United Nations, the World Health Organization, and others. My work and research focuses on the rights of people with disabilities.

## I. Overview

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The Willing to Work Inquiry is timely as Australia vies for a place at the table at United Nations Human Rights Council and undergoes the Universal Periodic Review and it offers a chance for Australia to firmly demonstrate its commitment to the human rights of persons with disabilities. While Australia has been a leader on the multilateral level on disability issues, as it was in the development of the UN *Convention on the Rights of Persons with Disabilities*, it has the lowest rate of employment participation by persons with disabilities among all OECD countries.<sup>1</sup> Moreover, despite the growing momentum of disability reform in Australia, persons with disability are still twice as likely to be unemployed and are more likely to experience long term underemployment.<sup>2</sup> This is why the DRI welcomes the opportunity to make this submission in response to the Issues paper: *Employment discrimination against Australians with Disability* prepared by the Australian Human Rights Commission, to assist in the process of meaningful reform.

Workforce participation by Australians with disability is disproportionately affected by environmental and attitudinal barriers compared to those without disabilities through direct and indirect discrimination. This is due to societal preconceptions about persons with disability, current work culture and practices and laws which adversely impact the full enjoyment of their human rights, particularly the right to decent work on an equal basis with others as protected under both international<sup>3</sup> and domestic law.<sup>4</sup>

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<sup>1</sup> Organisation for Economic Co-Operation and Development, 'Sickness, Disability and Work' (Background Paper for High-Level Forum, Stockholm, 14-15 May 2009).

<sup>2</sup> See: Australian Bureau of Statistics 'Australian Social Trends' (Cat No 4102.0).

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), art. 27; *Convention on the Elimination of all forms of Discrimination against Women*, opened for signature on 8 December 1979, 1249 UNTS 13 (entered into force 1983), art. 14; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art. 32; *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1977), art. 6, 7.

<sup>4</sup> *Disability Discrimination Act 1992* (Cth).

Employment discrimination affects not only those seeking work, but also those in the workplace and it further impacts all areas of a person's life because work promotes financial independence, social inclusion and fulfilment.<sup>5</sup> The following section outlines our key recommendations which will be expounded in the section afterwards.

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<sup>5</sup> World Health Organisation & World Bank, *World report on disability*, WHO Press, Geneva Switzerland, (2011).

## **II. Executive Summary of Recommendations**

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Employment discrimination against Australians with disabilities is a serious concern across Australia and requires a proportionately urgent national response to ensure persons with disabilities can substantively, not just seemingly, have full enjoyment to the right to decent work on an equal basis with others. Towards this purpose we recommend the following:

- 1. Invest in persons with disabilities to promote their full participation rather than a charity model to supports;**
- 2. Appoint a separate Disability Discrimination Commissioner;**
- 3. Review Commonwealth laws for medical model ideology of disability including the definition of disability;**
- 4. Reform, streamline and harmonise anti-discrimination legislation and consider consolidation into a federal human rights Act;**
- 5. Strengthen employment support services for Australians with disability in transition;**
- 6. Implement decision in *Nojin* and take steps to eliminate practice of ‘competency-based’ wage calculation;**
- 7. Establish or empower an existing public authority, like the AHRC, with the role of enforcement of human rights and anti-discrimination law to enable access to remedies for breach of anti-discrimination law and promote a culture of compliance;**
- 8. Address education barriers that limit workforce participation through an express positive obligation to make reasonable accommodations for students with disability to access mainstream education;**
- 9. Funding for the Employment Assistance Fund and the JobAccess Advisory Service to improve accessibility of workplaces, reasonable accommodations**

**and supports and understanding of disability in the workplace by HR personnel and managers;**

**10. Redraft discrimination law to introduce a positive obligation to make reasonable accommodation in the workplace for all following the Canadian leading practice model; and**

**11. Review operation of exemptions power under *Australian Human Rights Commission Act section 55*.**

These recommendations would not only promote the rights of persons with disabilities, but all workers and all Australians and would further serve to promote respect and recognition for those with disabilities as citizens with rights and support their full participation in society.

### III. Recommended Approach

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#### *Apply the CRPD framework*

We propose that this inquiry adopt the principles of the CRPD in Article 3 to provide a framework that guides reform and programs to address employment participation of persons with disability. This approach should be further highlighted as last year the ALRC Final Report *Equality, Capacity and Disability in Commonwealth Laws* identified key guiding principles for the evaluation of current laws including dignity, equality, autonomy, inclusion and participation, and accountability.<sup>6</sup> These principles are sourced in Article 3 of the CRPD<sup>7</sup> and are reflected in the key policy areas of the National Disability Strategy 2010-2020 (NDS).<sup>8</sup> One of the purposes of the NDS is to ‘help ensure that the principles underpinning the *CRPD* are incorporated into policies and programs affecting people with disability, their family and carers’.<sup>9</sup>

The CRPD evidenced a paradigm shift in the civil rights movement for persons with disabilities away from a charity or medical model. A human rights model recognizes those with disabilities as citizens and holders of rights who form part of the diverse membership of the Australian community. Laws and practices need to be examined for their prejudicial misconceptions of disability and the pressure to normalize or exclude Australians with impairments rather than empower them.<sup>10</sup>

The movement galvanized by the CRPD has yet to be fully realized in Australia, but by applying a human rights approach informed by the disability rights movement and the voices and experiences of persons with disability, reform can maximize the

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<sup>6</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014), [28].

<sup>7</sup> *UN Convention on the Rights of Persons with Disabilities*, above n 3, art. 3(a).

<sup>8</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *National Disability Strategy 2010–2020 Report to the Council of Australian Governments, Laying the Groundwork 2011-2014*, (2012).

[http://www.dpac.tas.gov.au/data/assets/pdf\\_file/0008/185759/NDS\\_First\\_year\\_report-web.pdf](http://www.dpac.tas.gov.au/data/assets/pdf_file/0008/185759/NDS_First_year_report-web.pdf)

<sup>9</sup> *Ibid* [3].

<sup>10</sup> Kanter, A. *The Development of Disability Rights Under International Law: From Charity to Human Rights*, Routledge (2015); ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, above n 6, [26].

autonomy and social and economic inclusion of persons with disability in society and their engagement in the workforce.

