

National Mental Health
Consumer & Carer Forum
(NMHCCF)

Melbourne 12 September 2016

Reasonable Adjustments or the biggest systemic failure in modern day Mental Health

By

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References

- Australian Human Rights Commission - Workers with Mental Illness: a Practical Guide for Managers
- Australian Human Rights Commission – Willing to Work National Inquiry into Employment Discrimination against older Australians and Australians with Disability
- Will changes to Queensland’s workers’ compensation laws for psychiatric injuries stress out public liability respondents?
September 19, 2014
- Reasonable Adjustments – Peer Hub 2016
- Chapter 5 The Disability Discrimination Act – Addressing employment discrimination against Australians with disability – conclusions and recommendations
- Michael Burge OAM, "Valuing the Lived Experience" presentation
12th Biennial Asia Pacific International Mental Health Conference
October 2016

Do you know what Reasonable Adjustments are?



Just a few responses I have received from managers, mental health professionals, clinicians, case managers, key workers, support workers, etc

- It only applies to people with a physical disability
- being flexible in the workplace creates more work for us
- we treat everyone the same
- evidence shows the particular task should not be an issue
- we don't have any clear policies on reasonable adjustment
- It will decrease productivity and cost us more
- people will only use this as an excuse for their behaviour; etc

Responses from those who are aware of what Reasonable Adjustments are - just to mention a few:

- we need to be careful we do not reasonably adjust people out of the workforce and make it too hard for employers
- We are aware of the resources; **SANE, Beyond Blue & Heads Up** but ...
- I will not make employees aware of this because they may use this as an excuse to not do what they are told
- I wont employ someone who is going to create more work for us.

Reasonable Adjustments Awareness

The lack of awareness and understanding of what exactly “Reasonable Adjustments” entails, is very concerning.

We need to address the ineffective implementation of “Reasonable Adjustments” within the workforce or it will have a huge impact on people with a Psychosocial Disability (mental illness), particularly a thriving Peer Workforce.

I believe this has the potential to be the biggest systemic failure in modern day Mental Health with regards to rights of people with a Psychosocial Disability (mental illness).

Michael Burge OAM

"Valuing the Lived Experience" presentation

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Nothing in the world is more dangerous than a sincere ignorance and conscientious stupidity.

Martin Luther King Jr.



SANE Australia

A recent survey by SANE Australia found that a majority of the 520 people surveyed said that no support had been provided to them at work when mentally unwell and less than half of managers (43 percent) had an understanding of mental illness.

The turnover and retention of experienced Peer Workers has been a concern of mine for a few years now. Not to mention the lack of awareness some case managers have about reasonable adjustments and the impact it may have on their clients in the workforce across Australia.

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What happened to good old fashion
compassion, understanding & common
sense in the workplace

People with a lived experience of Mental
Illness / Psychosocial Disability have a
basic human right to both know and be
aware of the employers obligation to make
Reasonable Adjustments to accommodate
them in the workplace.

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Good Examples of Reasonable Adjustments & Guides

- Richmond PRA
- Beyond Blue - What reasonable adjustments can I ask for at work etc
- Heads Up - Making reasonable adjustments & Identifying positive adjustments etc.
- SANE, etc

But

Implementation and use of these in many organisations is inadequate and sometimes non existent for many reasons e.g. Victimisation

The term ‘Reasonable Adjustments’ is used because, under the Disability Discrimination Act (1992), employers are obligated to make adjustments to accommodate an individual’s disability, unless that adjustment would result in unjustifiable hardship. Many employers accept that workplace flexibility is an attraction and retention strategy. Reasonable adjustments are also often called ‘workplace’ adjustments.

Reference Australian Network on Disability.

<http://www.and.org.au/pages/tapping-into-talent-employing-people-with-disability-reasonable-adjustments-modifying-the-work-envir>

Reasonable Adjustment

The Australian Human Rights Commission defines reasonable adjustments as 'changes to a job, which can be made to enable a worker to perform their duties more effectively in the workplace'. These adjustments should respond to the particular needs or issues of a worker and can include:

- offering flexible working arrangements (for example, job rotation, variable start and finish times)
- changing some aspects of the job or work tasks (for example, exchanging a single demanding project for a job consisting of a number of smaller tasks)
- changing the workplace or work area (for example, moving a worker to a quieter work area)

Reasonable Adjustment

- Reasonable adjustment is provision in the Disability Discrimination Act 1995 which applies to people with disability, their associates and carers. Whilst accommodations for a physical disability are clear, and perhaps more 'tangible' than for a mental health problem, the same principles of reasonable adjustment apply for consumer workers.
- Consumer Workers have the same legal right to reasonable adjustment as any person with a disability
- Reasonable adjustment is about flexibility which is mutually agreed between employer and the consumer worker in accordance with both legislative requirements and workplace policy/procedure.

