Shaping our future: Discussion on disability rights

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# About Victoria legal Aid

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

Providing timely legal help for vulnerable groups including people with a disability or mental illness is one of VLA’s strategic advocacy priorities. VLA also identifies people with a disability experiencing legal problems as priority clients. We provide two specialist services to people with disability and mental illness.

The Mental Health and Disability Law Program provides expert legal advice and advocacy to people diagnosed with mental health issues and those who experience some form of disability, particularly cognitive neurological disability. The Independent Mental Health Advocacy (IMHA) is a state-wide non-legal advocacy service for people receiving compulsory treatment under the *Mental Health Act 2014* (Vic). IMHA advocates support and assist people to make or participate in decisions about their assessment, treatment and recovery.

Our dedicated Equality Law Program provides advice and representation to people experiencing discrimination, harassment and victimisation in all areas, including employment. We assist people with complaints in various jurisdictions, using state and federal anti-discrimination legislation, including the *Fair Work Act 2009* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 2010* (Vic). Services provided by the Equality Law program include phone advice, duty lawyer services, clinic advice sessions and ongoing case work and representation. Approximately 40 per cent of legal advice provided by the Equality Law Program in 2015–16 related to disability discrimination.

# Employment and people with disability

VLA supports:

* Amendments to the *Australian Human Rights Commission Act 1986* (Cth) empowering the Australian Human Rights Commission to investigate breaches of discrimination law; issue enforceable undertakings and improvement notices; and apply to a Court or Tribunal to enforce compliance with those undertakings and notices.
* Amendments to the *Disability Discrimination Act 1992* (Cth) to address the comparator test, the onus of proof, and the reasonable adjustments provision.
* An urgent review of changes to eligibility for disability support pension introduced in 2011 including the program of support requirements, and the impairment tables.

## 1.1 – Improving disability discrimination protections

Our clients face barriers to workforce participation both when applying for jobs and during their employment, and many are dismissed for a discriminatory reason.

Our submission to the *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and with Disability* (AHRC 2016) (Willing to Work National Inquiry) identified that the legal framework for protection from discrimination law is complex and confusing. Employees and employers must consider their rights and obligations under the *Fair Work Act 2009* (Cth), the *Disability Discrimination Act 1992* (Cth) and State and Territory discrimination laws. There is a need to strengthen and clarify the protection provided by discrimination law, and to support individuals to realise their rights when they experience discrimination.

The challenge with the *Disability Discrimination Act* is that it can only be enforced by an individual. There is no statutory body with the power to enforce compliance. Relying solely on individuals to enforce discrimination laws is ineffective due to the many barriers that they face, including:

* reputational risk and risk of being punished at work (which may lead to long-term unemployment)
* psychological vulnerability (often due to the harm caused by the unlawful treatment)
* difficulties of proving the conduct including the lack of access to documents and other information held by the employer and witnesses (who are often still employed by the employer)
* legal and medical costs, and
* the low cost benefit of pursuing a complaint due to the significant time, energy and cost involved in pursuing a complaint of discrimination and because of the low awards of compensation.

We note that the final report from the Willing to Work National Inquiry recommended a statutory agency be responsible for the promotion and improvement of equality for older people and people with disability in employment.

To address the reliance on individuals to enforce their rights, we support the amendment of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) to empower the Australian Human Rights Commission to more freely investigate breaches of discrimination law; issue enforceable undertakings and improvement notices; and apply to a Court or Tribunal to enforce compliance with those undertakings and notices.

Our submission to the Willing to Work National Inquiry canvassed a range of other proposed changes to the Disability Discrimination Act, including amendments to address the comparator test, the onus of proof, and the reasonable adjustments provision. We enclose a copy of our submission here in case it may also assist you in your work.

## 1.2 – Access to Disability Support Pension

VLA acknowledges the importance of proactively addressing discrimination towards those with disability in employment. Notwithstanding this, there are many in our community whose disability prevents them working more than 15 hours per week in the open market. Limits on work capacity mean that these people are reliant on social security payments or charity to adequately support themselves.

Disability support pension (DSP) has traditionally provided some financial protection to this cohort of people. However, over the last six years significant changes have been made to the eligibility requirements for DSP. Whereas the reform to the DSP eligibility criteria was intended to lead to a relatively small but significant drop in the number of successful applicants each year, its effects have been far more dramatic. For example, prior to the changes (in 2010) 63.9 per cent of applicants for DSP successfully obtained the payment.[[1]](#footnote-1) By contrast, the most recent figures from 2016 show that DSP is now obtained by only 25.8 per cent of those who apply for it.[[2]](#footnote-2)

A key contributor to the large reduction in access to the DSP has been the introduction of new impairment tables, first replaced in 2012. According to a 2016 report from the Australian National Audit Office reviewing DSP, the replacement of the impairment tables was intended to reduce the number of successful DSP applicants by 6,500 each year.[[3]](#footnote-3) In fact, according to recent Department of Social Services figures, the number of successful applicants dropped by 25,000 in the first full year (ie 2012).[[4]](#footnote-4) This trend has continued and intensified. The 2016 figures reveal that the number of successful applicants in that year were over 60,000 lower than the year prior to the introduction of the tables (ie 2011).[[5]](#footnote-5)

The 2011 Advisory Committee Review of the impairment tables,[[6]](#footnote-6) which led to their modification recommended that the Department of Human Services monitor the initial implementation of the revised tables and undertake a comprehensive evaluation of the results over the first 18 months following implementation. It also recommended that the tables be reviewed at least every five years thereafter. Neither of these has occurred.

A social security system that does not provide sufficient protection to those who are unable to support themselves sufficiently with work leaves those with disability at risk of poverty, social isolation and detrimental mental and physical health outcomes. We enclose a copy of our 2016 submission to the Federal Parliament’s Joint Standing Committee on Public Accounts that addresses many of the difficulties our clients experience in accessing DSP.

We support public reviews of the 2012 impairment tables, the program of support requirements and other changes to the eligibility requirements for DSP to ensure that those who are unable to work due to disability are able to access appropriate payments.

# The criminal justice system and people with disability

VLA is committed to ensuring that the rights of people with disability are protected in the criminal justice system. Specialist lawyers within our Criminal Law program provide advice and representation for people accused of criminal offences who have a cognitive impairment or intellectual or physical disability.

As is evident in our analysis, VLA’s practice experience is based on Victorian criminal law and procedure. However, the concerns we identify are relevant across jurisdictions and demonstrate the need for a coordinated response. Where appropriate, we have also identified examples of good practice evident in Victoria, such as the Assessment and Referral Court List.

VLA supports:

* Changes to evidence laws to prevent police from beginning or carrying out questioning or an investigation of, or conducting a forensic procedure on, a person with a cognitive impairment or intellectual disability in the absence of an independent support person.
* The expansion of specialist and highly effective problem-solving courts, such as the Assessment and Referral Court List at the Melbourne Magistrates’ Court which was developed to meet the needs of accused people with a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder or neurological impairment.
* Expansion of the availability of Justice Plans, which take into account the effects of an offender’s disability and provide for their participation in services designed to reduce further offending, to anyone who falls within the definition of ‘disability’ within the *Disability Act 2006* (Vic).
* Amendment of the *Sentencing Act 1991* (Vic) and analogous legislation in other jurisdictions to impose a higher threshold test before imprisoning a person with a cognitive impairment for a period of less than 12 months.
* The introduction of measures in community corrections order breach proceedings to identify whether a person with a cognitive impairment has particular needs, and what those needs are, based on a collaborative approach between legal and non-legal professionals.
* Greater investment in resources to support a renewed focus on reintegration, including a legal help component to pre-release preparation.
* Funding to provide assistance to prisoners seeking to access the National Disability Insurance Scheme, which would enhance the quality of the relations and transactions within the NDIS, assist prisoners to realise their rights and access entitlements under the NDIS, and promote better outcomes for people with a disability.

## 2.1 – Police questioning

The particular rights and needs of people with disability must be taken into account in the context of police questioning.

VLA supports changes to evidence laws which would require an independent support person to be present before police: (a) carry out questioning of (b) investigate, or (c) conduct a forensic procedure on, a person with a cognitive impairment or intellectual disability. We also support legislative change to restrict the admissibility of police records of interview where the requirements of people with a cognitive impairment have not been adequately addressed in the interview process, for example, where they have been interviewed without legal advice.

Victoria has an Independent Third Person (ITP) Program which operates through amateur (but trained) volunteers, to assist people with a cognitive impairment in police interviews. However, there is some anecdotal evidence to suggest that ITPs may not always be effective in promoting clients’ legal rights, particularly the right to silence. Some clients have advised us that an ITP has encouraged them to make admissions, or provided improper advice.

We would therefore support the trialling of a professional advocacy and referral service, staffed by officers with sufficient and specialist training, to offer support to people with a cognitive impairment who are interacting with the criminal justice system.

## 2.2 – Court proceedings

In order to accommodate the needs of people with disability, court procedures need to be made more flexible and more accessible.

VLA considers that flexibility should be encouraged in court proceedings to adapt procedures (where appropriate) in the following ways:

* excusing a person with a disability from attending administrative mentions or directions hearings where he or she is represented
* regular rest breaks during trials and other extended hearings
* priority listings
* the judge or tribunal member sitting at the bar table with the parties to reduce formality and intimidation where appropriate
* regular opportunities for lawyers to explain and clarify understanding during proceedings (akin to the additional time given to language-based interpreters to interpret proceedings), and
* ensuring that judicial officers, registry staff and other court professionals are appropriately trained and sensitive to the difficulties facing those with a disability and encouraged to dispense with standard protocols where appropriate.

VLA also supports the adoption of the principles of ‘universal precaution’ and ‘universal design’ across the criminal justice sector, where this would improve the interactions of people with an intellectual disability with the criminal justice system, such as:

* taking steps to test whether a person comprehends what is taking place
* assessing whether a person requires suitable supports early in the interaction
* the use of effective plain language and improved communication strategies, noting that clear and accessible information enables people to better understand the nature of their legal problem, and understand and exercise their rights
* extending the availability of Easy English versions of standard forms and written information provided by Victoria Police to suspects and accused persons, and
* establishing a specialised team of officers within the corrections system with suitable training and experience to supervise people with intellectual disabilities, who should have lower case-loads to enable them to effectively support their clients during the period of any community correction order.

VLA also supports the expansion of specialist and highly effective problem-solving courts, such the Assessment and Referral Court (ARC) List, which shifts the focus away from determining a legal contest between opposing sides, towards being actively engaged in addressing the underlying causes of offending.

The ARC List is a successful problem-solving court which was developed to meet the needs of accused people with a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder or neurological impairment, many of whom often also have interconnected problems such as homelessness and substance abuse. It operates at Melbourne Magistrates’ Court. VLA’s criminal lawyers provide a dedicated duty lawyer service to the ARC List.

The ARC List operates an intensively managed program which provides support to the accused in order to help break the cycle of offending. ARC List clients are case managed by clinicians and linked to a range of mental health, disability, housing, drug and alcohol, health and other support services, as appropriate. ARC list proceedings are conducted with as little formality and technicality as possible. Those involved sit around an oval table and police prosecutors are not in uniform. Service providers involved in supporting the accused person are encouraged to attend court to facilitate a collaborative approach.

Currently, problem-solving courts in Victoria are only available to offenders in specific catchment areas. VLA supports the eradication of ‘postcode injustice’ in relation to solution-focused approaches in the criminal justice system. As such, we support implementation of the ARC List throughout Victoria.

## 2.3 – Sentencing

Sentencing laws have long recognised that certain conditions and personal circumstances diminish the moral culpability of an offender, even for a very serious offence. However, more needs to be done to ensure that disability is taken into account in the sentencing process.

Under the *Sentencing Act 1991* (Vic), adult offenders with an intellectual disability can be the subject of a Justice Plan which takes into account the effects of their disability and provides for the offender’s participation in services designed to reduce further offending. VLA would support an amendment to section 80 of the Sentencing Act, to allow Justice Plans to be available to anyone who falls within the definition of ‘disability’ within the *Disability Act 2006* (Vic). This expansion would mean (for example) that Justice Plans would become available for people with an acquired brain injury who are currently excluded if diagnosed after the age of 18 years.

In addition, VLA supports amendment of the Sentencing Act and analogous legislation in other jurisdictions to impose a higher threshold test before imprisoning a person with a cognitive impairment for a period of less than 12 months. In addition, the requirement for reasons as to why an alternative sentence would not be appropriate for this class of vulnerable accused could be helpful in reducing the use of harmful short terms of incarceration to respond to what are often static cognitive conditions, where treatment and community support programs would be far more appropriate.

VLA also supports the introduction of measures in community corrections order breach proceedings to identify whether a person with a cognitive impairment has particular needs, and what those needs are, based on a collaborative approach between legal and non-legal professionals.

## 2.4 – Prison

The successful reintegration of prisoners, aimed at reducing the risk of reoffending, is in the interests of the whole community. VLA considers that there should be greater investment in resources to support a renewed focus on reintegration, including a legal help component to pre-release preparation.

