

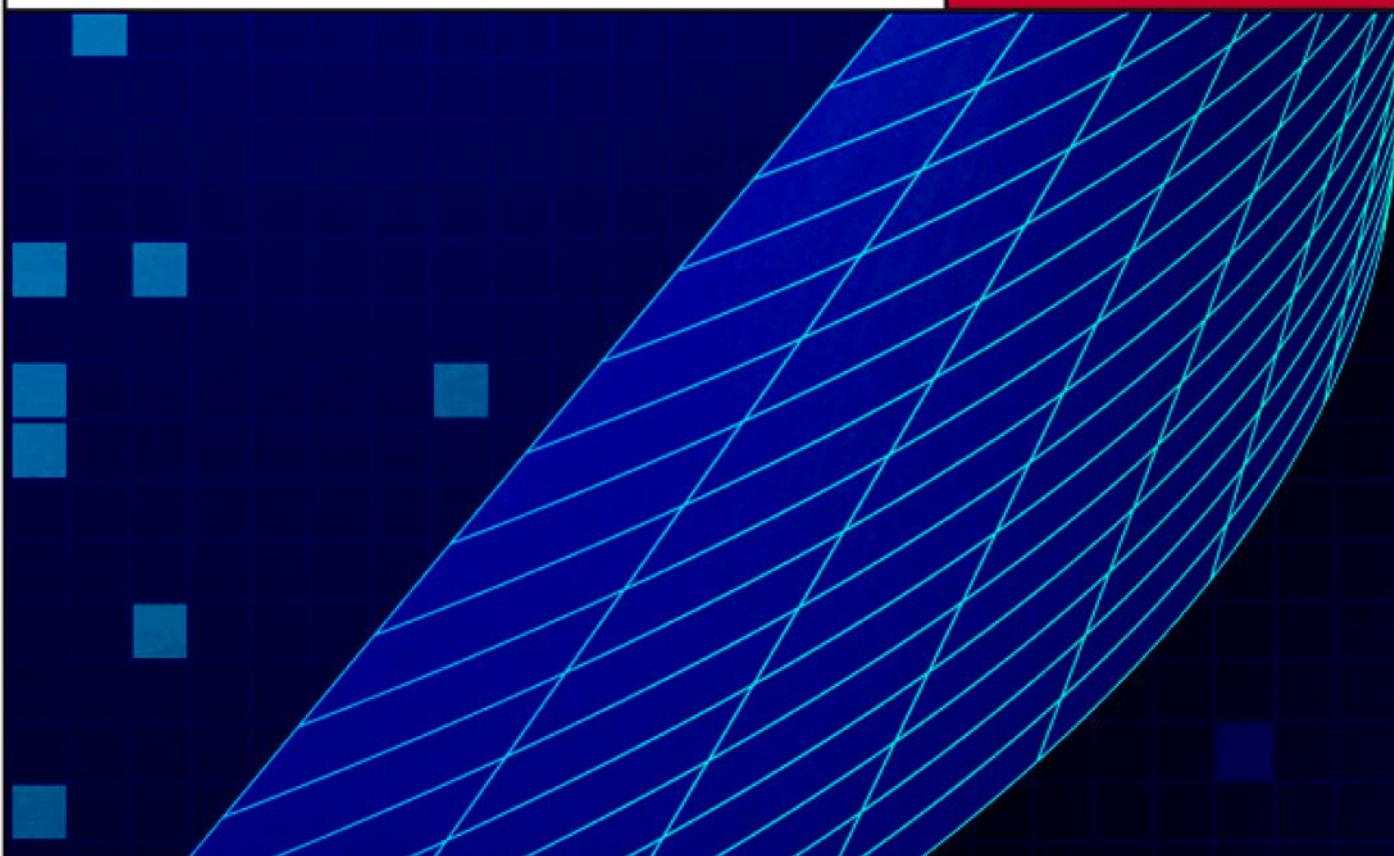
**Submission to the Australian  
Law Reform Commission**



**Response to Issues Paper 44, *Equality, Capacity and Disability  
in Commonwealth Laws***

 AUSTRALIAN INDUSTRY GROUP

**20 January 2014**



## ALRC ISSUES PAPER 44

### *Equality, Capacity and Disability in Commonwealth Laws*

1. Ai Group welcomes the opportunity to comment on the *Equality, Capacity and Disability in Commonwealth Laws Issues Paper* released by the Australian Law Reform Commission in November 2013.
2. Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees in an expanding range of sectors including manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, and other industries.
3. Ai Group's response to the Issues Paper is directed to the Commonwealth laws and legal frameworks relating to the employment of people with a disability, including disability discrimination law in so far as it relates to employment.
4. Ai Group is a strong advocate for increasing the employment participation of people with a disability in Australia. Our position in this regard is set out in our response to the Department of Education, Employment and Workplace Relations discussion paper *Increasing employment opportunities for people with disability* submitted in February 2013 (**Attachment**).
5. Since February 2013, the Australian Bureau of Statistics has reported that “people aged between 15 and 64 years with disability have both lower participation (53%) and higher unemployment rates (9.4%) than people without disability (83% and 4.9% respectively)”.<sup>1</sup> This figure is similar to the findings set out in the Report to the Council of Australian Governments, *Disability 2010–11: Comparing performance across Australia*, dated 30 April 2012, which revealed that in 2009 “people with disability had a significantly lower labour force

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<sup>1</sup>Australian Bureau of Statistics, Catalogue 4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2012, (13 November 2013), <http://www.abs.gov.au/ausstats/abs@.nsf/cat/4430.0>.