Reasonable Adjustment

Further detailed examples of reasonable accommodations to address the effects of a worker's mental illness in the workplace from the Australian Human Rights Commission can be found in its Practical Guide for Managers. These include flexible working options and strategies to address:

- difficulties with thinking processes (for example, memory and concentration)
- difficulties with organisation and planning
- difficulties with social interaction
- physical symptoms and functioning
- absence from work
- emotional responses

Reasonable Adjustment

The Commission provides detailed guidance and practical ways to accommodate workers with a mental illness, whether or not they are peer workers:

- Identify the ‘inherent’ (or ‘core’) requirements of the employee’s job.
- Assess the employee’s skills and abilities.
- Identify reasonable adjustments with the employee.
- Check that the employee can meet the inherent or core requirements of the job when reasonable adjustments are made

Flexible and supportive workplace practices

- Flexible and supportive workplace practices should apply to all staff. All staff should be made aware of how the organisation can support them if they are experiencing difficulties within their job, for example, staff who identify as consumers can request support be provided by an external support person, in addition to that provided by their line manager.
- *If choice is power, then to be able to plan and negotiate reasonable adjustment options not only enhances recovery but effectively ensures the organisation is able to continue to provide the service it is funded for and provide a supportive environment for all staff.*

Disability discrimination legislation and employment

- The Commonwealth Disability Discrimination Act 1992 (Cth) (DDA) and equivalent state and territory laws make it unlawful to discriminate against, harass or victimise people with disabilities or their associates – including in employment.

Direct discrimination occurs in employment where:

- a worker is treated less favourably by an employer than someone without disability because of his or her disability. e.g. refusing to employ or sacking someone because s/he has a mental illness; or
- an employer refuses to make reasonable adjustments for a worker with disability and this has the effect that the person is treated less favourably than someone without disability.
- For example, not allowing someone with depression to work part-time where this arrangement has been sought as an adjustment for the worker's mental illness may be direct discrimination.

Direct discrimination under the Disability Discrimination Act

Section 5 of the DDA defines 'direct' discrimination. It provides:

Direct disability discrimination

- *(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.*

Direct disability discrimination

- *(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:*
 - *(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and*
 - *(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.*

Indirect discrimination occurs in employment where:

- an employer imposes a requirement or condition that applies generally, but an employee cannot comply with it because of their disability
- the requirement or condition has the effect of disadvantaging people with the disability, and
- it is unreasonable in all of the circumstances.
- For example, it may be indirect discrimination to require a worker with mental illness to meet a general policy to start work at 7am, when the effect of their medication means they are not alert in the early morning.

Indirect discrimination occurs in employment – cont'd

- an employer imposes a requirement or condition which is unreasonable and a worker with a disability can comply with the requirement or condition only if reasonable adjustments are made, but
- the employer does not make reasonable adjustments, and
- this failure or refusal to make adjustments disadvantages people with the disability.
- For example, it may be indirect discrimination to impose a requirement that employees must work an 8 hour shift but not allow a worker with mental illness to take additional breaks where required to be able to complete their shift.
- Indirect discrimination may not be deliberate but may occur due to a lack of awareness about the negative impact a particular policy can have on a worker with mental illness.

Indirect discrimination under the DDA

From 5 August 2009, the definition of indirect discrimination in s 6 of the DDA is as follows:

Indirect disability discrimination

- *(1) For the purposes of this Act a person (the discriminator) discriminates against another person on the ground of a disability of the aggrieved person if:*
 - *(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
 - *(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and*

Indirect disability discrimination – cont'd

- *(c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.*
- *(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person on the ground of a disability of the aggrieved person if:*
 - *(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
 - *(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and*

Victimisation

Victimisation means subjecting or threatening to subject a person to some form of detriment because they have:

- lodged, or is proposing to lodge, a complaint of discrimination or harassment
- provided information or documents to an internal investigation or an external agency
- attended a conciliation conference
- reasonably asserted their rights, or supported someone else's rights, under federal anti-discrimination laws
- made an allegation that a person has acted unlawfully under federal anti-discrimination laws.
- Victimisation is against the law. It can also be a criminal offence.

In the End, we will
remember not the
words of our enemies,
but the silence of our
friends.

-Martin Luther King Jr.



What is victimisation?

- *Victimisation is being treated badly because you've made, intend to make, or have helped someone else make a complaint, refused to breach the Act or because you've provided information about a complaint. It also includes someone who has agreed to be a witness.*
- *In Queensland, the Anti-Discrimination Act 1991 says it is against the law to victimise people in certain circumstances. Victimisation can be an offence that can be prosecuted and the offender can sometimes be fined.*

Good Resources

- Australian Human Rights Commission
 - Willing to Work National Inquiry into Employment Discrimination against older Australians and Australians with Disability
 - 2010 Workers with Mental Illness: a Practical Guide for Managers
- Chapter 5 of Disability Discrimination Act - Addressing employment discrimination against Australians with disability - has a number of conclusions and recommendations
- Reasonable Adjustments – Peer Hub 2016

WILLING TO WORK National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability Australian Human Rights Commission 2016 - Chapter 7: Federal discrimination laws and the Fair Work Act – **raises a number of issues**

Underreporting The concern raised most frequently with the Inquiry in relation to the effectiveness of legal protections was that individuals do not always make a complaint or take other formal action after experiencing discrimination, whether it is to the Australian Human Rights Commission, to the Fair Work Commission or through internal workplace grievance processes.