VLA considers that legal advocacy for prisoners seeking to access the National Disability Insurance Scheme (NDIS) would enhance the quality of the relations and transactions within the NDIS, assist prisoners to realise their rights and access entitlements under the NDIS, and promote better outcomes for people with a disability. It would also assist in the identification and resolution of other common legal problems experienced by people with disability. Whether funding to provide this service would be administered by the National Disability Insurance Agency (NDIA) or by another Commonwealth Department would be a matter for the government.

# Indefinite detention of people with cognitive and psychiatric impairment

VLA supports the development of principles to be observed across legislative regimes providing for the detention of people with disability, including: clear legislative authority for detention with appropriate safeguards; alternatives to indefinite detention; and clear and effective pathways back to the community.

Indefinite detention of people with cognitive and psychiatric disabilities raises fundamental issues of compliance with Australia’s international human rights obligations and values of fairness and equality before the law. Our specialist lawyers provide legal and other advocacy services to those who are in indefinite detention because of cognitive or psychiatric impairment.

Our clients are placed in indefinite detention pursuant to a number of pieces of legislation in Victoria, and there is significant variation in the policies and processes adopted under these different legal frameworks. While Victoria is often viewed as having relatively advanced frameworks for detention of people, our practice experience is that these provisions should be significantly improved.

The principles that we consider should be observed in any legislation authorising the detention of people with disability are:

1. **Clear legislative authority for detention with appropriate safeguards:** Any detention should be clearly authorised in legislation and accompanied by appropriate safeguards, including decision-making by an independent court or tribunal based on cogent evidence, with appropriate rights of appeal and review, and a right to legal representation.
2. **Alternatives to indefinite detention:** In order to be justified, indefinite detention under the schemes such as that provided for under the Victorian *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) must be a last resort, with all alternative options (including detention and supervision under civil orders in the community) meaningfully explored first.
3. **Clear and effective pathway back into the community:** Indefinite detention of a person on the basis of a cognitive or psychiatric impairment can only be justified where there are available effective pathways for a person to move back into the community, and only where it takes place in the least restrictive and most therapeutic environment possible. Appropriate options for moving out of detention should be at the forefront in decision-making and create momentum to progress people back into the community. To enhance this objective, and as we have suggested in relation to prisoner reintegration (see [2.4 – Prison](#_2.4_–_Prison)), we consider that a legal advocacy service targeted at access to the NDIS should also be extended to people detained on the basis of cognitive or psychiatric impairment.

# The implementation of the NDIS

VLA supports the provision of appropriate, timely and clear information about appeal rights in relation to the NDIS.

VLA has played a key advocacy role for NDIS participants pursuing formal appeal processes under the Scheme. Our specialist lawyers are the sole organisation in Victoria allocated funding for individual matters under the Commonwealth External Merits Review – Support Component (EMR-SC) funding scheme for complex or novel matters. We have been referred more than 30 of these matters since the introduction of the scheme. A significant number of appeals heard by the Administrative Appeals Tribunal (AAT) since the introduction of the NDIS have been run by VLA. In 2017, we successfully ran a leading case in relation to the allocation of funding in the NDIS in the Federal Court of Australia (see, *McGarrigle v National Disability Insurance Scheme* [2017] FCA 308), which considered the nature of reasonable and necessary supports under the NDIS.

However, to our knowledge, there have been no hearings at the AAT involving unrepresented applicants. Similarly, all VLA clients that have received funding for assistance through our service have previously had the support of advocacy organisations. This is important and relevant because it raises a question whether people who are not linked in with legal or advocacy services are, for some reason, not independently seeking a review of or to appeal NDIS decisions. In order to empower individuals to exercise their rights of review, it is imperative that people are provided with appropriate, timely and clear information about their appeal rights. This should include information about the law that applies to the decisions made about them, and information about how to access advocacy services.

# Mental health insurance discrimination

VLA supports changes to discrimination laws which would prevent mental health insurance discrimination, including stronger protection for consumers and obligations on insurers to provide data and reasons for denying cover.

VLA works closely with beyondblue, Mental Health Australia and the Public Interest Advocacy Centre to address the unlawful discriminatory practices of insurance providers against people experiencing a mental illness.

In Australia, people with a mental illness regularly experience discrimination by insurance providers. A prior experience of a mental illness can negatively affect a person’s access to a variety of insurance products, particularly in the case of travel insurance, life insurance, total permanent disability insurance and income protection insurance. This may take the form of higher premiums, excessive restrictions on policies or outright rejection of an application or claim due to a blanket exclusion for claims caused by mental illness.

In *Ingram v QBE Insurance (Australia) Ltd*,[[7]](#footnote-7) the Victorian Civil and Administrative Tribunal found that QBE (Australia) Ltd directly discriminated against our client, Ms Ingram, by providing her with a travel insurance policy that had a blanket exclusion for claims relating to all mental illnesses, and relying on this clause to reject her claim to reimburse travel expenses. Ms Ingram’s case was an Australian-first test of discrimination by insurers on the basis of a mental illness.

Since winning Ms Ingram’s case, we have assisted a number of individuals with similar claims. We are also campaigning for changes to discrimination laws. We support a range of measures which would prevent mental health insurance discrimination, including:

* stronger protection for consumers
* insurers making available to consumers the data and information relied upon when excluding or rejecting claims based on a mental illness
* insurers providing detailed reasons for any denial of cover
* a requirement for insurers to report annually on how often and on what basis they discriminate because of a mental illness
* a requirement for insurers comply with updated Insurance Industry Anti-Discrimination Guidelines, and
* specification of the ‘other relevant factors’ insurers can consider in declining insurance.

# Appendix A – VLA submission to Willing to Work Inquiry

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

Submission to the Australian Human Rights Commission

December 2015

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

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# About Victoria Legal Aid

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

## Our specialist practice expertise

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

## Key contacts

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# Executive Summary

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

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

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

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

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

Our submission makes practical recommendations which:

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

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

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

# Summary of recommendations

## Common Recommendations

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

**Recommendation 2:** *The Age Discrimination Act 2004* (Cth) (ADA) and *Disability Discrimination Act 1992* (Cth) (DDA) should be amended to require employers to make interview notes for all interviewees available to an individual interviewee on request.

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

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

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

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

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

**Recommendation 8:** The *Fair Work Act 2009* (Cth) (FWA) should be amended to extend the time for filing general protections claims involving dismissal from employment, consistent with Commonwealth discrimination laws.

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

## Disability Discrimination Recommendations

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

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

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

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

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

## Age discrimination recommendations

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

# Improving Commonwealth discrimination law

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

## Enforcing discrimination law

A significant weakness of Australian discrimination law is its reliance on a complaints based system, where individuals must hold discriminators to account. In our experience, this is particularly problematic in situations of workplace discrimination where complainants and witnesses are often financially dependent on the discriminator and are discouraged from making a complaint by the potential repercussions within their workplace and industry. Research confirms that the majority of people with complaints of discrimination and harassment under Australian discrimination law do not report the conduct or make a complaint.[[8]](#footnote-8) Even where clients are legally represented, due to a range of factors outlined below the burden of enforcing their rights is often so great that they either accept a poor settlement or simply walk away rather than pursue legal proceedings.

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

* Fear of negative reputational consequences and of being punished at work
* Difficulties proving the conduct, including due to lack of access to documents and other information held by the employer, and witness reluctance to give evidence. These problems have been referred to as the employer’s ‘monopoly on knowledge’,[[9]](#footnote-9) and
* The poor cost-benefit of litigation (even if the complaint is successful) due to the significant time, energy and cost involved in pursuing a complaint of discrimination (at a period in life when the applicant is energy and time poor), the fact that compensation payments are usually low and the risk of an adverse costs order in the federal jurisdiction in the event that the proceeding is unsuccessful.

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

Under section 682(1)(f) of the FWA, the FWO has the power to bring complaints on behalf of clients and has done so on a few occasions to date in relation to discrimination matters. However the number of prosecutions is extremely limited in comparison to the prevalence of discrimination. In 2014-2015 the FWO commenced just one piece of litigation in relation to discrimination.[[10]](#footnote-10) The FWO’s enforcement role in this area should be increased through provision of greater resources and priority status being given to discrimination investigations.

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

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

Enabling a regulator to enforce compliance with the law is a standard practice in other statutory regimes, including workplace safety, privacy, environmental protection, animal welfare, and consumer affairs. The introduction of these compliance functions would remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation. Further, empowering the AHRC to enforce compliance with anti-discrimination law would recognise the significance of discrimination and harassment as unlawful behaviour that can result in substantial harm to individual health and safety as well as the broader community. Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive and productive, and will have better public health outcomes.[[11]](#footnote-11)

**Too unwell to take it further – Claire’s story**

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

I put in a discrimination complaint with the Victorian Equal Opportunity Commission and went to conciliation. The process was horrible and although my bosses did not deny all of the allegations we couldn’t get them to put a reasonable offer. I settled for a very low amount, which only covered the things I was already entitled to.

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

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

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

## Making interview notes available

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

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

**700 applications in two years – Sharon’s story**

‘A couple of years ago I was made redundant from a job I’d worked in for 10 years, they told me they were getting younger staff in cause they can pay them less. Since then I’ve been looking for work. I’m in my late 40s and I’ve been going for retail jobs. I would have put in over 700 applications to every place I can find over the last few years but no one will hire me. I was going anywhere and everywhere. It was definitely because of my age because of all the things they said to me. When I’d go for jobs I’d be told things like: “we’re hiring younger people, you’re too old” and “sorry, boss wants young people now”. And when I walked into the shops they were all young! All young!

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

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

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

## Early exchange of relevant information

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

Complainants should have a right to ask the respondent questions that are relevant to their allegations prior to conciliation, as is the case in the United Kingdom and Ireland. The response should be admissible as evidence, and courts should be able to draw an adverse inference from a failure to respond.[[12]](#footnote-12) In addition to assisting complainants, introducing a questionnaire procedure can increase efficiency by enabling parties to better assess the merits of their case, leading to early settlement or withdrawal of a complaint.

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

## Removing the comparator test

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

Neither Victoria’s *Equal Opportunity Act 2010* (Vic) nor theAustralian Capital Territory *Discrimination Act 1991* (ACT) require a comparator in order to find direct discrimination has occurred. Not only is there no express requirement for a comparator in the legislation in these jurisdictions, the relevant Tribunals have confirmed that there is no implied requirement for a comparator.[[13]](#footnote-13) We consider that the simplification and clarification of the definition of discrimination at a Commonwealth level will assist to promote greater compliance with anti-discrimination laws and assist business and service providers to understand their legal obligations.

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

## Protecting witnesses

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

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

**No support – Peter’s story**

‘My doctor told me to take some time off work for my mental health. It wasn’t until I was ready to return to work that my employer said they’re not satisfied that I was well enough to do the job. The doctor looked at my position description and said you can perform these duties that’s fine. I gave that to them and they said they were going to arrange an independent medical examination. I did that and they still didn’t let me back. It was a job that I loved and that I really wanted to get back into, and it was part of my rehabilitation as well to do that because I didn’t like being off work. Eventually it was arranged for me to come back to work but the guy they had hired to replace me told me my boss said I had to sit in the office and do nothing. To be told this on top of everything else – it’s debilitating. I asked Management does the company want me to stay and they said no, the company wants you to move on. So basically I knew at this time that my time is numbered, they’re going to get rid of me. I really felt like I didn’t have any other choice but to resign.

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

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

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

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

## Increase the amount of damages

We see first-hand the often devastating impact of discrimination on our clients, and the lasting effects of being excluded from the workforce because of their disability or age. Discrimination is more often experienced by people who are poor, particularly people receiving government payments, and people who are experiencing other forms of disadvantage.[[14]](#footnote-14) Research also shows that discrimination has a greater impact on disadvantaged groups than it does on relatively advantaged groups.[[15]](#footnote-15) As our clients’ stories demonstrate, the harm that flows from discrimination is significant and can last for years after the event. It impacts on our clients’ mental health, on their relationships with their family, and on their financial security.[[16]](#footnote-16) It can lead to further legal issues such as eviction from housing, debt from unpaid bills and credit cards, and relationship breakdown. We often see the lasting impact that discrimination has on our clients careers. It takes most of our clients a significant time to re-enter the workforce as they recover and rebuild their self-esteem. Discrimination can also have a lasting impact on a client’s reputation in their industry, particularly in regional areas. Our clients often report the difficulty they have in job interviews when they are asked about their previous employment, about why they left the job and why they took some time to find another job.

**The impact of discrimination – Mary’s story**

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

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

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

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

The low rates of compensation discourage many of our clients from enforcing their rights under discrimination law. In 2014–15 there were just two successful discrimination cases in the Federal Court and the Federal Circuit Court.[[17]](#footnote-17) This means that discrimination law is largely invisible to employers, because they do not see any consequences for breaching the law. Even where employers are held to account, in our experience the low financial consequences to employers for discriminatory behaviour is a further disincentive for them to comply with the law.