### ***Consider the reform context***

The ratification of the CRPD in 2008 led to a series of reports and inquiries into the experience of persons with disability such as *The Shut Out Report: The Experience of People with Disabilities and their Families in Australia* in 2009, *The National Disability Strategy 2010–2020* ('NDS') in February 2011, the 2011 Productivity Commission Inquiry Report: *Disability Care and Support* that recommended the National Disability Insurance Scheme. In 2013 however at the first review of Australia by the treaty body for the CRPD, the Committee found that Australia fell short in realizing the various rights it was obliged to guarantee. They offered several recommendations<sup>11</sup> but few have been implemented as demonstrated by the criticism received at the recent 23<sup>rd</sup> UPR session.<sup>12</sup>

We submit that the fight for equal rights of persons with disability in Australia should be considered in the review of practices, programs and laws in this current inquiry to ensure that no recommendations turn back the progress we have made. Reform should focus on increasing access to employment opportunities by addressing attitudinal and systemic barriers to promote enjoyment of the right to work as a key to improving economic security and personal wellbeing of Australians<sup>13</sup> with disabilities.

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<sup>11</sup> UN Committee on the Rights of Persons with Disability, '*Concluding Observations on the Initial Report of Australia*', Adopted by the Committee at its Tenth Session (2–13 September 2013)' (United Nations, 4 October 2013) 9.

<sup>12</sup> OHCHR, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Australia*, A/HRC/WG.6/23/AUS/2; OHCHR, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Australia*, A/HRC/WG.6/23/AUS/3.

<sup>13</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *National Disability Strategy 2010-2020, Economic security* (2012), [6].

## ***Consolidate and strengthen anti-discrimination Law***

An important recommendation from the ALRC Final Report was the need for a review and consolidation of the five current Commonwealth anti-discrimination laws as a priority. This proposal had earlier gained momentum with the *Human Rights and Anti-Discrimination Bill: Exposure Draft Legislation 2012*<sup>14</sup> and the Inquiry report,<sup>15</sup> but has since been delayed.<sup>16</sup>

Compartmentalisation of discrimination grounds leads to fragmentation of human rights standards and evidences a lack of recognition of the diversity of persons with disability who may experience discrimination or disadvantage due to intersectional issues. Existing anti-discrimination laws should be consolidated and strengthened to ensure that the rights of Australians with disabilities have genuine rather than piecemeal protection against discrimination in gaining and retaining employment and access to real remedies in instances of breach.

## **IV. Breaking down employment barriers**

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There are several intersecting issues that cause problems for workforce participation by Australians with disabilities. The above human rights framework can be applied to identified issues and discriminatory laws to promote a disability positive approach to reform. Existing anti-discrimination laws do not adequately protect Australians with disability from employment discrimination and the available legal remedies for those affected by employment discrimination are insufficient. The obstacles before a person

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<sup>14</sup> Attorney General's Department, *Human Rights and Anti-Discrimination Bill 2012: Exposure Draft Legislation*, (2012),

<http://www.ag.gov.au/consultations/documents/consolidationofcommonwealthanti-discriminationlaws/human%20rights%20and%20anti-discrimination%20bill%202012%20-%20exposure%20draft%20.pdf>

<sup>15</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, Senate Printing Unit (2013), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and Constitutional Affairs/Completed inquiries/2010-13/antidiscrimination2012/report/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/anti\\_discrimination\\_2012/report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/report.ashx)

<sup>16</sup> Human Rights Law Centre, *Delay on Stronger anti-discrimination laws met with extreme disappointment*, (March 2013), <http://hrlc.org.au/delay-on-stronger-anti-discrimination-laws-met-with-extreme-disappointment/>

claiming their right to work demonstrate a disability-phobic judicial and business culture in Australia which views those with disabilities as a societal burden and business cost.

### ***Charity model: 'Financial sustainability'***

Exclusion from the workforce and underemployment of persons with disabilities affects Australia as a whole through lowered productivity and has social and economic costs where a whole segment of the community is marginalised and excluded. However, the National Disability Insurance Scheme (NDIS) for example, while aimed at providing personalised community based supports, demonstrates a charity model approach to disability. The NDIS is applied like a charitable expenditure rather than investment in persons with disabilities. Section 3(3) of the Act requires 'regard' to be had to the 'financial sustainability' of the scheme which has led to decision-makers giving greater weight to cost avoidance that violates the rights of persons with disability rather than empowering them. Administrative Appeals Tribunal decisions reflect this weighting that colours interpretation of who is eligible and what supports are reasonable at a *minimum*<sup>17</sup> which is contrary to the aims of the Act itself. Costs has been focused on in practice despite the legislative history of the NDIS and its other objects of the Act<sup>18</sup> that reflect CRPD principles in Article 3 and its purpose to give effect to the CRPD as its *first object*.<sup>19</sup>

Professor Stephen Hawking has spoken about his own experience and that employment enabled him to live a worthwhile life but that the majority of persons with disabilities have not had that same opportunity. His story highlights not only that disability need not be an obstacle to success, but that we have an obligation to invest sufficient funds and expertise to unlock the potential of people with disabilities to overcome attitudinal, physical and financial barriers to gain productive employment

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<sup>17</sup> *ZNDV v National Disability Insurance Agency* [2014] AATA 921; *Mulligan v National Disability Insurance Agency* [2014] AATA 3; *Young v National Disability Insurance Agency* [2014] AATA 40.

<sup>18</sup> NDIS Act, ss 3, 4.

<sup>19</sup> NDIS Act s 3(1).

and personal fulfilment.<sup>20</sup> Supporting financial participation will help persons with disability avoid poverty, dependency on social welfare and family members and lead to increased productivity in Australia and recognition in the workplace for diversity.

Accordingly, our approach to disability reform should not be approached with low and firm budget limits as a predominant concern but rather investing the resources that are *necessary for full participation and inclusion*. This approach should be followed in administrative decisions and reflected in legislative drafting to ensure a charity approach to interpretation is not promulgated.

### ***Separate Disability Discrimination Commissioner***

Disability discrimination and reform requires a dedicated advocate. This is why we urge for a separate Disability Discrimination Commissioner to advocate for these issues. By making the role part-time, it demonstrates a lack of political will to deal with both age and disability discrimination and to represent those groups adequately and equally.