Access to legal assistance Individuals and organisations raised concerns about complainants' access to legal advice and representation. In terms of lawyers providing advice to people; legal assistance is an increasing problem, legal aid commissions lack funding and as a result have stringent means testing requirements. A lack of awareness as to rights creates a barrier to accessing justice.

Legal Aid Queensland stated that discrimination law is 'confusingly drafted and exists across a bewildering number of legislative instruments in multiple jurisdictions', creating difficulties for a non-lawyer trying to understand their rights — particularly in terms of deciding which jurisdiction to make a complaint in.

Emotional toll of pursuing a complaint The Inquiry heard that discrimination in employment, and even the process of taking action in relation to discrimination, can have a significant emotional toll on individuals.

In consultations and submissions, the Inquiry heard from individuals who described their experiences with the complaint and court processes: I got worn out by the process.

It's confusing, daunting.

People are just trying to deal with life, like finding accommodation, having enough money.

Cont'd

Emotional toll of pursuing a complaint – cont'd

The case lasted for almost two and a half years and cost over \$220,000.00 in legal fees...If I had known what I would be put through, I would never have considered taking action... The organisation protected their HR manager and senior executives who still have their highly paid jobs. The financial costs to them are insignificant. I am left to somehow pick up the pieces of my life.

Burden of proving discrimination - organisations and individuals raised concerns with the Inquiry about the difficulties of proving that discrimination had occurred. The Act prohibit both direct and indirect discrimination:

- Direct discrimination happens when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics, such as their age or disability.
- Indirect discrimination occurs when there is a rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute - **easier to prove.**

The comparator test In order to prove direct discrimination in court, the complainant must meet the 'comparator test'. The test requires a comparison to be made between the way in which a person with a protected attribute (such as disability or age) is treated in the way in which a person without that attribute would have been treated in circumstances that are materially the same.

The legal test that requires a comparison of the treatment of someone without the particular characteristic has impacted on the ability of people facing complex forms of discrimination where there is no genuine comparator. Furthermore, the exact characteristics attributed to the comparator (often hypothetical) often determine whether a case can succeed or fail.

Comparator Test Case Study

The following case study provided to the Inquiry highlight some of these concerns about the comparator test:

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.

Fear of victimisation following a complaint - Although the Age Discrimination Act and the Disability Discrimination Act both prohibit 'victimisation' for making a complaint to the Australian Human Rights Commission, the Inquiry heard that for many individuals, fear of negative repercussions still had a significant impact on their decision about whether to pursue formal action in relation to discrimination:

Everyone knows someone who knows someone. If you complain it will come back to bite you... we aren't a big place.

If word got out that I had made a complaint I wouldn't be able to get another role.

Effectiveness of the anti-discrimination system A number of individuals and organisations raised concerns about the overall effectiveness of individual complaint systems in preventing discrimination. The Inquiry heard from some community legal centres that making a complaint of discrimination does little to achieve the broader systemic change necessary to prevent discrimination from occurring all together:

Another issue raised was the **need for powers to compel employers to comply with the law.**

It felt like there was no “watchdog” to call who could arbitrate or make sure the employer was complying with the law in this matter.

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.

Inquiry recommends an approach to anti-discrimination law that promotes simplicity and consistency and which improves access to justice for individuals.

The Inquiry heard from some community legal centres that taking action in relation to discrimination does little to achieve the broader systemic change necessary in order to prevent discrimination from occurring altogether.

The Victorian Equal Opportunity Act 2010 has adopted a positive duty on employers to eliminate discrimination, harassment and victimisation.

The positive duty is about being proactive.

In the same way occupational health and safety laws require you to take steps to improve your procedures, policies and practices to avoid workplace injuries occurring, the positive duty requires you to do the same to prevent discrimination from occurring.

A number of submissions raised concerns that the Australian Human Rights Commission **does not** have powers to enforce federal discrimination laws.

NMHCCF considerations for way forward

- Establish a Working Group dedicated solely to this
- Advocacy Brief on "Reasonable Adjustments".
- Promote awareness of how “Reasonable Adjustments” impact on people with a lived experience of mental illness.
- Continue to advocate for the adherence of human rights principles and legislation re Reasonable Adjustments addressing entrenched attitudes & culture
- Address discrimination in the workplace; including victimisation against those who speak up
- Address the overwhelming bias towards insurance organisations & WorkCover towards employers
- Provide more support for consumers during the very stressful WorkCover and insurance claims processes
- Promote use of disability champions to increase awareness amongst leaders and employees
- Promote education & training to address the barriers related to a lack of understanding about disability, and the limited awareness of employer and employee rights and obligations.



***"History will have to record
that the greatest tragedy
of this period of social
transition,
was not the strident clamor
of the bad people, but the
appalling silence of the
good people."***

-Martin Luther King, Jr.



I call on everyone to continue to fight for the human rights of people with a lived experience of mental illness with regards to Reasonable Adjustments - lets say NO to discrimination in the workplace

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Questions