Damages for non-economic loss (for example for hurt and humiliation) are also extremely low, particularly under the FWA where compensation for pain and suffering is rarely awarded and rarely exceeds $10,000. The low amounts of damages awarded in discrimination cases is particularly stark when compared to damages awards other jurisdictions for similar wrongs and types of harm, such as in cases of defamation,[[18]](#footnote-18) employer negligence,[[19]](#footnote-19) breach of employment contract,[[20]](#footnote-20) and misleading and deceptive conduct in employment.[[21]](#footnote-21) In discrimination law the focus is on compensating for the loss caused by the discrimination, whereas in defamation law damages extend beyond compensatory loss and serve three purposes: consolation for personal distress and hurt, reparation for damage to the applicant’s reputation, and vindication of the applicant’s reputation.[[22]](#footnote-22) In the Full Court of the Federal Court’s decision in *Richardson v Oracle* Justice Kenny observed that there is a substantial disparity between the quantum of awards in defamation and discrimination matters, despite the similar situations of applicants in both cases.[[23]](#footnote-23) Both claims relate to the dignity and standing of the applicant in the community which warrants protection, perhaps even more so for discrimination claims given the broader societal interest in the effective operation of discrimination law.[[24]](#footnote-24) There is no justification for valuing the harm caused by defamation more than that caused by discrimination. Therefore, the quantum of damages for discrimination should be brought into line with compensation for defamation.

**Low compensation – Michael’s story**

‘This was the first official job I’ve had in 10 years. It meant a lot to me, I was really happy about it. I felt really good having a job again. I was sick for two weeks and I was in contact with my employer during that time, they didn’t say anything about my job being in jeopardy or anything, and I rang up saying I’m ready to come in and he told me he doesn’t need me anymore. Then I got a separation certificate which said I’m being dismissed because of health issues. I started to realise that what my employer did to me was wrong. He had no reason to do that. I didn’t know my rights, I had to read tonnes of information just to fill out the forms.

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

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

## Costs

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

While there is discretion not to award costs under Commonwealth discrimination law, it is clear that the Courts do not consider discrimination claims to warrant any departure from the ordinary rule in that jurisdiction that costs will follow the event.[[25]](#footnote-25) The approach to costs under Commonwealth discrimination laws is contrary to the approach to legal costs in the relevant provisions of the FWA and State and Territory discrimination laws. Under the Victorian *Equal Opportunity Act 2010* (Vic), for example, costs may be ordered at the Tribunal stage but only where one party has unreasonably caused the other to incur unnecessary costs. The Victorian Civil and Administrative Tribunal has ruled that costs orders should not be made lightly in the discrimination jurisdiction so as not to deter applicants from using the method of redress provided by discrimination law.[[26]](#footnote-26) Unfortunately, however, the reality is that the failure to reward successful applicants with a favourable costs order is having the opposite effect.

Just as the presumption that costs follow the event discourages meritorious applicants from pursuing their discrimination complaint to hearing due to the significant financial risk, the presumption that the parties bear their own costs discourages meritorious applicants because an award of compensation is extremely unlikely to cover their legal costs. For example in a recent case under Victorian discrimination law the applicant was awarded $100,000 in compensation for a meritorious claim but incurred approximately $140,000 worth of legal fees. Justice Garde declined to award more than a small portion of the applicant’s costs leaving the applicant with little or no benefit from her claim despite the stress, time, and resources that went into achieving the successful outcome.[[27]](#footnote-27) Contrast this with the outcome in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 where the applicant was awarded over $130,000 in compensation and the respondent was ordered to pay her legal costs which were in excess of $220,000. If that case were brought in a ‘no cost’ jurisdiction the applicant would have been left almost $100,000 out of pocket despite winning her case. (Notably, at first instance in this case the applicant was awarded a much lower amount of compensation and ordered to pay the respondent’s legal costs due to a Calderbank offer). As outlined by Member Fitzpatrick in a different discrimination case heard by the Queensland Civil and Administrative Tribunal ‘it is not in the interests of justice that [the applicant] suffer the complete erosion of her award of compensation by legal costs necessarily incurred in successfully bringing her claim’.[[28]](#footnote-28)

We submit that the potential deterrence effect of a presumption that parties will bear their own costs can be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in discrimination cases in the United States.[[29]](#footnote-29) The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. Under section 43 of the *Federal Court of Australia Act 1976* (Cth) and section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) the Courts’ costs powers are subject to any restrictions placed by other Acts. The *Australian Human Rights Commission Act 1986* (Cth) could be amended insert a provision adopting this approach.

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

## Time limits under the FWA are too short

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

The Fair Work Commission has a discretion to extend the time limit in exceptional circumstances under Section 366 of the FWA. The threshold for extending this time limit is set very high and operates as a bar to most clients bringing a General Protections claim outside the 21 day period. For example in the case of *Cole v Key Resources Pty Ltd* [2014] FWC 3278 Commissioner Blair found that the fact the applicant had a miscarriage and seizure within the 21 days and was shocked, distressed and confused did not justify a three day extension. Given Commonwealth and State discrimination laws allow at least 12 months to bring a claim our clients still have the ability to bring a discrimination claim outside of this 21 day time limit. However the FWA may have been the most favourable jurisdiction to them, particularly if they can bring an additional claim for dismissal because of a temporary absence for illness or injury, or because of an exercise of their workplace rights.

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

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

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

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

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

## Difficulties of proof

The significant power imbalance resulting from the respondent’s monopoly on knowledge is partly alleviated by the General Protections provisions in the FWA. Under section 361 of the FWA an employer has the burden of proving a non-discriminatory reason for an action taken if a General Protections claim is lodged. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) outlines that this section ‘recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason’. The Courts have held that this first requires the applicant to establish a prima facie case that the discriminatory conduct occurred before the burden of proof shifts.[[30]](#footnote-30) This approach is in line with the approach of comparative jurisdictions such as the United Kingdom to the employer’s monopoly on knowledge.[[31]](#footnote-31) Our experience is that shifting the burden of proof to the employer improves the prospect of the matter resolving by agreement at a mediation as well as at hearing. This is because an employee can shift the focus of a mediation to what evidence the employer has that its actions were lawful, rather than focussing solely on the limited evidence available to the employee.

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

Unfortunately, section 361 of the FWA has been interpreted very restrictively, so applicants have been unable to enjoy its full potential benefit. The High Court has held that the subjective reason of the decision-maker is determinative,[[32]](#footnote-32) which means that discrimination that is unconscious or justified after the fact is likely to be lawful, so long as the reason provided for the impugned conduct is credible. The approach taken by the Courts under the DDA is more appropriate, where a discriminatory motive is not necessary to prove unlawful discrimination, and the Court will look beyond the stated reason to the real reason for the treatment.[[33]](#footnote-33)

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

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

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

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

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

# Discrimination on the basis of disability

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

## Requesting discriminatory information

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

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

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

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

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

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

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

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

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

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

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

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

## Strengthening reasonable adjustments

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

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

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

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

A few weeks into my return to work my boss took me outside the office door where there were no witnesses and asked me how I was. I said not too bad. My boss then said “will you be back to work full time in three weeks”? I said no, as discussed previously I was working on increasing my hours each week and in a couple of months I would be back full time. She then stated “well then I don't have a job for you and you can go now”. At the time this whole experience of returning to work in an unknown job, the constant degrading by younger co-workers and the constant chopping and changing of my days of work was horrible. And then to be told there was no job for me was the ultimate rejection, which made me feel useless and depressed. I cried for days because I wasn't given a chance to recover – ask anyone who has had heart surgery how tired the operation leaves you let alone how painful it is for months.

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

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

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

The extent to which the ‘discriminates between employees’ aspect of adverse action in section 342 of the FWA extends to indirect discrimination is not yet settled. The Federal Court has held that it is open to find that adverse action could extend to indirect discrimination where the employer’s reason for imposing the “facially neutral” criterion was a discriminatory one.[[34]](#footnote-34) This concept of “indirect discrimination” is far more limited than that under the ADA or the DDA. Under the ADA and DDA it is not necessary to prove that the employer intended to discriminate against their employees in order to find indirect discrimination occurred. Further, the Courts have held that the concept of a “failure to make reasonable adjustments” for an employee with a disability is not captured by the FWA.[[35]](#footnote-35)

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

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

## Temporary absence due to illness or injury

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

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

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

**Dismissed due to a temporary absence – Chantel’s story**

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

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

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

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

# Discrimination on the basis of age

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

## Grandparents with carer responsibilities

Increasingly grandparents who seek to remain in the workforce take on carer responsibilities for their grandchildren.[[36]](#footnote-36) This may take the form of a school pick up a few times a week, or a full day or two of care every week or in the school holidays. In order to gain access to or remain in the workforce grandparents may need some flexibility with their hours and days of work. Unfortunately there are currently limited protections under discrimination law for grandparents. Under the *Sex Discrimination Act 1984* (Cth) protection from discrimination based on family responsibilities is limited to direct discrimination. This restricts the ability of grandparents to negotiate with their employers to reasonably accommodate their responsibilities to their grandchildren.

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

# Appendix B – VLA submission to Joint Standing Committee on Public Accounts

Qualifying for the Disability Support Pension

Joint Committee of Public Accounts Inquiry

14 November 2016

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

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is the largest legal service in Victoria, providing legal information, education and advice for all Victorians.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria. We also deliver non-legal advocacy services to people receiving mental health treatment.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

In addition to helping individuals resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account.

VLA is the leading provider of legal services to Victorians with disabilities and mental illness, with more than 21,560 clients in 2015–16 – or 26 per cent – disclosing that they fall within this category.

VLA’s specialist services to people with disability and mental illness include:

* The Commonwealth Entitlements Sub-Program, which provides advice and representation to people seeking review and appeal of decisions relating to eligibility for the Disability Support Pension (DSP). This team provides weekly advice clinics in the Administrative Appeals Tribunal (AAT). The Commonwealth Entitlements team also assists people with other Centrelink related matters, as well as applicants challenging decisions of the National Disability Insurance Agency at the AAT.
* The Mental Health Disability Law Sub-Program (MHDL Program), which provides expert legal advice and advocacy to people diagnosed with mental health issues and people who experience some form of disability, particularly cognitive neurological disability.
* Independent Mental Health Advocacy (IMHA), a state-wide non-legal advocacy service for people receiving compulsory treatment under the *Mental Health Act 2014* (Vic) (Mental Health Act). IMHA advocates support and assist people to make or participate in decisions about their assessment, treatment and recovery.

In 2015–16, VLA’s Commonwealth Entitlement’s team provided legal advice on 2,090 occasions in relation to Centrelink matters. On 670 of these occasions this advice related specifically to review by Authorised Review Officers (ARO) and on 585 occasions in relation to review by the AAT.

# Executive Summary

VLA assists numerous people whose claims for the disability support pension (DSP) have been rejected. Clients regularly present in significant and acute distress due to the impact of their condition, and frustration and confusion about the reasons for their rejection. A person who succeeds at the final stage of the appeals process will usually have waited 18 months for a final decision to be made.[[37]](#footnote-37) The high set aside rates at each stage of the appeal process suggest that many of those waiting for a decision will be found to have been eligible.[[38]](#footnote-38) There are also many instances where people lodge new applications that are ultimately successful, and for whom the lack of transparency and delay effectively causes prejudice to the lodging of these claims.

This submission responds to the Joint Committee of Public Accounts Inquiry into the Australian National Audit Office (ANAO)’s report, *Qualifying for the Disability Support Pension* (report). In particular, this submission focuses on the Program of Support requirements, provision of information to applicants for the DSP, evaluating the effectiveness of the Impairment Tables, ways to minimise failures to consider case law and the relevant legislative instruments and the new claims assessment process.

This submission is guided by five key principles that should inform Centrelink decision-making in relation to DSP. These focus on improving the quality of decisions and ensuring that those with disabilities who meet the eligibility requirements for the DSP are efficiently and accurately assessed in a transparent manner.

# Key principles for Centrelink decision-making in relation to DSP

1. **Make the correct decision at the earliest stage possible –** Policies, guidelines and procedures should prioritise the initial accurate assessment of applications for the DSP. Claims processes should be designed to maximise the prospect of an eligible applicant’s claim being assessed accurately and efficiently. This ensures applicants who are ultimately successful do not suffer hardship awaiting the resolution of their matter, and the Secretary avoids the costs associated with unnecessary appeals.
2. **Ensure applications and appeals are determined in a manner consistent with case law, policy and subordinate legislation –** All government decision-making should be consistent and in accordance with the law. This should apply to both the individual determination of claims and the setting of frameworks and procedures for making decisions about eligibility.[[39]](#footnote-39) This includes making information available to the public,[[40]](#footnote-40) delivering services in a fair, prompt and cost-efficient manner,[[41]](#footnote-41) having regard to the special needs of disadvantaged groups in the community,[[42]](#footnote-42) and having due regard to AAT decisions.[[43]](#footnote-43)
3. **Provide applicants with sufficient information about the reasons for a decision and the criteria referred to by the decision-maker –** This is necessary to enable the applicant to understand the reasons why their claim is rejected. This assists applicants to assess whether an appeal has merit, and reduces the potential prejudice to those who have the ability to instead succeed with a later claim. The complexity and opacity of the DSP eligibility criteria, combined with the impact of the applicant’s impairment means applicants may require assistance to address or review the Secretary’s adherence to the law.
4. **A failure to grant the DSP to an eligible recipient is as egregious an administrative failure as the incorrect grant of DSP to an ineligible recipient.**
5. **People with disabilities who have a clear inability to work should not be required to attend a program to test their capacity to work –** Public funds and programs are best directed towards and reserved for people who have some prospect of benefitting from those programs.