We recognise that there is an intersectional group of Older Australians who also experience disability and suffer some of the same social stigmas due to their perceived or actual impairments. But persons with disabilities face distinct challenges regarding employment which impacts their capacity to find work and their experience in the workplace. Employment discrimination against Australians with disability affects their job prospects and their career trajectory over a lifetime and differently for different groups and having someone focus on both portfolios may lead to focus on areas of overlap rather than representing all persons with disability, such as women, racial minorities, children and other groups. Persons with disabilities and Older Australians both deserve a full time advocate and by making it a dual role it discounts the diversity of their experiences and undermines the urgency for reform.

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<sup>20</sup> World Health Organisation & World Bank, *World report on disability*, WHO Press, Geneva Switzerland, (2011), [3].

## ***Anti-Discrimination Agency***

The UNCRPD Committee recommended legislation and policy be amended to ensure access to justice for persons with disabilities.<sup>21</sup> But currently there is a void in the enforcement of anti-discrimination law and supported access to legal remedies for breach. Lack of an agency means that enforcement is left up to the individual which for many is an unsurmountable barrier to remedy and it does not bring about systemic change.

Costs are awarded against the loser who in these cases may have been out of work for years due to discriminatory dismissal or refusal of reasonable accommodations. The individual litigation model is not accessible for many Australians with disability who disproportionately face poverty or come from disadvantaged groups. There is also limited legal aid and disparity in size, power and resources between the employer and disadvantaged person and the law itself is weighted against the claimant which has led to little success and when remedies have been awarded, they are inadequate.

This agency could be introduced under AHRC or in a new regulatory body with a mandate similar to ASIC in prosecuting breaches of the Corporations Act with local bodies like VEOHRC, which had been given similar powers before they were taken away by the 2010 amendment, to monitor within the state or territory and take up individual claims, class actions or enforce compliance and address industry wide discriminatory practices and work culture.

## ***Breaking down Attitudinal Barriers***

Attitudes and misconceptions of persons with disability informs practices and laws that violate their rights, in particularly the right to decent work. Violation of this right has severe economic and social ramifications on the person's life and their wellbeing and leads to reliance on social security which, for worker's deemed to be 'fit' to work but unable to find it due to attitudinal barriers, may be below the poverty line.

Promotion of a disability-inclusive work culture and supported by education about disability will help facilitate more disabled people in workplaces across Australia

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<sup>21</sup> CRPD/C/AUS/CO/1, paras. 27-30.

which will then become the ‘norm’. To combat attitudes that are a barrier to access employment, there should be a greater effort to support and incentivise employers to employ persons with disabilities through expansion of the Employment Assistance Fund and the JobAccess Advisory Service as well as a disability positive campaign. A first step would be for the public service to prioritise employment of persons with disabilities and examine its own practices which has led to only 3.1% of its workforce identifying as persons with disability as compared to 8.8% of the general workforce as highlighted in the AHRC terms of reference for this inquiry.

### ***Discriminatory Practices and Programs***

- **Low level of compliance with accessibility standards**

The level of compliance with accessibility standards and regulations in Australia is low as it is perceived as a hassle by employers and is not adequately enforced and consequently serves as a barrier to employment of Australians with disabilities. This is because accessibility is not viewed as a right and employers do not appreciate the role it has in social exclusion. We recommend that sufficient resources be allocated to ensure the monitoring and implementation of the disability standards and requirements.<sup>22</sup>

- **“Competency-based” wage calculations**

Wage calculation on the basis of arbitrary attributes rather than job performance and productivity may have a discriminatory effect. An example of this is the Business Services Wage Assessment Tool (**BSWAT**) which was found by the Full Federal Court in the case *Nojin v Cth & Another*<sup>23</sup> to be indirectly discriminatory on the basis of disability.

Many of the competencies that determined the wages were not directly relevant to the work of the intellectually disabled workers employed through the Australian Disability Enterprise in supported employment. Buchanan J concluded that the

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<sup>22</sup> CRPD/C/AUS/CO/1, paras. 20-21.

<sup>23</sup> [2012] FCAFC 192.

BSWAT actually reduced wages which the intellectually disabled persons would have been entitled by reference to considerations that do not bear upon the work they do in the supported working environment.<sup>24</sup>

The aim of ADEs should be to promote competitive integrated employment that promotes self-sufficiency and wellbeing rather than cheap labour at the expense of persons with disabilities, particularly given that the program claims its financial stability required the lower wages, which necessitates predetermination by the ADE that the calculator would have this discriminatory effect which was relied upon. In America the practice of sheltered workshops such as this has been called a violation of the Americans with Disabilities Act<sup>25</sup> by the Department of Justice<sup>26</sup> which intervened in the class action in *Lane v. Brown*.<sup>27</sup> This case was settled but it highlights that this practice is contrary to international best practice and discriminates on the basis of disability.

We recommend that steps be taken to abolish competency-based wage calculation and further that the AHRC not support the postponement of the legal obligation to desist using the BSWAT.

### ***Qualification disparities as a barrier***

- **Move students from separated “Special Education” programs to supported mainstream education with reasonable accommodations from early childhood to tertiary levels**

Children and young adults with disability are faced with limited employment prospects not only due to attitudinal, systemic and environmental barriers but also

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<sup>24</sup> Ibid, [148].

<sup>25</sup> *Americans With Disabilities Act of 1990*. Public Law 101-336. 108th Congress, 2nd session (July 26, 1990).

<sup>26</sup> Department of Justice, *Justice Department Reaches Proposed ADA Settlement Agreement on Oregon’s Developmental Disabilities System*, Media Release, accessed online: <http://www.justice.gov/opa/pr/justice-department-reaches-proposed-ada-settlement-agreement-oregons-developmental>

<sup>27</sup> See more information:

[http://www.ada.gov/olmstead/documents/lane\\_fact\\_sheet.pdf](http://www.ada.gov/olmstead/documents/lane_fact_sheet.pdf)

because their access to education has been institutionally denied. According to the ABS Survey of Disability, Ageing and Carers in 2009, for people with disability aged 15-64 years seeking work, 13% said that a lack of the necessary skills or education was a barrier to finding work. A positive obligation to make reasonable accommodation in educational settings will help ameliorate skill and qualification disparities between persons with disabilities and the general population.

To access the workforce, Australians with disabilities must also have access to education on an equal basis with others. The UNCRPD Committee recommended Australia make attempts to transition students with disability from Special Education programs into supported mainstream education as separation promotes disability-phobic attitudes and social segregation of students with disabilities and also an acceptance of lower quality education. Towards this end, we recommend the provision of reasonable accommodation in education from early childhood to tertiary levels of the quality necessary to increase participation and completion rates by students with disabilities<sup>28</sup> which are tailored to meet their individual needs and the support early intervention supports in educational settings.

