



# WORKERS WITH A DISABILITY

## Preamble

1. People with Disability have the same right as all Australians to secure, meaningful work, a living wage, a secure retirement, and to participate equally in social and economic opportunities.
2. Almost one in five Australians report having a disability. Despite being a significant proportion of the community People with Disability experience high levels of inequality and poverty, often as a direct consequence of exclusion from work and inadequate industrial protections in work.
3. Unemployment, sub-minimum wages, insecure work, discrimination, violence and harassment, minimal retirement incomes and high rates of poverty are entrenched and systemic for working People with Disability:
  - a) Only 53% are in paid employment, compared with 83% of workers without disability
  - b) The unemployment rate is around twice that of workers without disability
  - c) Workers with Disability have significantly lower wages than non-disabled counterparts, including where education levels are the same
  - d) 45% live below the poverty line, compared to 27% of those without disability.
  - e) For those in work, bullying and harassment are far too frequent, with workers with a disability experiencing these realities at twice the rate of other workers.
4. These outcomes have changed little during the 25 years of operation of the *Disability Discrimination Act 1992* (Cth), which has comprehensively failed to address systemic employment discrimination against People with Disability.
5. The *Fair Work Act 2009* (Cth) has also failed to meet the employment needs and expectations of Workers with Disability, in particular failing to ensure the flexible working arrangements needed to participate in work on equal terms with non-disabled workers.
6. Changes to working conditions as a result of the COVID-19 pandemic demonstrate that many of the barriers to employment for people with disability, from flexible working hours to working from home, were erected by employers rather than a function of the roles. Congress calls on government at all levels to encourage this flexibility to continue after the threat of the pandemic subsides.
7. Congress remains committed to the National Disability Insurance Scheme (NDIS), to increase access to all facets of community life for People with Disability, including participation in work.
8. Congress calls on all levels of government to commit to full funding of the NDIS, to:
  - a) Ensure People with Disability have equal access to education, training and employment;

- b) Provide secure, meaningful work with fair wages and decent working conditions for workers in the disability support workforce; and
  - c) Create more opportunities for People with Disability to work in the disability sector.
9. Congress notes, however, that the majority of People with Disability are not entitled to NDIS support, particularly those with disability as a result of mental ill-health. The NDIS is intended to provide services to 460,000 people, around 2% of the population, when almost one in five working age Australians has a disability. Some aspects of the federal government's NDIS rollout have eroded disability services that were provided and delivered by public sector departments in some states, such as Western Australia. In some cases, this has led to a gap in eligibility for services, a reduction in the quality of disability services, and the loss of a skilled workforce who had built trust with people with disability, their families and support networks.
  10. Without systemic reform to discrimination and industrial relations laws, People with Disability will continue to face significant barriers to obtaining work, with the ongoing effects of inequality, exclusion and poverty.
  11. Congress is committed to the removal of attitudinal, institutional and legislated barriers in the workplace relations and superannuation systems across all jurisdictions and levels of government in Australia that prevent Workers with Disability accessing their rights to equality in employment.

## Representing and organising workers with disability

12. Australian Unions are committed to ensuring that Workers with Disability have strong and effective union representation in the workplace.
13. Congress notes the training and guidance developed internationally, particularly in the United Kingdom, to build unions' capability to consult, organise and bargain with and on behalf of Workers with Disability.
14. Congress endorses development by the ACTU Organising Centre, with oversight of the ACTU Workers with Disability Committee, of worker-focused disability awareness and inclusion training to assist Australian Unions to represent Workers with Disability more effectively, including in the areas of disability discrimination, flexible working arrangements, awards and bargaining, and Occupational Health & Safety.
15. Australian Unions commit to furthering disability equality through the improvement of awards and agreements, and by ensuring awards and agreements do not, directly or indirectly, create or entrench barriers to employment for Workers with Disability.

## A fairer supported wage system

16. In 2012 the Federal Court found use of the competency-based Business Services Wage Assessment Tool (BSWAT) to set the wages of workers in Australian Disability Enterprises (ADEs) was unlawfully discriminatory, with some workers paid as little as 99 cents per hour.
17. In 2016 the Court approved the settlement of a class action between the Commonwealth and workers whose wages had been assessed under the BSWAT. The over \$100 million settlement meant more than 8,000 Workers with Disability became eligible to receive 70% of the stolen wages owed to them by the government.
18. Congress applauds all those who have fought to achieve compensation for Workers with Disability underpaid under the BSWAT.
19. Congress notes the April 2018 and December 2019 decisions of the Fair Work Commission to modify or replace the Supported Wage System (the current productivity-based wage assessment process for workers in supported wage settings) in the *Supported Employment Services Award 2020* with a new wage assessment tool, subject to a trial period.