# Summary of recommendations

## Part A – Provision of Information to Applicants

**Recommendation 1: Update the claim form to include all of the DSP eligibility criteria**

The claim form must include the POS requirement, the legal definition of ‘permanent’; and reference to the Impairment Tables including a web link.

**Recommendation 2: Simplify the DSP page of the DHS website**

The webpage must include on the landing page a link to the Impairment Tables and information about the POS requirement.

**Recommendation 3: Amend rejection letters to make them clear and informative**

Rejection letters must include the following:

* 3.1 – clearly set out which criteria the applicant has failed to meet and why
* 3.2 – include copies of the relevant Impairment Tables
* 3.3 – contain information about the limitations of the ARO in relation to the ‘claim period’ should an appeal be sought, and
* 3.4 – provide information on how to enrol in a POS.

**Recommendation 4: Improve ARO decisions**

ARO decisions must:

* 4.1 – clearly explain the ARO role in relation to reviewing DSP eligibility as of the ‘claim period’
* 4.2 – clearly identify the ‘Issues’ in an applicant’s claim, including whether the POS requirement has been met
* 4.3 – include a summary of the applicant’s POS participation to demonstrate how much more time in a POS is required, and
* 4.4 – include copies of the relevant Impairment Tables.

## Part B – New process for assessing claims

**Recommendation 6: DSS reverse the recent changes to the DSP medical evidence policy.**

**Recommendation 7: DSS investigate and implement a process for generating the Treating Doctor’s Report from medical practice software.**

In line with the recommendation of the 2011 Advisory Committee report into the impairment tables.

**Recommendation 8: DSS reverse the policy regarding Disability Medical Assessments.** Alternatively, DHS implement benchmarking and quality assurance standards for Disability Medical Assessments.

## Part C – Failure to consider case law and the legislative instruments

**Recommendation 9: Decision-makers must have due regard to relevant decisions of the AAT in accordance with the principles of administration set out in section 8 of the Act.**

**Recommendation 10: Decision-makers must make decisions in accordance with the provisions of the relevant Determinations, including the participation exemptions.**

## Part D – Program of Support Requirements

**Recommendation 11: The program of support requirements should not apply to an applicant for the DSP who is unable to benefit from a program of support either:**

**a) because it would not improve their work capacity above 15 hours; or**

**b) because of the impact of their impairment.**

**Recommendation 12: Applicants for the DSP who are able to satisfy the Secretary that they are unable to benefit from a program of support at the time of their claim should not be subject to the requirement that they be actively participating in a program at the time of their claim.**

**Recommendation 13: Include time spent in formal transition to work programs and rehabilitation programs when considering whether a person meets the requirements for active participation in a program of support as was the case under the original 2011 Determination.**

## Part E – Evaluating the effectiveness of the Impairment Tables

**Recommendations 14: Evaluate the effectiveness of the impairment tables as a tool for accurately rating functional impact, with particular focus on redressing the problem of assessing multi-body system impairments, and simplifying the hierarchy of descriptors for greater clarity, consistency and certainty.**

**Recommendation 15: Amend the Introduction to Table 9 to expressly refer to the application of the manifest grant criteria.**

**Recommendation 16: Amend the Determination to specifically refer to effects of medication in allocating impairment ratings.**

**Recommendation 17: Amend Table 9 to refer to the ABAS III.**

# Part A – Provision of Information to Applicants

As emphasised in the ANAO report, the provision of correct and timely information is crucial.[[44]](#footnote-44) The lack of information available to DSP applicants leads to unmeritorious claims being lodged, rejected and appealed, to the frustration of applicants and at considerable expense to both Centrelink and the AAT.

## 1. Applications

The claim for Disability Support Pension form (SA466) (the claim form) does not refer to the medical criteria for eligibility for the DSP.[[45]](#footnote-45) The claim form also fails to mention the requirement for DSP applicants without a ‘severe’ 20-point impairment to have participated in a POSfor at least 18 months in the three years’ prior to applying for the DSP. It does not explain that for a condition to be considered ‘permanent’ it needs to be fully diagnosed, treated and stabilised.

Although there is further information available to applicants on the Department of Human Services website under ‘Eligibility and Payment Rates for DSP’[[46]](#footnote-46) the POS requirement is outlined on a separate subpage and is not immediately obvious to applicants as being a critical component of eligibility for the DSP.[[47]](#footnote-47)

**Recommendation 1: Update the claim form to include all of the DSP eligibility criteria**

The claim form must include the POS requirement, the legal definition of ‘permanent’; and reference to the Impairment Tables including a web link.

**Recommendation 2: Simplify the DSP page of the DHS website**

The webpage must include on the landing page a link to the Impairment Tables and information about the POS requirement.

## 2. Rejections

The formal rejection of a DSP claim from Centrelink (‘the rejection letter’) provides little to no information that is specific to the applicant. Rejection letters typically refer to the requirement that an applicant’s conditions be ‘permanent’ and must score at least 20 points on the Impairment Tables, even though neither of these criteria are referred to on the claim form.

The rejection letter notifies applicants of their appeal rights. However, without comprehensive information about either the criteria for eligibility for the DSP, or the basis on which their claim has failed, applicants cannot make an informed decision about whether or not an appeal is warranted. Furthermore, the rejection letter does not provide applicants with critical information about how the review mechanism operates.

It is our experience that DSP applicants wishing to appeal a DSP rejection are unaware that both the Authorised Review Officer (ARO) and the Tribunal Members at the AAT must look back in time and ‘stand in the shoes’ of the original decision-maker at Centrelink and assess whether the applicant was eligible for the DSP during the 13 week ‘claim period’ from the time that they initially applied for the DSP.

If the basis for a DSP rejection was failing to satisfy the POS requirement and no exemptions to this requirement apply, then this decision cannot be changed on review.

The applicant will therefore waste months waiting on a decision from the ARO, when in that time they could have enrolled in a POS in preparation for a new DSP claim, had they been provided with adequate reasons in the rejection letter.

**Recommendation 3: Amend rejection letters to make them clear and informative**

Rejection letters must include the following:

* 3.1 – clearly set out which criteria the applicant has failed to meet and why
* 3.2 – include copies of the relevant Impairment Tables
* 3.3 – contain information about the limitations of the ARO in relation to the ‘claim period’ should an appeal be sought, and
* 3.4 – provide information on how to enrol in a POS.

## 3. Internal Appeals

Written reviews from AROs (ARO decisions), whilst more comprehensive than rejection letters, often fail to provide applicants with adequate information regarding the criteria for eligibility for the DSP.

ARO decisions will identify particular ‘issues’, which do not fully accord with the earlier information provided to applicants on the application form or the rejection letter.

### Sample ARO decision

In making this decision I have considered the facts and circumstnaces of your case and examined how relevant legislation and policy applies to the facts.

You requested a review because you disagree with the decision to not pay your Disability Support Pension.

Issues:
The main issues in this review are whether:
• You have one or more permanent conditions
• You have an impairment rating of at least 20 points under the Impairment Tables
• You have a continuing inability to work for 15 hours a week, or more, because of your impairment. 

ARO decisions usually do not identify the POS requirement as an ‘Issue’, even though an applicant without a severe impairment will have their claim fail on the POS requirement regardless of whether their conditions are ‘permanent’.

Information regarding the POS requirement is often buried in the body of the ARO decision so it is not immediately obvious to applicants that it is as important a requirement as the Issues identified on the first page. There is also no information provided about how to enrol in a POS or what such a program entails.

ARO decisions also fail to explain the role of the ARO as determining whether the DSP applicant qualified in the 13 week ‘claim period’, or include the relevant Impairment Tables.

This often leads to applicants lodging a further appeal with the Social Security and Child Support Division of the AAT (‘AAT-1’, previously SSAT). This is because, despite the process of internal ARO review, they still do not have adequate information about the criteria for eligibility for the DSP or why their claim has failed.

**Recommendation 4: Improve ARO decisions**

ARO decisions must:

* 4.1 – clearly explain the ARO role in relation to reviewing DSP eligibility as of the ‘claim period’
* 4.2 – clearly identify the ‘Issues’ in an applicant’s claim, including whether the POS requirement has been met
* 4.3 – include a summary of the applicant’s POS participation to demonstrate how much more time in a POS is required, and
* 4.4 – include copies of the relevant Impairment Tables.

## 4. Job capacity assessments

It is only once an applicant has lodged an application with AAT-1 that they receive a copy of the documents on which Centrelink has determined that they did not qualify for the DSP during the claim period (the Tribunal or T-documents).

The T-documents include the report of the Centrelink Job Capacity Assessor (JCA), which is the assessment of an applicant’s conditions on which the Centrelink decision-maker usually relies. JCA reports often use terms inconsistent with the legal meaning of those same terms in the Act.

In accordance with section 94 of the Act, in relation to a DSP applicant’s medical conditions, ‘permanent’ means fully diagnosed, fully treated and stabilised and unlikely to improve within the next two years. However, JCA reports will often list conditions as ‘permanent’ but also **not** fully diagnosed, treated and stabilised, as shown in the example below.

### Sample JCA report

Condition: Vertigo
Type: Permanent
Source: Treating Doctor's Report
Treatment details: Loss of Balance – According to available information, this condition is currently under further investigation by a consultant neurologist
Verified by medical evidence: Yes
Full diagnosed, treated and stabilised: No

This leads to considerable confusion and frustration on the part of applicants.

In the matter of *Re Eid v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs,[[48]](#footnote-48)* Deputy President Forgie commented at [58] that the role of the JCA reports is to assist decision-makers and therefore, ‘it is reasonable to expect that they will use language that is consistent with the relevant legislative framework.’

**Recommendation 5: Improve JCA Reports**

JCA Reports must use language that is consistent with the Act.

## 5. External Appeals

Applicants at the AAT-1 are usually not armed with a full understanding of the criteria for eligibility for the DSP, and are often confused further by the information provided in the T-documents, such as the JCA Report discussed above.

Tribunal members provide applicants with a written decision after their hearing, which affirms, varies or sets aside the original Centrelink decision regarding their DSP application. The AAT-1 decision is often accompanied by an excerpt of section 94 of the Act and the Impairment Tables relevant to the applicant’s claim.

Receiving the decision from AAT-1 is the first time that applicants are actively provided with the relevant provisions of the law and the Impairment Tables that are critical to their DSP claim.

# Part B – New process for assessing claims

## 1. The claim form

Until recently, the primary documentary assessment tool for assessment of the DSP was a formal, 11-page medical report from the claimant’s treating doctor (Treating Doctor’s Report – ‘TDR’). The TDR required applicants to list the diagnosed conditions and answer a set of questions about treatment, functional impact and work capacity. This form was required to be lodged together with an applicant’s DSP claim form.

In 2011, the Advisory Committee Final Report on the review of the impairment tables recommended that the ability to generate TDR form data from medical practice software be investigated and implemented. The recommendation was not implemented, and the TDR continued to be lodged in paper form along with the claim form.

Subsequent to completion of the ANAO fieldwork, the TDR was replaced by a single page within the DSP claim form, requiring an applicant to answer five questions about diagnosis and treatment. Applicants are now directed to a ‘Medical Evidence Checklist’ at the end of the claim form for information about what ‘medical evidence’ to provide. The requirements are further explained in a separate Medical Evidence Requirements form (SA473), which is available on the DHS website.

A claimant may also be asked to complete a ‘Consent to disclose medical information’ form (SA472) for assessors to contact their GP if further information is needed. A further form entitled ‘Additional Medical Evidence for Disability Support Pension Record’ (SA463) is completed by the assessor to record the information thus obtained.

A Medicare scheduled fee is claimable by GPs who are contacted by assessors through this process. In this context, it is important to note that the ANOA audit fieldwork was conducted prior to policy changes to DSP medical evidence requirements, removing the requirement for a TDR. This significant change to the eligibility process should be borne in mind in particular in relation to the ANAO finding that job capacity assessment reports were ‘well supported by evidence’ (p. 25).

VLA regards the new process as inimical to good administration of the DSP. It substantially reduces the amount of medical evidence available to the JCA and makes it more difficult for claimants to meet the requirement for corroborative evidence that conditions are fully diagnosed, treated and stabilised.