- **Greater support for Australians with disability to make transition:**
  - a. **from high school to tertiary education or training;**
  - b. **from university to the workplace;**
  - c. **from a leave of absence back to work.**

Transitioning from school to university or training or work is a difficult period for persons with disability who may need accommodations in their studies and special career guidance where their disability could affect their career prospects.<sup>29</sup> More research needs to be done on this so we recommend an inquiry into the needs of

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<sup>28</sup> CRPD/C/AUS/CO/1, paras. 45-46. See also CRC/C/AUS/CO/4, paras. 57-58.

<sup>29</sup> Ziguras, S. (2005), 'Transitions and risks of exclusion in the Australian labour market', (Paper presented at 'In Transitions and Risk: New Directions in Social Policy conference', Centre for Public Policy, University of Melbourne, 23-24 February, Melbourne).

persons with disability in these kinds of transitions that focuses on what supports they need and to determine what supports should be implemented in schools and the community to ease these career transitions.

- **In particular, focus on the needs of persons with disability upon release from prison or institutions back into the community and employment**

Transition from prison back into the community is difficult for all former prisoners but persons with disability are disproportionately incarcerated in Australia<sup>30</sup> which in QLD is at a rate of 5 times more than the general population<sup>31</sup> and in Victoria 25% of prisoners have had contact with mental health services prior to imprisonment.<sup>32</sup> This has a lot to do with criminalisation of psycho-social impairments by police<sup>33</sup> which should be addressed through increased training of PSOs and police.

We recommend an inquiry into the needs of persons with disability upon release from prison as persons with disabilities are so disproportionately incarcerated there is a need for particular focus on their needs in this context to identify the reasons why and what supports should be made available to assist re-integration and gaining employment to help prevent recidivism.<sup>34</sup>

Institutionalisation of persons in other settings also affects their employment participation. The social change to non-institutionalisation of persons with disability is wrongly equated with de-institutionalisation. This has led to some persons with

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<sup>30</sup> Baldry, E., Dowse, L., Clarence, M., *People with mental and cognitive disabilities: Pathways into prison*, (Paper presented at the National Legal Aid Conference Darwin 2011, UNSW).

<sup>31</sup> Corrective Services Queensland. *Intellectual Disability Survey 2002*.

<sup>32</sup> Mullen, P (2001) *A Review of the relationship between mental disorders and offending behaviours on the management of mentally abnormal offenders in the health and criminal justice system*, Criminology Research Council, Canberra; Mullen, P.E., Burgess, P., Wallace, C. 'Community care and criminal offending in schizophrenia'. *Lancet*, (2000), [614-617].

<sup>33</sup> NSW Legislative Council, *Inquiry into the Increase in NSW Prisoner Population Final Report*, NSW Parliament, Sydney, (2001).

<sup>34</sup> Draine, J., M. S. Salzer, et al. 'Role of social disadvantage in crime, joblessness, and homelessness among persons with serious mental illness.' *Psychiatric Services* (2002), [565-573].

disability merely ending up incarcerated rather than re-integrated due to lack of transitional supports.<sup>35</sup> This leads to difficulty attaining work and re-integrating into the community than their non-disabled peers which is why greater support to smoothen this process alongside programs that divert persons with disability from detention or institutionalisation to supported living in the community could promote lifelong work participation prospects.

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<sup>35</sup> Australian Institute of Health and Welfare (AIHW) Australia's Welfare 2001, AIHW Cat. No. AUS-24, AIHW, Canberra, (2001); Australian Bureau of Statistics, *Population characteristics: People in institutional settings*, 4102.0 - Australian Social Trends, (2003).

## V. Reform Commonwealth anti-discrimination and human rights laws

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Employment discrimination impacts Australians with disability in gaining and keeping employment and Australian law is not only failing to address the above issues but also serves as an institutional barrier to the right to work on an equal basis with others. Reform of existing Commonwealth law according to the CRPD principles would bring Australian law in line with international best practice and our international human rights obligations.

### ***Australian Human Rights Commission Exemption Power***

The use of the temporary exemption power vested in the AHRC under section 55 of the *AHRC Act* to deny procedural fairness<sup>36</sup> and suspend a legal obligation that has been recognised in one of the highest courts of Australia<sup>37</sup> is of great concern.

The exemption has been over employed as a device to circumvent the requirement to comply with human rights and should be limited to circumstances which promote equity rather than deny human rights of Australians with disabilities. There is need for greater guidance on the scope and criteria for exercising the exemption in section 55 with emphasis that it is to be temporary and that it should not operate to deny rights and permit a practice that has been judicially determined to be discriminatory.

### ***Anti-Discrimination Law***

In 2013 the UN Committee for the CRPD recommended that Australia strengthen anti-discrimination laws to address intersectional discrimination and guarantee protection from discrimination on the grounds of disability.<sup>38</sup> They also recommended that efforts be made to promote work participation of women and Indigenous persons with disabilities.

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<sup>36</sup> *People with Disability Australia and Australian Human Rights Commission* [2015] AATA 548.

<sup>37</sup> *Nojin v Cth & Another* [2012] FCAFC 192.

<sup>38</sup> CRPD/C/AUS/CO/1, para. 15

Australian anti-discrimination legislation is out-dated and not compliant with international law and State practice and needs to be reformed to meet Australia's human rights obligations under the CRPD. Comprehensive review and consolidation of the Disability Discrimination Act, Sex Discrimination Act, Racial Discrimination Act and the Age Discrimination Act will be required and insertion of effective legal remedies to address systemic and intersectional discrimination.

### **Issues with the definition of disability**

- **The definition should be revised to incorporate a social model approach to disability and include recognition that disability is often a social construct that arises when a person with impairments interacts with external barriers.**

The DDA provides in section 4 a definition of disability that is inconsistent with the human rights model of disability and defines disability with reference to a perfectly formed body or mind and fails to recognise that disability is often the result of a person with impairments interacting with environmental, attitudinal or institutional barriers. By referring to persons with physical disability as 'malformed' or 'malfunctioning' and to any manifestation of a psychosocial disability as 'disturbed behaviour' is a medical model approach to disability that views the body as abnormal and the source of disability and has a eugenic character. This language sets the definition closer towards a severe disability which excludes those with less apparent impairments who could benefit from anti-discrimination protection or reasonable accommodation but are not deemed to meet that high threshold.