20. Congress opposes any further reduction or suppression of wages of workers in supported wage settings and calls upon the Commonwealth Government:
  - a) carry out meaningful consultation with Workers with Disability and their representatives in relation to any proposed review or replacement of wage assessment tools;
  - b) ensure Workers with Disability are no worse off through any changes to the Supported Wage System; and
  - c) provide the support needed for Workers with Disability, Australian Disability Enterprises and other employers to deliver a living wage and secure retirement to workers in supported wage settings.
21. Australian Unions will continue to campaign against discriminatory and arbitrary wage assessment tools being applied to workers in supported wage settings and to ensure that all workers have the right to meaningful and secure employment with legal wages.
22. While opportunities to work within the Supported Wage System are valued by many, under this system many workers continue to earn sub-minimum wages even when other social security supports are taken into consideration.
23. The unchanging unemployment rate of People with Disability also suggests supported wage settings have not been successful in enabling sufficient numbers of workers to grow their skills and progress to open employment opportunities, contributing to the entrenched and unacceptable rates of poverty experienced by People with Disability.
24. Congress notes movement in some jurisdictions in the United States away from segregated employment settings, and towards the elimination of sub-minimum wages for Workers with Disability.
25. For example, in 2002 the state of Vermont in the United States closed all 'sheltered workshops', eliminating publicly-funded segregated work for People with Disability. By 2015 almost half of all individuals receiving support services were employed in the regular workforce, often in tailored jobs, and all were paid the state minimum wage or more, reducing social security payments by US\$1.7 million.
26. Once in open employment, Workers with Disability also have greater opportunity to increase their wages through advancement, learn new skills, exercise choice and participate in their community than those in the supported wage system.
27. Congress calls for the elimination of the Disability Pay Gap, including elimination of productivity-based and sub-minimum wages for Workers with Disability in Australia, and the creation of more jobs for People with Disability in open and inclusive employment settings.

## **Disability support pension**

28. Australian Unions call for an increase in the Disability Support Pension (DSP), to provide a living social wage for People with Disability that is above the poverty line.
29. If rejected, DSP applicants who are unable to find work are likely to receive JobSeeker instead. Newstart has requirements to attend Centrelink, apply for a predetermined number of positions (regardless of whether or not they are suitable for the person), and include penalties for alleged non-compliance. These conditions are onerous for people without disability; for People With Disability they can be exhausting and contribute to further depression, anxiety, and feelings of insecurity about housing, food, and capacity to meet financial obligations.
30. More than 25% of Newstart recipients have some form of disability. The allowance is manifestly inadequate as a safety net for any jobseeker, and is totally inadequate when the additional costs of living with disability are taken into consideration.

31. There is no evidence that determining People with Disability are capable of work and reducing their access to the DSP leads to more People with Disability obtaining paid work.
32. Congress opposes further cuts to social security allowances, pensions and programs needed by People with Disability to live with dignity and in security. Australian Unions are committed to ensuring that there is adequate support for People with a Disability, including DSP recipients, to enter the workforce.

## Flexible working arrangements

33. The *Disability Discrimination Act 1992* (Cth) requires employers to make reasonable adjustments to the workplace so workers can meet the inherent requirements of the job, but a request may be refused if it would impose 'unjustifiable hardship' on the employer.
34. Section 65 of the *Fair Work Act 2009* (Cth) also enables employees with disability to request a change in working arrangements. Such requests may, however, also be refused on 'reasonable business grounds'. There is currently no right to appeal an employer's refusal of a request for a change in working arrangements.
35. Workers with Disability need greater certainty that they can access flexible working arrangements that assist them to maintain their wellbeing and fitness for work, while maintaining a living wage and consolidating their employment experience.
36. Congress endorses the long-standing recommendations of the Australian Human Rights Commission to amend s.65 of the *Fair Work Act 2009* to include a positive duty on employers to accommodate reasonable requests for flexible working arrangements, and to establish procedural appeals for decisions related to the right to request flexible work arrangements.