VLA regards the process for obtaining additional medical evidence by way of phone contact with the claimant’s GP as problematic. The claimant is not privy to these discussions, and there is no scope to otherwise objectively assess the accuracy and completeness of the information recorded. As the case of *Tamua & Secretary, Department of Social Services* illustrates, a GP may answer these questions cursorily or based on a set of assumptions about the patient which are not apparent to the assessor asking the questions. This significantly undermines the reliability of the ‘evidence’ thus obtained.

Key evidence relevant to the claim is not required to be provided at the time the claim is submitted. This is inefficient and adds to the delay in determining the claim. The current claim process also reduces the ability for effective participation by the applicant in the assessment process (as they may be unaware of key medical evidence), and is unduly difficult to navigate.

**Sandy’s case (Part I)**

Sandy lives on her own in a small town in Northern Victoria. The closest Centrelink office is in a larger town some distance away. The bus runs there once a week on Thursdays.

Sandy lived for many years with an undiagnosed cognitive disability. She can read simple words, and predict others by working out the starting letters. She cannot read complex information. If a letter looks important, she takes it to a neighbour to read for her.

Sandy lodged a DSP claim using the new claim form. Centrelink sent Sandy a letter saying they needed more information. They said if she did not respond by a certain date her claim would be refused. When that date passed, Centrelink sent her another letter extending time. The letter said Sandy’s claim would be refused if she did not respond by a certain date.

Centrelink sent Sandy a letter refusing her claim. Sandy contacted VLA and we requested Sandy’s file to find out what had happened, as Sandy did not understand why her claim had been refused.

When we understood the reason for the refusal, we lodged an appeal on Sandy’s behalf providing the information Centrelink asked for. The ARO decided the medical evidence supported Sandy’s claim.

**Recommendation 6: DSS reverse the recent changes to the DSP medical evidence policy.**

**Recommendation 7: DSS investigate and implement a process for generating the Treating Doctor’s Report from medical practice software.**

In line with the recommendation of the 2011 Advisory Committee report into the impairment tables.

## 2. Government-contracted doctor Disability Medical Assessments

The 2015 policy changes to assessing eligibility for the DSP also introduced a Disability Medical Assessment (DMA) by a Government-contracted doctor. We understand referral to a government-contracted doctor will occur if a grant of DSP is recommended following a job capacity assessment. This oversight process will not occur where the recommendation is to reject a claim.

As the ANAO report notes, this practice also occurs at the level of internal review:

‘Human Services … has also advised that it has since required authorised review officers to consult assessors before changing decisions and to refer claimants for a Disability Medical Assessment before completion of the review, where the review officer is considering setting aside a decision to reject a claim on medical grounds’ (p. 37).

In our view the DMA process is flawed. Our practice experience suggests there are unacceptable delays for referral to government-contracted doctors. Further, based on the limited DMA reports we have seen, our view is they are poorly written, unacceptably brief and findings are unsupported by evidence. Having regard to these criteria, they present as an inferior quality document to the treating doctor’s medical report and the assessment completed JCAs, and are likely to lead to increased appeals. Based on what we have seen we recommend the Department urgently implement quality assurance standards for these reports.

**Sandy’s case (Part II)**

The ARO wrote to Sandy about her case. In the letter the ARO said that based on the medical evidence Sandy qualified for the DSP. The ARO said Sandy would be contacted about an appointment with a government-contracted doctor for a Disability Medical Assessment.

Because of Sandy’s disability she did not understand the letter or what was happening with her DSP claim. Three months later, Centrelink arranged an assessment with a government-contracted doctor. Centrelink asked Sandy if she could travel to a Centrelink office for a face to face assessment. The nominated Centrelink office was not the office closest to Sandy’s home. Sandy could not travel due to complications from recent surgery. The social worker at the local hospital assisted Sandy by arranging for the assessment to be conducted in Sandy’s home via Skype. Sandy said the assessment took 15 minutes.

**Jenny’s case**

Jenny suffers from chronic incontinence caused by treatment for bowel cancer and peripheral neuropathy caused by subsequent chemotherapy. This means she relies on splints on her hands for any activities with her arms, and a walking frame and moon boots for mobility. Her initial application for the DSP was rejected. She sought an ARO review of the decision and attended a further job capacity assessment which assessed her as having 35 impairment points and otherwise meeting the requirements for the DSP. The change in assessment was primarily due to additional evidence provided by her treating GP. The decision to recommend a grant was then referred by the ARO for review by a government-contracted doctor Disability Medical Assessment. The doctor rejected all aspects of the claim because they were not able to contact Jenny’s GP to clarify a question about her level of impairment. Suzi was required to appeal to the Tribunal where the Tribunal were able to assess her impairments based on the evidence available.

**Recommendation 8: DSS reverse the policy regarding Disability Medical Assessments.** Alternatively, DHS implement benchmarking and quality assurance standards for Disability Medical Assessments.

# Part C – Failure to consider case law and the legislative instruments

The ANAO report examines the Secretary’s decision-making processes for assessing eligibility for DSP and when applicants seek review. It considers whether assessments are consistent with legislation, policy and guidance.[[49]](#footnote-49) It also looks at the benefit of reducing review activity,[[50]](#footnote-50) and the opportunity for reviews and appeals to ‘continuously improve administrative arrangements and inform policy deliberations’.[[51]](#footnote-51) The report also notes the benefit of raising awareness amongst staff of the outcomes of appeals and reasons.[[52]](#footnote-52) We consider such improvements to be essential to improving the quality of decision-making for applicants for the DSP.

In VLA’s experience, decision-makers routinely refuse claims for DSP for reasons inconsistent with decisions of the AAT and contrary to the relevant legislative instruments. This leads to decisions that are an incorrect application of the law. The principles of administration set out in section 8 (f) of the *SS (Administration) Act 1999* specifically provide that:

‘In administering the social security law, the Secretary is to have regard to:

… the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal.’

Ignoring relevant legal provisions and case law, inevitably results in erroneous decisions and time consuming and lengthy review processes for people already experiencing significant disadvantage.

Better administrative decision-making would reduce the cost of review to the Commonwealth, and reduce the distress and inconvenience suffered by applicants. Some areas where we regularly see error and which are outlined in more detail below are:

* Claims are refused because a diagnosis was not confirmed prior to or during the qualification period.
* Evidence prepared after the qualification period is disregarded by decision-makers irrespective of the contents.
* Decision-makers conclude that a condition is not fully treated if ‘intensive’ or ‘all available treatment options’ have not been ‘exhausted’.
* Claims are refused if there has been a recent change in medication or a referral to a different practitioner.
* Decision-makers frequently make findings that are not supported by the medical evidence, preferring instead opinions expressed in JCAs and disregarding relevant legislative instruments which permit corroborating evidence from carers and those providing support to claimants with mental health issues and intellectual disabilities.
* Claims are regularly refused on the basis that the claimant has not actively participated in a program of support for 18 months prior to the date of claim, without considering the exemptions to the participation requirements.

## 1. Requirement that the condition be ‘fully diagnosed’

A claimant must satisfy the eligibility criteria for the DSP in the 13-week period commencing on the date the claim is lodged with Centrelink (qualification period). One of the requirements is that a condition is fully diagnosed.[[53]](#footnote-53) A common reason for refusing a claim is that the condition was not fully diagnosed during the qualification period. However, case law makes it clear that a condition can be diagnosed after the qualification provided. In the case of *Re Eid v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs,* Deputy President Forgie held:

‘There is nothing inherent in the process of diagnosis or in diagnosis itself that suggests that a condition does not exist until it is diagnosed… Provided there is a diagnosis at some stage and the evidence shows that the person suffered from the condition in the relevant period, that meets the description of being a condition that is fully diagnosed.’[[54]](#footnote-54)

The need for a diagnosis is particularly problematic for claimants experiencing mental health conditions. Due to limited resources, or their residence in regions with limited services, their condition/s are often managed by their general practitioner and a general psychologist. The Introduction to Table 5 – concerning Mental Health Function provides that the diagnosis must be made by a psychiatrist or confirmed by a clinical psychologist. Claimants are informed either by the JCA or the ARO that they require a psychiatrist or a clinical psychologist. However, they are not told that **only the diagnosis** must be confirmed by one of those professionals. Consequently, claimants conclude that they need to change treaters and request a referral from their doctor. At the next stage of review, their claims are then refused on the basis that the recent referral may result in improvement and therefore, the condition is found not to be fully treated and stabilised. This is so, despite the condition being considered chronic and there being an extensive history of pharmacological treatment managed by their GP and counselling with a registered psychologist.

## 2. Qualification period

Decision-makers at various stages of review frequently refuse to accept or consider medical evidence if it is dated after the qualification period regardless of its contents. In the decision of *Re Siljanovski and Secretary, Department of Social Services the Tribunal* the departmental representative urged the Tribunal to prefer the JCA report over the treating doctors’ reports because the latter were not written within the qualifying period.[[55]](#footnote-55) The Tribunal refused to accept the department’s submission because it was apparent that the content of both reports related to the conditions during the qualification period. In that case the claimant succeeded in her application for review before the Tribunal. Claimants often obtain medical evidence addressing the relevant eligibility criteria well after they lodge their claim. Such evidence often casts light on the history and prognosis of their condition/s as at the qualification period, or is specifically related to their presentation at that time. Decision-makers should consider all available evidence and make findings accordingly.

## 3. Fully treated and stabilised

Paragraph 6 of the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (the Determination) requires that a condition must be fully treated and fully stabilised. This is a requirement that the person has had reasonable treatment and further treatment is unlikely to result in a significant functional improvement to a level enabling the person to undertake work.

The Determination requires reasonable treatment to be undertaken, which is defined as treatment that is *reasonably accessible*, is *at a reasonable cost* and *can be reliably expected to result in a substantial improvement*. A reason often cited for refusing a claim is that the condition was not fully treated at the qualification period because of a recent change in medication. In the case of *Re Abdulrahman & Secretary, Department of Families, Housing, Community Services and Indigenous Affairs,[[56]](#footnote-56)* Senior Member Britton sated at [14]:

‘There is nothing in the Introduction to the Tables to support the proposition that a condition can only be considered to be fully treated if no changes are made to the treatment regime. In my opinion the term ‘fully treated’, as used in the Introduction, is intended to convey that the person has received all reasonable available treatment at the relevant point in time, so as to indicate that as far as practicable, the condition has been stabilised.’

Some conditions require regular review and adjustments to medications for various reasons, not necessarily because a significant improvement is expected. Yet decision-makers fail to consider the definition of fully stabilised in paragraph 6(6) and the definition of reasonable treatment in paragraph 6(7) of the Determination. Decision-makers also place onerous treatment requirements contrary to the provisions in the Determination.

Decision-makers refuse claims on the basis that ‘all treatment options have not been exhausted,’ there is no evidence of ‘comprehensive or intensive treatment’ and/or the condition has not been ‘optimally treated’. Recently, a decision-maker concluded that although the claimant’s depression was fully diagnosed by a psychiatrist in 2012:

‘in order for a psychological disturbance to be considered in the assessment of an individual’s qualification … the condition must be diagnosed and assessed by a psychiatrist or a clinical psychologist, and then be subject to related intervention and review.’

**Jenny’s experience**

Jenny applied for the DSP on the basis of ongoing impairments following treatment for bowel cancer. The ARO noted she had been diagnosed and treated for bowel cancer three years prior to her claim, had ongoing review from her oncologist and GP since, had received medication to attempt to treat the impairment, and also attended a pain management clinic and physiotherapy. The ARO concluded the condition was not fully treated because ‘the department must establish that the current and past treatments (including secondary rehabilitation) had comprehensively exhausted all treatment options and that no further treatment or investigation is planned or needed’. As such an impairment rating could not be allocated.

Such requirements are inconsistent with the Determination which requires reasonable treatment as defined. In the case of mental health conditions, all that is required from a psychiatrist or a clinical psychologist is a diagnosis. Assessors and review officers should be equipped with regular updates and information on appeals reasons and outcomes to make these decisions in a manner consistent with the law.

## 4. Evidence

Decision-makers frequently make speculative findings in the absence of evidence preferring opinions expressed by JCAs. In *Re Eid*, Deputy President Forgie stated that the role of JCAs is to provide a summary and analysis of the medical evidence to decision-makers. Their reports should not be treated as evidence of the sort provided by treating doctors and specialists and decision-making should not *‘defer to an opinion or recommendation expressed in a JCA … and in doing so relinquish the task of coming to a decision on each aspect of s. 94 on all the evidence.’[[57]](#footnote-57)*

This is particularly common in cases involving chronic pain which is treated with allied health intervention and pain medication. In the absence of a formal pain management program, JCAs routinely concluded that chronic pain is not fully treated and stabilised and therefore not permanent, despite evidence from general practitioners confirming that it is permanent. In the Federal Court matter of *Harris v Secretary, Department of Employment and Workplace Relations*,[[58]](#footnote-58) Gyles J stated at [16-17]:

‘The finding that the chronic pain had not been diagnosed, treated or stabilised is puzzling. Pain had been diagnosed and treated at the time of the claim in 2004 and it had persisted and was treated for a two year period thereafter… there was no suggestion in any of the material that the condition was temporary. Referral to a pain clinic was not suggested by any of the medical practitioners and that suggestion does not point to any particular diagnosis or treatment which was required.