This definition also is not in the spirit of the CRPD which in its Preamble, recognises disability as an evolving concept rather than a diagnosis which results from the interaction between a person with an impairment and external barriers that hinder or prevent their full and effective participation in society on an equal basis with others. The Act in its operation, also heavily relies on expert opinion and medical diagnosis of disability rather than recognising lived experience. The necessity to fit this definition when requesting reasonable adjustments may be difficult without a

diagnosis and sometimes reaching a diagnosis may take years of trial and error where the person's impairments are not adequately accommodated. This can lead to loss of work and moreover, the over reliance on a diagnosis in the assessment of whether someone can perform the inherent requirements of the job reflects a miscomprehension of disability and that it affects even those with the same diagnosis differently.

### **Consider Reasonable Accommodation for all**

Introduction of an express and positive duty for employers would ensure access to reasonable accommodations for all workers would promote workforce participation of all and encompass those with impairments who do not identify as having a disability but who also require reasonable accommodations in the workplace.

In Canada the obligation to provide reasonable accommodation is enshrined in federal and provincial human rights legislation and has been interpreted by the courts into the general non-discrimination clause in paragraph 15 of the *Canadian Charter of Human Rights and Freedoms*. Their anti-discrimination legislation serves as an excellent example and it includes all who require reasonable accommodations rather than singling out those with disabilities.

The Supreme Court of Canada found that reasonable accommodation for disadvantaged groups was a cornerstone of human rights jurisprudence which requires a positive duty to ensure that they benefit equally.<sup>39</sup> It is specifically provided for in employment under the *Employment Equity Act* paragraph 5(b) "every employer shall implement employment equity by . . . making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in society."

The unjustifiable hardship exemption should be heightened to ensure that the positive duty does not end where hardship begins and that the employer bears the onus to actively, in consultation with the employee, identify reasonable accommodation

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<sup>39</sup> *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624).

options and apply for extra support or funding from the Government where necessary which in turn should make provision for these supports. Persons with disability who are willing to work and could but for a reasonable accommodation should be so assisted as to do otherwise would violate their human rights and unnecessarily exclude them from the workforce. This also makes fiscal sense as paying for a workplace support versus ongoing social welfare support is usually likely to be cheaper and it will enable the individual to continue to participate in society but economically and socially.

This amendment would promote the rights of all workers and help mitigate employer bias against those with disabilities as a ‘hassle’ or ‘business cost’.

### **Reverse the burden of proof where there is a *prima facie* case of discrimination**

Under the current Commonwealth anti-discrimination laws unlike indirect discrimination, the burden of proof for direct discrimination lies with the applicant who is required to prove the respondent treated them less favourably. Once the claimant establishes the discriminatory impact of a condition, requirement or practice, the burden is then shifted to the respondent to prove reasonableness.<sup>40</sup> This discrepancy was identified and addressed in the delayed *Human Rights and Anti-Discrimination Bill 2012* under clause 124 which will require the applicant to establish a *prima facie* case that unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies.<sup>41</sup>

This approach is appropriate due to the “peculiar knowledge principle” which was explored in the Irish case *Mahoney v Waterford and Limerick Railway Co*<sup>42</sup> which explains that while there is a general rule that the one relying proves, there is a well-

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<sup>40</sup> *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, [89].

Available online:

<http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Explanatory%20Not.pdf>

<sup>41</sup> [88-89].

<sup>42</sup> [1900] 2. IR 273.

known exception that in matters which are peculiarly within the knowledge of one defendant the onus is shifted.<sup>43</sup> This is also consistent with current international norms such as the UK Employment Appeals Tribunal decision in *Barton v Invesec Henderson Crosthwaite Securities Ltd*<sup>44</sup> interpreting the EU Directive 97/80/EC that requires that after the establishment of a prima facie case, the burden of proof for direct or indirect discrimination in sex discrimination shifts to the respondent.<sup>45</sup> It was also adopted by the Court of Appeal for England and Wales in *Wong v Igen Ltd*.<sup>46</sup>

This simple change would go a long way to ensuring access to justice by persons with disability by removing a legal barrier to bringing an action.

### ***Consider a Federal Human Rights Act***

While the Australian Government has rejected Recommendation 22 of the recent UPR session to introduce a Human Rights Act, its reasoning is unsupported. Existing mechanisms are inadequate to provide for protection and promotion of human rights, particularly in the case of persons with disability.

A Federal Human Rights Act would harmonise anti-discrimination law and explicitly recognises and guarantees the human rights of all persons. Current categorisation in law and legal remedies for disadvantaged groups in discrimination law fails to recognise the diverse grounds of discrimination and intersectional disadvantage, particularly in the work context where discrimination may not be made out on a single basis as it is due to multiple statuses, i.e. against Indigenous women with disability.

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<sup>43</sup> As applied in *Merck Sharpe and Dohme* [1988] ILRM 629.

<sup>44</sup> [2003] IRLR 332.

<sup>45</sup> Duffy, K. 'Anti-Discrimination Law – Shifting the Burden of Proof',

<http://www.era->

[comm.eu/oldoku/SNLLaw/03\\_Burden\\_of\\_proof/DUFFY\\_Burden%20of%20Proof.pdf](http://www.era-comm.eu/oldoku/SNLLaw/03_Burden_of_proof/DUFFY_Burden%20of%20Proof.pdf)

<sup>46</sup> [2005] EWCA Civ 142.

## VI. Conclusions

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### *Key Recommendations*

The right to decent work on an equal basis with others is a fundamental right that must be realised in order to support the social and economic participation of persons with disabilities in Australia. This first requires recognition of the contribution that persons with disabilities can bring to the workplace and re-conceptualisation of disability to be consistent with a human rights approach rather than charity or medical model. There also needs to be better mechanisms for enforcement and remedies for breach and consolidation of anti-discrimination law to be flexible and adaptable to the diversity of disability, intersectional grounds of disadvantage and discrimination and equal protection.