## Disability leave

37. The National Employment Standards (NES) provide workers with minimum leave entitlements that support a fair and functional society, including annual, sick, parental, carers and compassionate leave.
38. But if you are a Worker with Disability, the NES only provide the right to request flexible working arrangements rather than a minimum disability leave entitlement, and the decision of the employer cannot be appealed.
39. Congress notes that a Disability Leave entitlement has been achieved through bargaining in the UK:
  - a) Disability Leave is paid leave for activities inherently associated with a workers' disability, for example to attend physical therapy or rehabilitation sessions.
  - b) Disability Leave is not sick leave. It recognises that disability and illness are not equivalent, and that Workers with Disability should not be forced to use annual or sick leave for routine maintenance of their well-being and fitness for work.
  - c) Disability Leave treats disability as a normal part of the human condition, which requires accommodation of flexible work to enable People with Disability to participate equally in work and the economy.
40. In particular, Workers with Disability should not be required to take annual leave or sick leave to attend NDIS planning meetings that are critical to ensuring there are adequate supports in place to maintain their employment.
41. Congress supports the development by the ACTU of a discussion paper for consultation with Affiliates regarding the potential issues and benefits of a minimum entitlement to Disability Leave in Australia.

## Superannuation & income insurance

42. All workers need a secure retirement income. The UN Convention on the Rights of Persons with Disabilities recognises that people with disability have the right to equal access to retirement benefits and programmes.
43. However, many Workers with Disability in Australia earn low or sub-minimum wages and finish their working lives with nil or minimal superannuation.
44. When work is interrupted by injury and disability, superannuation payments are often significantly affected. There is no superannuation safety net for workers away from work for 12 months or more because they have acquired a disability. Superannuation payments generally cease during that period.
45. Workers often resort to accessing their superannuation to make changes to their home, car and other essentials to accommodate their new disability. This reduces their superannuation balance and, over time, they may use all of their superannuation to mitigate the impact of their disability on their life, leaving nothing at retirement.
46. The superannuation system requires reform to support Workers with Disability to achieve a secure retirement and, if they acquire a disability during their working lives, maintain their superannuation during the period in which they are adjusting to their new circumstances.
47. Many People with Disability are living longer and healthier lives and work to retirement age. Workers with Disability are as vulnerable to the diseases of ageing as any other worker, but are often subject to discrimination that prevents them obtaining income protection insurance through their superannuation.
48. While the Disability Discrimination Act generally makes it unlawful to discriminate on the basis of disability when providing insurance and superannuation, the Act contains a partial exemption for insurance and superannuation providers where exclusion of a person from coverage is based on actuarial or statistical data. The Act also contains a general defence which may apply to providers where not discriminating would cause them 'unjustifiable hardship'.
49. This often means Workers with Disability are unable to protect their and their families' income in the event of an illness or trauma that can happen to any member of the working population.
50. Congress calls upon the Federal government and superannuation funds to introduce non-discriminatory superannuation and insurance products for Workers with Disability and injured workers.

## Support for injured workers

51. Congress calls for the reduction of work-related injury, disability and deaths, and for fair rehabilitation, return to work and workers compensation for all workers, including Workers with Disability.
52. In particular Congress supports:
  - a) A return to a basis of 'no-fault' compensation for all workplace injury and diseases, including where it is the aggravation of an existing injury or disease and disability.
  - b) Effective rehabilitation and return to work programs, including the provision of economic security through workers' compensation arrangements that restore workers to the position they enjoyed prior to their injury, including full access to superannuation and leave entitlements.
  - c) Provision of comprehensive and quality rehabilitation services and to return to suitable and decent employment.
  - d) The right of workers to choose their own doctor and not have employers attend their private medical appointments.

- e) Placing an absolute obligation on employers to provide suitable duties on return to work, and providing incentives for the employment of injured workers.
- f) Preventing termination of employment unless the injury management plan states that the return to work goal is a different job and a different employer.
- g) Abolition of the illegitimate use of 'whole of body assessments', which act to reduce compensation and limit access to statutory lump-sum payments and common law remedies via legislated minimum thresholds.
- h) Removal of time limits and step downs on weekly payments that effectively shift the injured worker onto social security benefits.
- i) Unions having the power to enforce non-compliance with workers compensation law together with rights of entry, inspection and other investigative powers.