It is troubling that an applicant presenting with a long standing diagnosed condition being treated in a conventional fashion should be rejected for a benefit, not because of any identified defect in diagnosis or treatment but, rather, upon the basis that further examination by another medical practitioner or other practitioners might suggest some other diagnosis or some other treatment…’

A Departmental appeal to the Full Court was dismissed with costs.[[59]](#footnote-59)

[Jenny’s experience](#Jenny), is also an example of this. In Jenny’s case the ARO had ample evidence of the treatment regime recommended by Suzi’s treating team, and implemented by her prior to her claim, but concluded without evidence that there may be other unspecified treatments available.

## 5. Impairment Tables

The impairment tables used to assess the functional impact of permanent conditions provide that self-report symptoms alone are not sufficient to assign an impairment rating and corroborating evidence is required. Importantly, the instructions to Table 5 concerning mental health function and Table 9 concerning intellectual function specifically permit, as corroborating evidence, ‘*interviews with the person and those providing care and support to the person.’* Yet decision-makers frequently fail to consider corroborating evidence of this nature.

Further, when assessing the functional impact of an impairment, decision-makers and JCAs often disregard paragraph 11(3) of the Determination which provides that a *‘descriptor applies if the person can do the activity normally and on a repetitive or habitual basis and not once or rarely.’* Claimants often say that they attend the local shop for basic items; they do so slowly with regular breaks because of pain or fatigue and require bed rest following their trip to the shop. Such evidence frequently results in a finding that the claimant is able to perform the activity (see [Clara’s case](#Clara)).

## 6. Program of support requirements

In the absence of a severe impairment – that is 20 impairment points under a single table, a claimant is required to have participated in a program of support for 18 months in the three years prior to lodging the claim for the DSP.

The *Social Security (Active Participation for Disability Support Pension) Determination 2014* (the Participation Determination) sets out the requirements for active participation. Relevantly, section 7 provides exemptions to the active participation requirement if a person ‘*is prevented, solely because of his/her impairment, from improving his/her capacity to prepare for, find or maintain work through continued participation in the program.’* Rarely, if at all, do decision-makers consider the exemptions contained in section 7. Consequently, despite having in excess of 20 impairment points under more than one table and a continuing inability to work 15 hours per week, claims are often refused because of the failure to satisfy the participation requirements, without any regard to the impact of the conditions on participation, and whether such a program will offer any benefit to the claimant. That the exemptions are not considered by decision-makers is highlighted in the Auditor-General’s Report which revealed only three cases in which the exemptions were considered. The exemptions have been incorporated in the Participation Determination and decision-makers have an obligation to consider them. We discuss in detail the implications of the program of support requirements for claimants without a POS history in [Part D](#_Part_D_–).

## 7. Recommendations

We support the comments made in the ANAO report in relation to the importance of appropriate policy guidance and other training products for decision-makers[[60]](#footnote-60). We also support the comments around the benefit for the Secretary in reviewing appeal decisions and incorporating this into policy guidance. Reviewers and assessors should be supported to make decisions that are consistent with the law and their obligations under the SS(Administration) Act. All of these examples add nuance to the process of determining eligibility for the DSP, which makes the process of accurate assessment more complex. We regularly see the use of similar wording in ARO decisions which suggests that there are tools being used to assist ARO officers make their decisions. It is crucial that these tools contain an accurate reflection of the law, and support a nuanced and responsive approach to decision-making.

**Recommendation 9: Decision-makers must have due regard to relevant decisions of the AAT in accordance with the principles of administration set out in section 8 of the Act.**

**Recommendation 10: Decision-makers must make decisions in accordance with the provisions of the relevant Determinations, including the participation exemptions.**

# Part D – Program of support requirements

In 2011 the Commonwealthgovernment introduced the program of support (POS) requirements for the DSP. The focus of the changes was a requirement for applicants to test their capacity to work by attending a program of support for 18 months.[[61]](#footnote-61) The designated POS providers are Job Services Australia, Disability Employment Services and Australian Disability Enterprises.[[62]](#footnote-62) The POS requirements loom large over many of the DSP appeals we assist with. The lack of advice and referrals about this requirement featured in the ANAO report.[[63]](#footnote-63)

In the second reading speech introducing the POS requirements, the Honourable Jenny Macklin, the Minister for Family, Housing, Community Services and Indigenous Affairs, assured the Parliament that ‘people with a severe impairment, such as those who are clearly unable to work, will receive financial support more quickly, and will not need to have actively participated in a program of support’.[[64]](#footnote-64)

VLA agrees that people who have a clear inability to work should not be required to test their capacity to work. Public funds and programs are best directed towards and reserved for those who have some prospect of benefitting from these programs.

As currently structured however, the POS requirements require many applicants for DSP with a disability to spend 18 months completing programs from which no benefit can be obtained. This question of benefit, or whether the person has a clear inability to work, is not assessed as part of the application process for the DSP.

There are two situations where a person would be unable to benefit from a POS. The first is where the person is unable to work due to the impact of their impairment. The second is where a person’s impairment would prevent them from benefiting from the POS. The legislative instrument provides that those who meet either of these criteria may in some very narrow circumstances be considered to have complied with the POS requirement without having completed 18 months with the POS,[[65]](#footnote-65) however they need to have attended at least one appointment with a POS provider before they applied for the DSP.[[66]](#footnote-66)

The requirements in the legislative instrument that a person have actively participated in a program of support prior to their claim, regardless of whether it will benefit them, is neither fair or responsive to the special needs of disadvantaged groups in the community. It uses a temporal logistical measure in preference to a substantive assessment of the person’s capacity to benefit from the program at the date of claim. Coupled with the lack of awareness that most applicants for the DSP seem to have about the POS requirement, it operates as an arbitrary and capricious limit on assessing eligibility for applicants for the DSP which causes significant distress to applicants who would otherwise be eligible.

**Recommendation 11: The program of support requirements should not apply to an applicant for the DSP who is unable to benefit from a program of support either:**

**a) because it would not improve their work capacity above 15 hours, or**

**b) because of the impact of their impairment.**

**Recommendation 12: Applicants for the DSP who are able to satisfy the Secretary that they are unable to benefit from a program of support at the time of their claim should not be subject to the requirement that they be actively participating in a program at the time of their claim.**

## 1. Lack of awareness of the program of support requirements and exemptions

Many of our clients with disabilities struggle with attending and completing the program of support. Consequently, many seek an exemption from Centrelink so that they do not have to attend the POS. They are rarely aware that, if they are granted an exemption, they do not accrue time as against the 18 months required to complete the POS. As the legislation stands, the problem is insuperable for those who claim DSP without a POS history, however brief, behind them.

There are two types of exemption. The first exemption is the automatic exemption provided to all applicants whilst their initial claim for DSP is assessed. This means a person who applies for DSP will not be required to attend a POS until their claim is decided. Following this, applicants with disabilities are then usually advised by Centrelink to obtain a ‘medical exemption’ from the program if their health prevents compliance. A medical exemption will usually be accepted if a doctor completes a statement that the person has a temporary condition preventing them from working eight hours or more a week. POS providers also often advise applicants for DSP to apply for a medical exemption if they are struggling to comply with the requirements of the program due to their disability. These exemptions mean many who are unable to work never begin accruing the time required to complete the program.

Crucially, those who never attend a POS due to an exemption are not able to be assessed for one of the alternatives to the active participation requirement. The primary alternative is for an applicant to show that they wouldn’t benefit from the POS.[[67]](#footnote-67) If an applicant for DSP wants to show that the POS would not assist them due to their disabilities, they normally need to provide something in writing from the POS provider.[[68]](#footnote-68). If a person had been referred to the POS prior to their claim, then we usually find that the POS provider will provide a letter addressing the question of whether the person will benefit from the POS. We find that the provider is best placed to address this issue, but of course this cannot occur if the person is not attending a provider, and it cannot occur where the person is referred to the provider after their date of claim. This means that there is an important protection in the POS determination for those who would not benefit from a POS due to the impact of their disabilities, but their lack of initial participation in a POS means they are unable to avail themselves of it.

This is complicated by the fact that is rare for VLA to provide advice to a client who understands the POS requirement and how it interacts with their eligibility, or the alternatives to participating for 18 months. This is consistent with the ANAO’s own findings in the report, and the submissions of the Social Security Appeals Tribunal (SSAT) referred to in the report.[[69]](#footnote-69) As noted, this lack of awareness can have negative implications for subsequent claims for the DSP.[[70]](#footnote-70)

**Anne’s experience**

Anne was in a serious car accident almost a decade ago where she sustained significant injuries to her spine and neck. She was in her late 40’s at the time and her condition has deteriorated since the accident. The main impact is a neuropathic pain condition, which causes her pain when doing most physical tasks. In attempting to get back into the workforce, she began work part-time as a volunteer for Vision Australia. They made allowances to accommodate her condition, but eventually she had to cut her hours from two mornings a week to one, and finally stop going in late-2013 due to the pain.

According to her GP, the condition will prevent her from ever working again. Her GP assesses her as having more than enough impairment points to qualify for the DSP, however she has not completed the POS requirements. Aware of the severe impact of her conditions, Centrelink itself exempted her for a whole year from the POS requirements. Because of this exemption, and despite the impact of her disabilities on her work capacity, she is unable to succeed with her current DSP claim.

It is those with the most significant limits on their work capacity who are most likely to be given medical exemptions by Centrelink from attending the program of support, which means they are not then able to engage with the provider about whether an exclusion is appropriate. Many discover their mistake months after their claim has been lodged when they are advised that their appeal has been rejected due to their failure to comply with the POS requirements.

**David’s experience**

David is a 64 year-old man who suffers from ongoing kidney rejection following a kidney transplant. He is exhausted most of the time, and struggles to concentrate due to his medication. He has no hearing in one ear, and hearing loss in the other. His claim for the DSP would likely have succeeded if he had met the POS requirements, but he was never advised of them until the very end of the appeal process, 12 months after he lodged his initial claim for the DSP. Following his appeal, he is now advised that he cannot attend a POS because of his three-month medical exemption.

## 2. Severe impairment requirement

People who are assessed as having a having a ‘severe impairment’,[[71]](#footnote-71) being an impairment where there is 20 points under a single impairment table, are exempted from the POS requirement. As outlined in this submission in relation to the impairment tables, this is a blunt tool for measuring the severity of a person’s impairment as it only measures the severity of their impairment in one area of functioning. People whose disability impacts in multiple areas of function are not considered to have a ‘severe impairment’. It is also premised on an assumption about the correlation between a single ‘severe’ impairment on one Table and that person’s work capacity, when a person with multiple disabilities may have similar limits on their work capacity and functional ability.

We discuss this problem in detail in [Part E](#_Part_E_–).

## 3. Lack of assessment of exclusion from POS requirements

Whilst there are circumstances where a person does not have to complete the 18 months of the program, there is little evidence that these various alternatives to the active participation for the purposes of the POS requirements are being independently considered by Centrelink. This issue was also directly raised by the SSAT in their submission to the ANAO.[[72]](#footnote-72) As outlined elsewhere in this submission, it is common to see the POS requirement addressed cursorily by an ARO decision-maker. Decision makers should be equipped to properly assess eligibility. However, as noted in the ANAO report, for only three of the files that they analysed was an alternative to the POS requirement applied.[[73]](#footnote-73)

**Sally’s experience**

Sally is a 58-year-old woman who had to gradually reduce her work hours in a roadhouse due to the impact of her osteoarthritis on her back, arms and mobility. She also suffered from ischaemic heart disease which caused significant fatigue. Prior to obtaining the job she had been unemployed. A program of support provider had assisted her to find the job and as she had sustained employment for more than six months she had been exited from that particular provider. When assessing her claim for the DSP, Centrelink determined that she did not meet the program of support requirements, despite successful completion of a program meaning that she had met the active participation requirements. Deborah required legal assistance to convince an ARO review officer that this was the case.

When determining eligibility for the DSP those who are not going to benefit from the program or cannot participate should be speedily and efficiently identified and excluded from the POS requirement. Like all other assessments in relationship to the eligibility criteria for the DSP, an applicant should be required to satisfy the Secretary that they met the criteria for an alternative to active participation at the date of claim by focusing on the substantive question of whether there is medical and other evidence to show they would not benefit from the program.

## 4. Participation in other rehabilitation programs

In 2014 changes were made to the legislative instrument to prevent people participating in transition to work as those associated with public and private insurance schemes from forming part of a program of support[[74]](#footnote-74). The rationale is not articulated in the explanatory memoranda. Return to work programs and other intensive programs focussed on increasing work capacity are valuable tools for testing and assessing a person’s ongoing capacity to work. They tend to be more specifically focussed on the worker’s needs than the employment programs administered through government funded providers, and are funded through the insurance schemes as opposed to the Commonwealth government. VLA considers that programs provided outside the Job Services Network should be sufficient for the POS requirements..