Our main recommendations can be summarised as follows:

- 1. Apply the CRPD principles and a human rights framework to reform**
- 2. Consider the reform context and the paradigm shift away from the medical model of disability**
- 3. Emphasis on investing in persons with disability and empowering them versus the predominant charity model of support.**
- 4. Review DDA and other anti-discrimination acts**
  - a) Rewrite the definition of disability to be in accordance with the social model of disability.
  - b) Burden of proof for ‘motive’ or ‘reason for’ discrimination should be on the respondent once a prima facie case has been established for discrimination.
  - c) Remove comparator tests for direct discrimination.
  - d) Incorporate indirect and direct as two recognised types of discrimination rather than separate categories to bring the tests in line with each other.
  - e) Address issues that are faced in cases of manifestations of disability in the tests, including the comparator test.
  - f) Recognition of intersectional grounds for discrimination and instigate measures in law to protect those suffering from compounded discrimination through streamlining the five anti-discrimination acts.

- g) Expand explicit and positive duty to make reasonable adjustment to all.
- h) Consider consolidation into a single Act to ensure all persons are equally protected against discrimination on all grounds.

**5. Separate Disability Discrimination Commissioner**

**6. Establish a new agency or empower the AHRC to investigate breaches, enforce discrimination law and monitor industries to fight disability-phobic work culture and discriminatory practices as well as bring actions on behalf of victims of discrimination.**

**7. Begin an educational campaign about disability in the workplace to combat attitudinal barriers to workforce participation.**

**8. Expansion of the Employment Assistance Fund and the JobAccess Advisory Service to assist employers in making reasonable accommodations and step in where an employer establishes unjustifiable hardship.**

**9. Review competency assessed wage calculation generally with a view to abolish where unrelated to the work of the employee or inherent requirements of the role.**

**10. Address education and transitions as a workforce participation issue to bridge the gap between disabled persons and the general population.**

The DRI looks forward to the outcomes of this inquiry and a robust response to the outlined issues facing Australians with disability that promotes their autonomy and right to decent work on an equal basis with others, consistent with international human rights law.

Sincerely,

The Hallmark Disability Research Initiative

University of Melbourne

Do you have questions about this submission regarding  
Australians with Disability?

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

## **SUBMISSION FORM**

**Name of person making submission:** Dr Ruth Williams  
**Submission made on behalf of:** The Hallmark Ageing Research  
Initiative, University of Melbourne

**Do you want your name to be kept confidential?** No

**Do you want your submission to be kept confidential?** No

**Email address:** [ruth.williams@unimelb.edu.au](mailto:ruth.williams@unimelb.edu.au)

**Organisation website:** <http://ageingresearch.unimelb.edu.au/>

**Please tell us who you are:**

Organisation  Academic/social policy practitioner

### **FORM 3: Organisation**

#### **About the organisation:**

The University of Melbourne's Hallmark Ageing Research Initiative draws together research on ageing from across the university in order to collectively make the most of opportunities and solve challenges associated with ageing. It is an interdisciplinary initiative that focuses on technology, design, healthy ageing, leadership, ageing in low and middle income countries and social aspects of ageing across the life course. The Hallmark initiative builds on existing research strengths, as well as consolidates and forms new internal and external partnerships in Australia and internationally.

#### **What is your role within your organisation?**

Academic Convener

#### **What is your experience of providing advocacy for Older Australians?**

I am the Academic Convener of the Hallmark Ageing Research Initiative. I coordinate the activities of the Ageing Research Initiative and engage in research in ageing across many different disciplines. I am also a Research Fellow with the Centre for Workplace Leadership at the University of Melbourne where my research is focused on mature age labour force engagement. My previous employment was as a Research Fellow at the National Seniors Productive Ageing Centre, a not-for-profit advocacy organisation that lobbies on behalf of Australians over the age of 50 years.

## VII. Overview

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### *The problem*

An ageing population means an ageing workforce. With the Baby Boomer generation beginning to retire in large numbers and young labour market entrants unable to replace those exiting the workforce, Australia has an impending labour market shortage. Despite the Government push to prolong working lives, older workers have significantly lower labour force participation rates than prime age workers. Participation rates among older cohorts appear to fall sharply in many countries after workers reach the age of 50 years.

### *Why prolonging paid workforce participation is important*

The economic and personal benefits of prolonging paid workforce participation are vast. These benefits include reduced social welfare obligations for governments, higher organisational productivity through retention of skilled workers, and greater personal fulfilment for older workers who are able to continue working in jobs they enjoy. However, there are difficulties associated with confronting and overcoming certain entrenched attitudes and biases to recruiting and retaining older workers.

### *Increasing mature age workforce participation will be driven by employers*

On the supply side, employees are being urged to work longer, and are being encouraged to plan to do so by government policy changes such as the increase in the Age Pension eligibility age. Further, many older workers have seen a decline in their retirement savings as a result of the Global Financial Crisis of the late 2000s and have insufficient superannuation balances that will allow them to retire<sup>47</sup>. On the demand side, employers need encouragement to retain mature age workers for longer. However, Government incentives such as the Restart program have seen

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<sup>47</sup> Loretto, W., & White, P. (2006). Employers' attitudes, practices and policies towards older workers. *Human Resource Management Journal*, 16(3), 313-330.

disappointing take up rates. Employers will need to realise the consequences of labour shortages, the importance of knowledge retention and that it makes good business sense for many organisations to reflect their growing older customer base. In the UK, Barnes<sup>48</sup> also identified that early retirement was a demand-side problem and that changes in retirement behaviour would need to emanate from employer policies. The authors identified three areas of policy where action was being taken by some employers: pro-age policies; flexible work policies; and managing health issues of older workers.

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<sup>48</sup> Barnes, H., Smeaton, D., & Taylor, R. (2009). *An Ageing Workforce: The Employer's Perspective*. Brighton, England: The Institute for Employment Studies (Great Britain).

## VIII. Executive Summary of Recommendations

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Employment discrimination against older Australians is a serious concern across Australia and requires a proportionately urgent national response to ensure mature age workers can substantively, not just seemingly, have full enjoyment of the right to decent work on an equal basis with others. Towards this purpose we recommend the following:

- 1. Urge employers to invest in mature age people to promote their full workforce participation and engagement by encouraging employers to adopt pro-active policies to improve workforce participation and engagement by older workers;**
- 2. Establish regulations for employers - similar to that of the Workplace Gender Equality Agency;**
- 3. Establish an agency with a dedicated role to promote older worker recruitment and retention - the Workplace Mature Age Equality Agency.**

These recommendations would promote the equal rights of older Australians in the workforce and would further serve to promote respect and recognition for mature age workers' rights and support their full participation in society.