*participation rate than people without disability (54.3% compared to 82.8%) ... and [t]hey also had a significantly lower employment to population ratio than people without disability (50.0% compared to 78.6%)”.*

6. It is essential that barriers to the employment of people with a disability are removed to enable an increase in the participation of people with a disability in the workforce. This will have a direct benefit on income tax revenue and will increase the economic capacity for people with a disability to contribute to Australian society more generally. The social benefits also translate into improvements in the mental health and general wellbeing for workers with a disability. However the removal of such barriers must not translate into imposing greater regulation and red tape on employers or additional work rights for people with a disability that would erect new barriers by creating disincentives for employers to employ workers with a disability.

Question 4: Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person’s ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the elements?

7. The area of anti-discrimination is overregulated, including laws relating to disability discrimination. The existence of Federal and State anti-discrimination laws complicate matters for employers by duplicating their statutory obligations and increasing red-tape. Such laws also enable complainants to ‘forum shop’ for a jurisdiction which would result in the most favourable outcome for their claim. This is inappropriate and unfair for employers who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different processes and remedies.
8. The Federal *Disability Discrimination Act 1992* (Cth) (DDA) should be amended to oust the operation of State and Territory laws dealing with this ground of discrimination.

9. The obligations upon employers under the DDA should not be expanded, including obligations relating to the assessment of capacity.

Question 6: What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with a disability and their ability to exercise legal capacity? What changes, if any, should be made to the *Disability Discrimination Act 1992* (Cth) to address these issues?

10. Paragraph 117 of the Issues Paper lists a range of systemic issues relating to the nature and operation of the anti-discrimination system which may limit the ability of people with disability to access (or enforce) their rights under the DDA.
11. Ai Group has not experienced any problem with the nature or operation of the DDA, including the role and powers of the Australian Human Rights Commission (AHRC).
12. Of particular importance to employers is the ability for employers to rely on the 'unjustifiable hardship' exception in the DDA in circumstances where 'reasonable adjustments' cannot be made.
13. The cost of adjustments needed to allow people with disabilities to take advantage of employment opportunities can be very significant but it is very difficult to generalise as each business is different. For this reason the rules relating to unjustifiable hardship and reasonable adjustments need to remain flexible.
14. Also important to employers is the 'inherent requirements' exception<sup>2</sup> as it acknowledges an employer's right to exercise judgment in determining what job requirements are essential for employees to possess without being subjected to unlawful discrimination claims.

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<sup>2</sup> Disability Discrimination Act 1992 (Cth), section 21A.

Question 7: In what ways, if any, should the general protections provisions under the *Fair Work Act 2009* (Cth) be amended to ensure people with a disability are recognised as equal before the law and able to exercise legal capacity?

Question 8: There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

15. As identified by the issues paper, section 351 of the *Fair Work Act 2009* (FW Act) protects employees or prospective employees from adverse action that is done because the employee or prospective employee possesses an attribute protected by the section.
16. Section 351 is an expansion of the protection that existed under the *Workplace Relations Act 1996* (Cth) and its wide scope duplicates the protections from discrimination in the area of employment that exist under Commonwealth, State and Territory anti-discrimination laws.<sup>3</sup>
17. The general protections in the FW Act are operating very unfairly for employers. In the year ending 30 September 2013 a total of 3,182 general protections claims were made. This was an increase of 426 claims on the previous year.<sup>4</sup> The incidence of general protections claims is continually rising.<sup>5</sup>
18. The reverse onus of proof under the general protections is particularly unfair for employers. Without evidence from the employer that the alleged adverse action did not occur because of an unlawful reason, the action is deemed to have occurred. The unlimited compensation is also a driver for claimants to pursue a general protections claim rather than pursuing a claim in a different jurisdiction.

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<sup>3</sup> See paragraph 1431 of the Explanatory Memorandum to the *Fair Work Bill*.

<sup>4</sup> See The Fair Work Commission quarterly reports to the Minister for Employment as required under s.654 of the *Fair Work Act 2009* (Cth), <http://www.fwc.gov.au/index.cfm?pagename=aboutquarterlyreports>.

<sup>5</sup> *Ibid.*

19. The anti-discrimination provisions should be removed from the FW Act, beyond those that have been in the Federal workplace relations legislation for many years (e.g. the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason). The major expansion in the anti-discrimination provisions implemented under the FW Act has created another layer of red tape for employers and higher costs for employers and the community. For example, the new provisions have required the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman.<sup>6</sup>

Question 15: In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with a disability before the law and their ability to exercise legal capacity?

20. The workplace relations framework supports the employment of people with a disability via the Supported Wage System (or Special Minimum Wage 2) which sets out a special minimum wages for persons with a disability whose disability is of a nature that impairs their productive capacity. These mechanisms provide an incentive for employers to engage workers who have a disability and who may not otherwise be considered by employers.
21. While on the surface this differential treatment may appear to not facilitate the equal recognition of people with a disability, it is important to recognise that the elimination of discrimination involves trade-offs between benefits and costs. The benefits arising from an increase in workforce participation cannot be understated. For example, by increasing the workforce participation of people with a disability equal recognition within the workplace and the broader community will be facilitated.

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<sup>6</sup> See page 2 of the *Overview of discrimination function 2009-10 Fair Work Ombudsman*, January 2011, <http://www.fairwork.gov.au/Publications/Discrimination%20overview/Overview-of-discrimination-function-2009-10-Fair-Work-Ombudsman-pdf.pdf>.

22. For those employees with disability where their disability does not impair their productive capacity, the minimum award wage set out in the relevant modern award applies.