**Nola’s case**

Nola had her first stroke in 2014 and her second stroke in 2015. During this time, Nola was employed with a Bank and she continues to maintain this employment. Following her second stroke, Nola was referred to a Community Rehabilitation Service at Yarra Ranges Health (Eastern Health) to assist with her recovery and worked with an occupational therapist to return back to work. The OT prepared a program for Nola and visited her work to ensure that it was safe for Nola to work. Nola eventually returned to work for four hours twice a week. She is unable to work anymore hours. Due to her disability, Nola applied for the DSP, which was rejected and she eventually appealed to the AAT1. The AAT1 found that Nola had: 10 pts under Table 1 (physical exertion and stamina); 5 pts under Table 3 (lower limb function); and 5 pts under Table 7 (brain function). However, Nola did not complete the program of support and for this reason her application was rejected. Nola currently has an appeal at the AAT2 and is arguing that her program with Eastern Health should be counted as a program of support. Nola should not have to complete a program of support through Centrelink when she is not looking for work and is unable to work more than 8 hours per week.

**Recommendation 13: Include time spent in formal transition to work programs and rehabilitation programs when considering whether a person meets the requirements for active participation in a program of support as was the case under the original 2011 Determination**

# Part E – Evaluating the effectiveness of the Impairment Tables

The impairment tables are contained in the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*. They are the assessment tool used by job capacity assessors to rate the functional impact of a DSP claimant’s permanent conditions on the abilities required for work and training activities. Functional impact is rated using a points system. There is a consistent points interval across the tables (0, 5, 10, 20, 30) and a claimant must get 20 points, either by aggregating points across tables or by obtaining a rating of 20 points under a single table.

The ANAO Report observed that the aim of the 2012 impairment tables was ‘to taper DSP growth and reduce new grants of DSP by approximately 6500 per year’.[[75]](#footnote-75) However the absence of evaluative data made it ‘difficult to attribute the relative impact of the 2012 changes to impairment tables on the grant rate’,[[76]](#footnote-76) even though volume data on grant and rejection rates between 2009–10 and 2013–14 showed that since the introduction of the revised tables the proportion of rejected claims has grown markedly.[[77]](#footnote-77)

The Report recommended that the effectiveness of the tables be evaluated to identify opportunities for improvement in the administration of the DSP, including the cost-benefit of the current DSP eligibility process. The report noted a significant increase in the number of reviews of DSP rejections over the past five years and observed that the increase ‘may be the result of the measures to tighten DSP eligibility and assessment processes’.[[78]](#footnote-78)

VLA supports the ANAO recommendation to evaluate the effectiveness of the impairment tables. We have identified a number of problems with the tables leading to errors in assessments and consequent requests for review, contributing to inefficiencies in the administration of the DSP.

**Recommendations 14: Evaluate the effectiveness of the impairment tables as a tool for accurately rating functional impact, with particular focus on redressing the problem of assessing multi-body system impairments, and simplifying the hierarchy of descriptors for greater clarity, consistency and certainty.**

## 1. Background

The 2011 Advisory Committee Review of the impairment tables recommended updating the focus of the tables from a body system-based assessment to a function-based approach, consistent with contemporary research and practice in work-related impairment assessments.[[79]](#footnote-79)

The Committee reported that in test assessments comparing the revised, function-based tables against the then current tables, 65 per cent of DSP recipients were rated lower under the revised tables.[[80]](#footnote-80) Further, 38 per cent of formerly eligible recipients became ineligible when reassessed against the revised tables.[[81]](#footnote-81)

The Committee recommended that DHS monitor the initial implementation of the revised tables and undertake a comprehensive evaluation of the results over the first 18 months following implementation. It also recommended that the tables be reviewed at least every five years thereafter.[[82]](#footnote-82)

## 2. A ‘piece-meal multi-table assessment’[[83]](#footnote-83) – the problem of multi body-system impairments

A problem with function-based assessment is the tendency for claimants with significant multi body system conditions to be assessed in such a way as to expose them to the POS requirement and the risk of an unsuccessful claim.

The 2011 Advisory Committee reported that 54 per cent of the assessments leading to grants which were selected for revised table testing were for conditions assessed under Table 20, a table which included ‘a mix of unconnected conditions’ including ‘malignancy’, morbid obesity, heart lung and liver transplants and chronic fatigue or pain. The Committee noted that table usage data recorded an ‘inordinately high’ use of Table 20. Table 20 was removed during the testing of the revised tables. The Committee considered that the removal of Table 20 was consistent with a functional approach to assessment. The Committee reported that 36 per cent of the test assessments that changed from eligible to ineligible had been assessed under Table 20.

The Committee reported that when Table 20 was removed, 52 per cent of Table 20 cases were assessed using Table 1. It is our experience that assessors will use Table 1 to assess the functional impact of a range of systemic conditions. However, Table 1 is expressed in a confusing manner which, in our view, leads to underassessment.

We have noted that the problem of using the revised tables to assess claimants with multi body system conditions has been addressed through the provision of increasingly more complex assessment examples in Guidelines to the Tables.[[84]](#footnote-84) This is noted in the ANAO report: ‘DSS advised that it has relied on feedback provide by Human Services, and has made changes to the Guidelines to the impairment tables to reflect this feedback’.[[85]](#footnote-85)

However, the complexity of the examples only serves to highlight the problem for claimants with global functional impairment.

As we note above, the problem is significant, as applicants subject to a ‘piece-meal’ assessment experience the significant ‘flow on’ effect of compliance with the program of support, and the real likelihood that their claim will be refused.

The problem was adverted to by the Tribunal in *O’Gorman-Watson:[[86]](#footnote-86)*

68. In my view, any reasonable assessment of the evidence before the Tribunal supports a conclusion that Ms O’Gorman-Watson’s MS had progressed to a degree that had a severe impact on her overall functional capacity.

69. Unfortunately as no additional assessment was performed, for present purposes, I must assume that she did not meet the statutory requirement for ‘severe impairment’, that is, 20 points in a single Impairment Table.

70. Therefore, I am confronted with a situation where a person with a progressive global medical condition whose total impairment rating was probably greater than 40 points across several Impairment Tables is to be considered to have a level of functional impairment that is not ‘severe’.

71. This raises the question as to whether the Act provides any remedy for such a situation.

**Margaret’s case**

Margaret was originally diagnosed with cutaneous lupus. Four years later she was also diagnosed with inflammatory arthropathy in the joints of her lower limbs. Later again, a whole body bone scan demonstrated inflammatory changes in her hands, feet, elbows, hip and shoulder joints. Margaret was diagnosed with systemic lupus. Her treatment included medication, steroid injections, physiotherapy and hydrotherapy, however her symptoms were severe and she was hospitalised from time to time with pain, skin rash and fatigue.

Margaret’s claim for the DSP was refused so she appealed to the SSAT. The tribunal decided her condition was fully diagnosed, treated and stabilised, and awarded her points under Tables 2, 3, 4 and 14. Because Margaret did not get 20 points under a single table, she also had to satisfy the POS requirement. The Tribunal found Margaret had participated for only 17 months prior to lodging her claim, but observed she had ‘more than adequately met the requirements of the intention of this legislation’ and satisfied an exception requirement for a program of support.

**Clara’s case**

Clara has suffered with symptoms of chronic fatigue syndrome/myalgic encephalomyelitis (CFS/ME) since her 20s. Her specialist reported that the condition was ‘a multisystem illness with symptoms including gastrointestinal, immunological and neurological features’. In Clara’s case the symptoms of her condition cause severe physical fatigue which is worsened when she expends energy. The effects may last for days or months, sometimes leaving her bedridden. Her cognitive and neurological functions are affected resulting in reduced attention span and concentration; and gastrointestinal symptoms include abdominal pain, bloating and nausea. She experiences ‘orthostatic intolerance’ when standing or with prolonged sitting, leaving her dizzy and feeling faint. Her immune system is compromised, causing tender lymph nodes, recurrent sore throat and flu-like symptoms.

Clara’s claim for the DSP was refused so she appealed to the first tier of the AAT. The AAT accepted Clara’s evidence about the functional impact of CFS/ME. The AAT used Table 1 to assess Clara’s impairment and concluded that she did not meet the descriptors for a severe impairment because ‘she is able to use public transport and she is able to walk around a shopping centre or supermarket albeit very slowly; she is often fatigued after a short trip away from the house.’

Clara obtained a total of 20 impairment points across Tables 1, 7 and 10. Clara’s appeal was dismissed because she could not satisfy the requirements for a program of support. On appeal to the second tier of the AAT, the Secretary accepted that Clara’s impairment warranted 20 points under Table 1 and so did not have to satisfy the program of support requirements. Centrelink’s decision was set aside and Clara was granted the DSP.

Margaret and Clara’s cases highlight the vice of the function-based ‘piece-meal’ assessments for people with system-wide disease or disability. In such cases, multi-table assessment involves a counter-intuitive exercise which results in a person with significant functional deficit not being assessed as severe for DSP qualification purposes. In Clara’s case, the problem was compounded by the confusing way in which the descriptors in Table 1 are expressed, which lead to errors of interpretation, and resulting underassessment.

## 3. The descriptors are expressed in a confusing fashion and are difficult to apply

The Rules for applying the impairment tables (Part 2 of the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* describes the ‘scaling system and descriptors’ format of the tables. The Guidelines to the tables describe an ‘incremental hierarchy’ of descriptors within each table. The hierarchy *‘is denoted, among other things, by the application of terms such as occasionally, frequently, often, sometimes, regularly, etc’* (our emphasis). Other tables contain a list of descriptors and provide that ‘at least one’ or ’most’ must apply. Some tables contain descriptors which are cumulative, and some are expressed as alternatives.

It is our experience that this lack of consistency leads to confusion and error. For example, in assessing functional impact under Table 1 there is a tendency to read into the table a limiting requirement that is not expressed in the text, which treats the 2 parts of the descriptor as unconnected. So, for example, the 20 point descriptor is interpreted to mean: (1) the person usually experiences symptoms when performing light physical activities; and (2) the person is unable to perform the activities in sub paragraphs (a)(i) to (iv) whenever the person attempts them.

It is our view that the text of this Table needs to be clarified so that it is clear that the descriptor applies to the impact on function **when the person is experiencing the symptoms**. This requires assessors to undertake more nuanced questioning than is currently evident from the assessment reports.

A further example of the difficulty in reading the tables is found in the AAT decision of *Tamua*:[[87]](#footnote-87)

90. I note also that, under cross-examination, Dr Armstrong said that she believed that, as the prefatory words under Table 2 for the assignment of 20 points concern circumstances where there is a severe functional impact on activities using hands or arms, she ‘would therefore infer that there would have to be a severe impact under each of the descriptors’. I infer from that evidence that Dr Armstrong, in considering the application of Table 2 to Mrs Tamua’s impairment from her carpal tunnel syndrome, incorrectly read all of the descriptors (including those in paras (a) and (c)) as requiring the interpolation and satisfaction of the word ‘severe’, despite the fact that it is only used in some of them.

In our view such errors are not isolated. The ‘hierarchy of descriptors’ are in many cases confusingly expressed and rely on subjective assessments which cause uncertainty and are fertile ground for appeal. Far greater clarity, consistency and certainty is required.

## 4. Described limits on functionality are inconsistent

We are of the view that described limits on functionality, in particular in Tables 2, 3 and 4 are not consistent with the impairment ratings to which they are attached. This results in underassessment.

For example, under Table 3 the descriptors cover both a person’s functional mobility and functional static standing tolerance. A person who has ‘some’ difficulties with mobility but is *unable to stand for more than 10 minutes* only qualifies for a *mild* (5 point) impairment rating. A person who is unable to stand for more than five minutes only qualifies for a *moderate* impairment rating. In our view these tolerances are entirely arbitrary and do not take into account functional impact in the realities of the open workplace.

Further, mobility and static standing tolerance are not addressed at all in Table 4 – Spinal Function. We often see job capacity assessment reports reporting a client’s limited standing tolerances in assessing the functional impact of spinal conditions. However, Table 4 makes no provision for this loss of function. The result for our clients is, unless there is evidence of referred pain into the lower limbs affecting function, the effects of spinal impairment on standing tolerance cannot be rated.

In our view, the overall effect of these inconsistencies is that the stated intent of the revised tables, which is to align impairment with work-related functional abilities, is not achieved and claimants are being routinely under-assessed.

## 5. The tables are inconsistent with the guidelines

### Manifest disability

The ANAO report noted that a person may be determined to meet the medical and continuing inability to work criteria for the DSP without the need for a job capacity assessment if they have a condition which has been granted as ‘manifest’. DSS’s Guide to Social Security Law sets out the policy for manifests grants of the DSP in limited circumstances, including where a person has *an intellectual disability where medical evidence clearly indicates an IQ of less than 70* (3.6.2.20).