## **IX. Recommended Approach**

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**Our proposal is focused on encouraging employers to adopt proactive policies to improve workforce participation by older workers. Specifically, we are recommending regulations similar to that of the Workplace Gender Equality Agency.**

### ***Summary of action by employers to prolong workforce participation***

Support for prolonging mature age workforce participation comes from a wide range of sources including peak human resources bodies such as the Chartered Institute of Personnel Development (CIPD) in the UK have released a recent report recognising that age diversity is generally perceived in a positive light. Older workers can share practical experience and expertise and can gain skills training and new work methods from younger workers. Barnes et al. (2009) and the CIPD identified a number of steps employers can take to further develop an age-diverse workforce:

- Compile data on worker age and review annually;
- Provide flexible work policies, including increased job control, part-time hours, phased retirement;
- Build self-efficacy and self-confidence of older workers regarding training;
- Provide education and training opportunities for all workers;
- Train managers in age-diversity awareness;
- Measure and improve employee satisfaction and engagement;
- Monitor health and wellbeing of older workers including reducing work-related stress;
- Foster inter-generational relationships in the workplace;
- Regularly review work expectations, have conversations about succession planning and retirement intention planning;
- Offer bridge employment.

**Our recommendation includes encouraging these sorts of activities by employers through an agency with a dedicated role of promoting older worker recruitment and retention.**

Making discrimination illegal does not necessarily mean that legislation is easy to enforce. An alternative approach to increasing older worker labour force participation may be to use the oft adopted Australian approach of ‘regulation-light’ where encouragement replaces penalties. The *Workplace Gender Equality Act 2012* may provide an appropriate model to address the issue of age inequality. The following is a simplified outline of the Workplace Gender Equality Act:

- This Act requires various employers (*relevant employers*) to lodge reports each year containing information relating to various gender equality indicators (for example, equal remuneration).
- Those reports are available to the public, subject to some exceptions for information that is deemed personal, information relating to remuneration and information of a kind specified by the Minister.
- The function of the Workplace Gender Equality Agency includes advising and assisting employers in promoting and improving gender equality in the workplace and undertaking research and programs for the purpose of promoting and improving gender equality in the workplace.
- The Agency may review a relevant employer’s compliance with this Act by seeking further information from the employer.
- If a relevant employer fails to comply with this Act, the Agency may name the employer in a report given to the Minister or by electronic or other means (for example, on the Agency’s website or in a newspaper).<sup>49</sup>

The Workplace Gender Equality Agency has succeeded in drawing attention to the role of gender equity in the workplace and is achieving small but important results in recognising and decreasing the gender pay gap. The Agency states: A growing number of CEOs are taking action to understand and correct pay imbalances between women and men according to new data released by the Workplace Gender Equality Agency.

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<sup>49</sup> Workplace Gender Equality Agency, <https://www.wgea.gov.au/>

## **RECOMMENDATION:**

### **Create a Workplace Mature Age Equality Agency:**

**Our recommendation is to create a Workplace Mature Age Equality Agency (the Agency). The Agency would have very similar terms of reference to that of the Workplace Gender Equality Agency.**

### **The Agency's vision**

For mature age workers to be equally represented, valued and rewarded in the workplace.

### **The Agency's values**

The Agency will drive positive mature age management practices by developing and recognising best-practice solutions. This will inspire change in workplaces across Australia, with the desire to be known as an employer of choice for mature age workers. In addition, the Agency will engage stakeholders in a respectful and inclusive manner to foster successful partnerships.

### **Primary functions**

The primary functions will include:

- To advise and assist employers in providing, promoting and improving age friendly workplace policies and practices for mature age workers;
- To develop, in consultation with relevant employers and employee organisations, benchmarks in relation to mature age friendly indicators;
- To issue guidelines to assist relevant employers to achieve meeting the criteria of being an employer of choice;
- To collect, analyse and review compliance with the criteria by employers;
- To undertake research, educational programs and other programs for the purpose of promoting and improving age friendly workplace policies;
- To promote and contribute to understanding and acceptance, and public discussion, of mature age friendly workplace policies and practice.

## **The Agency's aims are to:**

- Promote and improve mature age friendly workplace policies and practices that are developed, implemented and evaluated by employers;
- Support employers to remove barriers to the full and equal participation of mature age employees;
- Promote, amongst employers, the elimination of mature age discrimination in relation to employment matters (such as in relation to ill health and caring responsibilities);
- Foster workplace consultation between employers and employees on issues concerning mature age employment;
- Improve the productivity and competitiveness of Australian business through the advancement of mature age friendly workplace policies and practices.

The Agency will work closely with employers to help them comply with its reporting requirements. The reporting framework aims to encourage measures that improve mature age friendly outcomes. However, it is important that the administration and compliance to the criteria not be overly burdensome on business.

The Agency will collect data from organisations in order to develop educational benchmarks. These benchmarks are broken down by industry and size of organisation and will enable identification of areas for focus, development of improvement strategies and measurement of performance against peers.

The rationale for establishing benchmarking includes:

- Measures business performance
- Compares one business to a competitor
- Helps identify areas for improvement
- Sets goals and expectations
- Supports change management practices
- Increases competitive edge across industry

Ideally, the Agency will be managed by a Director of Workplace Mature Age Equality, with a small team of specialists to lead research (including data analysis and preparing for a benchmarking system), advocacy, operations, advice and reporting, public affairs, building partnerships across government and industry, innovation and creativity, education, events, awards, and communications.

The Agency will consult with a range of stakeholders to support the implementation of mature age friendly workplace policies and practice through the development of tools, resources and campaigns. By engaging with stakeholders including employers, employees and professional associations, we will be able to develop business methodologies to improve mature age friendly workplace policies and practices that are relevant and highly practical. Similarly, major public communications campaigns are relevant and impactful. Feedback is sought formally through the establishment of dedicated working groups or through surveys, and informally through direct engagement or roundtables.

Advisory groups may be formed for (i) *Development* of mature age friendly policies and practices within the workplace; (ii) *Implementation* of mature age friendly policies and practices within the workplace; (iii) *Evaluation* of mature age friendly policies and practices within the workplace. These consultation groups will provide input and advice.

The Agency should aim to build an ambitious program of work that includes in-depth research, tools and resources as well as innovative public awareness and culture changing campaigns aimed at improving mature age workforce participation.