The introduction to Table 9 provides that it is to be used in assessing a person with a permanent condition affecting intellectual function with an IQ score of 70 to 85 which originated before the person turned 18. Whilst the Table itself does not make this clear, the Guidelines now explicitly state: *For people with an IQ score of less than 70, the manifest eligibility criteria should be applied.*

We are pleased that the Guideline now makes clear the application of the manifest eligibility criteria to persons with an IQ score of under 70. We note this was not the case in earlier iterations of the Guidelines. However, the Guidelines are not legislation, and we see no reason why the Introduction to the Table should not be amended to make this explicit.

**Recommendation 15: Amend the Introduction to Table 9 to expressly refer to the application of the manifest grant criteria.**

### Medication

The Guidelines to the Tables provide that when identifying the loss of function, consideration should be given to the ongoing side effects of medication when the impact of the side effects is not expected to significantly improve.

Decision makers do not consider the effects of medication on the Tables, and we are obliged to make this submission on behalf of our clients in each case where medication necessary to treat a condition causes separate significant side effects (for example medication which reduces concentration or causes extreme fatigue). In our view the determination itself should be amended to incorporate this guidance.

**Recommendation 16: Amend the Determination to specifically refer to effects of medication in allocating impairment ratings.**

## 6. The tables contain out of date technical information

### Adaptive Behaviour Assessment

We note that the introduction to Table 9 refers to the ABAS-II. The ABAS-II now out of date and is no longer in use by experts to assess adaptive function. We note however that the psychologists contracted by DHS are continuing to use that assessment tool. We have found these assessments to be rudimentary and unsatisfactorily short on supporting evidence. In some cases, scoring was incomplete and / or incorrect, and initial raw scores were upwardly revised later with no explanation. Further, neither the Health Professional Advisory Unit or assessment services have on staff experts with the relevant qualifications to oversight these reports for accuracy. These significant shortcomings undermine our confidence in the reliability of these assessments and are leading to appeals.

**Recommendation 17: Amend Table 9 to refer to the ABAS III.**

1. Submission to the Joint Committee of Public Accounts and Inquiry – Auditor-General’s Report 18 (2015-2016) *Qualifying for Disability Support Pension*, Department of Social Services, 7 November 2016, p 6 (http://www.aph.gov.au/Parliamentary\_Business/Committees/Joint/Public\_Accounts\_and\_Audit/CRM/Submissions). [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Auditor-General’s Report 18 (2015-2016) Qualifying for Disability Support Pension, Australian National Audit Office, p 7. [↑](#footnote-ref-3)
4. Submission to the Joint Committee of Public Accounts and Inquiry – Auditor-General’s Report 18 (2015-2016) *Qualifying for Disability Support Pension*, Department of Social Services, 7 November 2016, p 6. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. *Review of the Tables for the Assessment of Work-Related Impairment for Disability Support Pension,*

   Advisory Committee Final Report, Commonwealth Government of Australia, 30 June 2011, p. iv. [↑](#footnote-ref-6)
7. (Human Rights) [2015] VCAT 1936. [↑](#footnote-ref-7)
8. See Australian Human Rights Commission, *Sexual Harassment: Serious Business –Results of the Sexual Harassment National Telephone Survey* (2012): 20% of people who had been sexually harassed in the workplace made a formal report or complaint. Also Australian Human Rights Commission, *Headline Prevalence Data: National Review on Discrimination Related to Pregnancy, Parental Leave and Return to Work 2014:* 18% of women who experience pregnancy and parental discrimination complain internally or to a Government agency. [↑](#footnote-ref-8)
9. Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180 and Laurence Lustgarten, ‘Problems of Proof in Employment Discrimination Cases’ (1977) *6 Industrial Law Journal* 212, 213. See also Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ [2009] 31 *Sydney Law Review* 579, 583. [↑](#footnote-ref-9)
10. Fair Work Ombudsman Annual Report 2014-2015, page 37 [↑](#footnote-ref-10)
11. See, for example: R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007); Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010) [↑](#footnote-ref-11)
12. For a discussion of this procedure, see Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’, (2009) 31 *Sydney Law Review* 579. [↑](#footnote-ref-12)
13. In the ACT see *Prezzi v Discrimination Commissioner & Anor* (1996) 39 ALD 729, in Victoria see: *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869 [↑](#footnote-ref-13)
14. Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012)27 and 85. [↑](#footnote-ref-14)
15. Michael T Schmitt, Nyla R Branscombe, Tom Postmes, Amber Garcia, ‘The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analysis’, in American Psychological Association, *Psychological Bulletin* (February, 2014), 2 and 10 [↑](#footnote-ref-15)
16. Empirical research also shows that discrimination causes physical and stress-related illnesses, housing insecurity, relationship problems, and poverty: Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012)172. [↑](#footnote-ref-16)
17. *Pop v Taylor* [2015] FCCA 1720 (26 June 2015) ($5,000 awarded as general damages plus $5,000 s special damages for disability discrimination); and *Haider v Hawaiian Punch Pty Ltd* [2015] FCA 37 (6 February 2015) ($9,000 awarded as general damages for racial vilification). (This total does not include proceedings brought under the FW Act.) [↑](#footnote-ref-17)
18. Carol Andrades, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), 12 [↑](#footnote-ref-18)
19. *Swan v Monash Law Book Co-operative* [2013] VSC 326, cited in Ibid at [101]. [↑](#footnote-ref-19)
20. *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [104]. [↑](#footnote-ref-20)
21. *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [105-6]. [↑](#footnote-ref-21)
22. *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652 [↑](#footnote-ref-22)
23. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at 109 [↑](#footnote-ref-23)
24. Carol Andrades, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), 12 [↑](#footnote-ref-24)
25. *Hollingdale v North Coast Area Health Service (No.2)* [2006] FMCA 585 per Driver FM [↑](#footnote-ref-25)
26. *Tan v Xenos* [2008] VCAT 1273 per Judge Harbison VP [↑](#footnote-ref-26)
27. *GLS v PLP (Human Rights)* [2013] VCAT 1367 [↑](#footnote-ref-27)
28. *Bell v State of Queensland & Anor* [[2015] QCAT 369](http://www.austlii.edu.au/au/cases/qld/QCAT/2015/369.html) [↑](#footnote-ref-28)
29. *Christianberg Garment Co v EEOC* 434 US 4012 (1978) [↑](#footnote-ref-29)
30. *Stephens v Australian Postal Corporation* [2014] FCA 732 (10 July 2014) [↑](#footnote-ref-30)
31. Sex Discrimination Act 1975 (UK) c 65, ss 63A, 66A; Race Relations Act 1976 (UK) c 74, ss 54A, 57ZA; Disability Discrimination Act 1995 (UK) c 50, s 17A(1C); Race Relations (Northern Ireland) Order 1997 NI 6, art 52A; Sex Discrimination (Northern Ireland) Order 1976 NI 15, arts 63A, 66A. [↑](#footnote-ref-31)
32. *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 [↑](#footnote-ref-32)
33. *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 [↑](#footnote-ref-33)
34. *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 [↑](#footnote-ref-34)
35. *Hodkinson v The Commonwealth* [2011] FMCA 171 [↑](#footnote-ref-35)
36. According to the Australian Bureau of Statistics grandparents now provide child care for almost one-third of children of working parents. See: ABS Media Release, ‘Grandparents are the main providers of informal care for children of working parents’, 28 April 2015, accessed online: <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/B80CB3BDAC6944AECA257601001B62F7?OpenDocument> [↑](#footnote-ref-36)
37. For example, of the eight disability support pension appeals finalised by the AAT-2 in the period 28 October 2016 to 9 November 2016 the original date of claim ranged from 27 January 2015 to 29 September 2015, with 7 of those claims originally being lodged in May 2015 of before. [↑](#footnote-ref-37)
38. “Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, p 36. [↑](#footnote-ref-38)
39. Section 8 of the *Social Security (Administration) Act 1991 (“SS (Administration)Act 1991”)*. [↑](#footnote-ref-39)
40. Ss (8)(a)(i) and (ii) of the *SS(Administration)Act 1991*. [↑](#footnote-ref-40)
41. Ss (8)(a)(iii) of the *SS(Administration)Act 1991*. [↑](#footnote-ref-41)
42. S (8)(b) of the *SS(Administration)Act 1991*. [↑](#footnote-ref-42)
43. S (8)(f) of the *SS(Administration)Act 1991*. [↑](#footnote-ref-43)
44. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, p 40. [↑](#footnote-ref-44)
45. See s 94 of the *Social Security Act.* [↑](#footnote-ref-45)
46. https://www.humanservices.gov.au/customer/services/centrelink/disability-support-pension. [↑](#footnote-ref-46)
47. https://www.humanservices.gov.au/customer/enablers/program-support-disability-support-pension. [↑](#footnote-ref-47)
48. [2013] AATA 558 [88]. [↑](#footnote-ref-48)
49. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016; pp 30-34. [↑](#footnote-ref-49)
50. Ibid, pp 35-40. [↑](#footnote-ref-50)
51. Ibid, p 35. [↑](#footnote-ref-51)
52. Ibid, p 35. [↑](#footnote-ref-52)
53. *Social Security (Tables for Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*, section 6(4). [↑](#footnote-ref-53)
54. [2013] AATA 558 [88]. [↑](#footnote-ref-54)
55. [2015] AATA 646 at [47-48]. [↑](#footnote-ref-55)
56. Re Abdulrahman & Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, [↑](#footnote-ref-56)
57. *Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] AATA 558 at [72]. [↑](#footnote-ref-57)
58. [2007] FCA 404 [↑](#footnote-ref-58)
59. *Secretary, Department of Employment and Workplace Relations v Harris* [2007] FCACF 130. [↑](#footnote-ref-59)
60. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016; p33. [↑](#footnote-ref-60)
61. Second reading speech, *Family Assistance and other Legislation Amendment Bill 2011*, House of Representatives, 2 June 2011. [↑](#footnote-ref-61)
62. *Social Security (Active Participation for Disability Support Pension) Determination 2014*, subsection 5. [↑](#footnote-ref-62)
63. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, pp 29-29. [↑](#footnote-ref-63)
64. Second reading speech, *Family Assistance and other Legislation Amendment Bill 2011*, House of Representatives, 2 June 2011. [↑](#footnote-ref-64)
65. *Social Security (Active Participation for Disability Support Pension) Determination 2014*, subsection 7. [↑](#footnote-ref-65)
66. *Social Security (Active Participation for Disability Support Pension) Determination 2014*, subsection 5 and 7 which state that a person must have been participating in the program in the 36 months prior to the day on which the claim for DSP is made or taken to have been made. [↑](#footnote-ref-66)
67. They need to show that “they are prevented due to their impairment from improving their capacity to find, gain or remain in the program through continued participation in the program” *Social Security (Active Participation for Disability Support Pension) Determination 2014*, subsection 7(5). [↑](#footnote-ref-67)
68. [↑](#footnote-ref-68)
69. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016; p 30. [↑](#footnote-ref-69)
70. Ibid. [↑](#footnote-ref-70)
71. *Social Security Act 1991* section 94(3B). [↑](#footnote-ref-71)
72. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, p 30. [↑](#footnote-ref-72)
73. Ibid., p 28. [↑](#footnote-ref-73)
74. The definition of designated provider in section 3 of the original [Social Security (Requirements and Guidelines – Active Participation for Disability Support Pension) Determination 2011](https://www.legislation.gov.au/Details/F2011L01783) allowed for:

    *(d) a provider authorised by a State or Territory government to conduct a transition to work program;*

    *(e) a provider authorised by the relevant workers’ compensation authority of the Commonwealth, or of a State or Territory, as a result of a claim made under the relevant legislation of the Commonwealth, State or Territory;*

    *(f)   a provider authorised by an insurer as a result of a claim under a contract of insurance for an accident (including motor vehicle accident), sickness or other trauma;*  [↑](#footnote-ref-74)
75. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, p 18. [↑](#footnote-ref-75)
76. Ibid., p 60. [↑](#footnote-ref-76)
77. Ibid., p 58. [↑](#footnote-ref-77)
78. Ibid, p 38. [↑](#footnote-ref-78)
79. <https://www.dss.gov.au/sites/default/files/documents/05_2012/dsp_impairment_tbls_final_rpt.pdf>. pii [↑](#footnote-ref-79)
80. Ibid, p 27. [↑](#footnote-ref-80)
81. Ibid., piii. [↑](#footnote-ref-81)
82. Ibid., p iv. [↑](#footnote-ref-82)
83. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2016/509.html?stem=0&synonyms=0&query=noall> at par 60 [↑](#footnote-ref-83)
84. <http://guides.dss.gov.au/sites/default/files/files/3_6_3_Impairment_July2016.pdf>. [↑](#footnote-ref-84)
85. Qualifying for the Disability Support Pension”, ANAO Report No 18 2015-16, Australian National Audit Office, Commonwealth Government, 2016, p 59. [↑](#footnote-ref-85)
86. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2014/277.html?stem=0&synonyms=0&query=o'gorman-watson>. [↑](#footnote-ref-86)
87. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2016/757.html?stem=0&synonyms=0&query=tamua>. [↑](#footnote-ref-87)