Achieving mature age friendly workplaces depends on close collaboration with employers. Partnerships may involve:

- Financial sponsorship;
- In-kind contribution of venues or specialist skills such as creative strategy and subject matter expertise;
- Co-creating and delivering education workshops;

- Co-hosting roundtables for CEOs or clients;
- Providing a case study for the Agency website;
- Promoting Agency education workshops, tools or public campaigns across various communication platforms; and
- Involvement in media campaigns.

Through the above mentioned recommendations, the suggestion is to create an agency that is committed to promoting and contributing to understanding, acceptance and public debate of mature age equality issues in the workplace. We believe it is important that a body is dedicated to ensuring mature age workers are equally represented, valued and rewarded in the workplace. This would assist the realisation of the inherent value mature age workers bring to the workplace and ensure principles of dignity, equality and mutual respect. Ultimately, “respect for human rights is the cornerstone of strong communities in which everyone can make a contribution and feel included”<sup>50</sup>.

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<sup>50</sup> Australian Human Rights Commission, <https://www.humanrights.gov.au/>

## **X. Conclusions**

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### ***Key Recommendations***

The right to decent work on an equal basis with others is a fundamental right that must be realised in order to support the social and economic participation of mature age workers in Australia. This first requires recognition of the contribution that mature age workers can bring to the workplace. There also needs to be better mechanisms for regulation.

The key recommendations to address the current issues faced by Older Australians in the workforce include:

- 1. Urging employers to invest in mature age people to promote their full workforce participation and engagement by encouraging employers to adopt pro-active policies to improve workforce participation and engagement by older workers;**
- 2. Establish regulations for employers - similar to that of the Workplace Gender Equality Agency;**
- 3. Establish an agency with a dedicated role of promoting older worker recruitment and retention - the Workplace Mature Age Equality Agency.**

The Hallmark Ageing Research Initiative looks forward to the outcomes of this inquiry and a robust response to the outlined issues facing Older Australians that promotes their right to decent work on an equal basis with others, consistent with international human rights law.

Sincerely,

The Hallmark Ageing Research Initiative

University of Melbourne

Do you have questions about this submission regarding Older Australians?

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## **XI. Overlap between Age and Disability Discrimination**

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Discrimination can be multi-layered and can be experienced within the workforce based on both age and disability as well as other factors. Due to the overlapping nature of age and disability discrimination within the workforce, we have some joint recommendations which apply to addressing both these forms of discrimination.

### **Introduce positive obligation for standardised regulations through the establishment of or empowering an existing public authority to promote a culture of compliance**

Establishing a peak body(ies) which oversees compliance of employers to minimum standards ensuring mature age and disability equality within the workplace and during the recruitment process. This can be based on similar terms of reference to that of the Workplace Gender Equality Agency.

The Mature Age/Disability Equality Index will seek to recognise how businesses are addressing the economic and social impacts of an ageing and disabled population through standards such as.

- Human Resources
- Occupational Health & Safety Management
- National Employment Standards
- Legislation
- Anti-Discrimination
- Human Rights Act
- Fair Work Ombudsman

As a strategic benchmarking tool these indices will identify, assess and compare the performance of a businesses processes, policies and environment to determine the state of the nation's workplaces. Using HR metrics and policy analysis, the aim is to assess and score the levels of practice across key areas culminating in an annual Age and Disability Equality Index Report.

## **Targeted training of HR and Line Managers and Supervisors**

In addition to the oversight of many standard regulations outlined previously, the Agency will also oversee compliance of targeted training of HR and line managers and supervisors regarding disability and age friendly human resource policies and practices within the workplace and during the recruitment process.

Research shows that employees deem support from HR, line managers and supervisors as more important than support from peers. By the nature of their pivotal role, managers and supervisors have the authority to make change, set standards, influence workplace policy, act as role models and set the cultural tone within an organisation. Therefore, it is imperative that HR and line managers and supervisors receive appropriate and adequate training to better understand the needs of their workers and how their individual situation may be addressed, often within a team setting.

## **Focus on workplace policies such as job redesign, rotation and redeployment**

The Agency will also oversee compliance to appropriate and adequate job redesign, rotation and redeployment where necessary. This may be designed to improve staff satisfaction, development, productivity, employee retention and promotion. Change and modifications to job tasks and roles can be targeted for either short or long term. The underlying principle of facilitating job redesign, rotation and redeployment depends on the allocation of tasks that are in line with personal abilities. As work abilities change with age and/or disability, particularly in the context of physically demanding work, it is important that the job redesign, rotation and redeployment process occurs in consultation with a range of possible stakeholders such as the employee, line managers, health physicians, and workplace health and safety professionals. The overall purpose of job redesign is to change elements of the job so that employees can continue to work in a comfortable and productive capacity.

The following factors need to be taken into consideration before implementing job redesign, rotation and redeployment:

- The employee must be willing to participate
- A systematic approach must be taken
- The employee's capacity and ability should match the work requirements
- Other stakeholders should be on board such as general practitioners or specialists, the union representative, HR department, line manager etc.
- Limit or minimise the negative effects of redeployment such as a decrease in income

### **Multiple discrimination**

The concept of multiple discrimination first emerged to describe the complex interplay of racial and gender inequalities. More recently, people with disabilities, indigenous peoples, members of religious minorities, members of the LGBTI community, the elderly and youth now seek advocacy in relation to experiences of disadvantage and exclusion from one or more forms of discrimination. Economic vulnerability and social class also impact upon the multidimensional and complex nature of discrimination.

Current difficulties in defining, measuring and addressing types of multiple discrimination necessitate further legal and policy developments in order to build knowledge, raise awareness, develop capacity, create new national institutions, and help elaborate new legislation and national policies. Recommendations to address multiple discrimination include:

- A definition of multiple discrimination be developed
- Human rights documents at all levels to include explicit recognition of the phenomenon of multiple discrimination
- Government policy-making to include awareness of multiple discrimination and strategies for addressing it, including mainstreaming initiatives that take into account complex, intersecting and multiple inequalities

- Anti-discrimination laws and conventions to allow complaints based on allegations of multiple discrimination<sup>51</sup>

Multiple discrimination can be addressed through the development of proactive organisational policy that abolishes structural and institutional inequalities at work. This can be supported by government initiatives designed to assist securing decent work and greater socio-economic equality in order to remedy persistent and complex multiple discriminations.

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<sup>51</sup> Sheppard, C. 'Multiple discrimination in the world of work', International Labour Organisation, Geneva, Switzerland (2011).

Do you have questions about this joint submission?  
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