



# Opening Address Counsel Assisting – Kate Eastman SC

## Public hearing 19: Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability

**Virtual, 22 November 2021**

Ms Kate Eastman SC: Thank you, Commissioners. We also acknowledge and pay our respects to the traditional custodians of the lands on which we are meeting today. We pay our respects to First Nations elders, past and present, and also to First Nations people following this public hearing.

Commissioners, in December last year, you convened Public hearing 9. The public hearing was led by people with disability who shared their experiences about the barriers and pathways to open employment. We listened to the evidence of 35 witnesses including people with disability, parents, supporters and advocates, together with some academics. You heard about the experience of people with disability finding and keeping jobs. You also heard about the transition in and out of the workforce, and their experience of discrimination and exploitation.

Commissioners, one of the witnesses was Oliver Collins. He lived with a very rare neuromuscular condition. In February 2020, he was one of the founding member of the Diverse Abilities Network of the Queensland Law Society. The network was established to promote greater participation from people with disability in the legal profession in Queensland. At the time he gave evidence at Public hearing 9, he was a solicitor in the Dispute Resolution group at law firm King & Wood Mallesons in Brisbane.

Mr Collins told you his various jobs and his career. He spoke candidly about his personal experiences and expectations. I want to quote a little part of his evidence. He said this:

I do not want anything to be different for me, in that I did not want to stand out from a negative point of view because of my disability and wanted to be treated like everyone

else. So I did not ask for anything. This helped me feel like I was making an equal contribution to the firm and was not increasing the burden on them in having me as an employee.

If I am honest with myself, this put much greater pressure on me physically, as I worked through pain and discomfort in order to achieve this. Those with disabilities should not be made to feel as if, by requiring special adjustments or equipment, their contribution in a workplace would be devalued or that their contribution would be worth less in any way than able-bodied colleagues because of differing physical abilities[.]

Commissioners, you will recall that this was candid evidence.

In April this year, Mr Collins passed away. We know his passing was a great loss to his family. On behalf of the Royal Commission, we express our condolences to Oliver's family and his colleagues at work. We greatly appreciated Oliver's participation in the public hearing and his evidence is relevant to the matters we will consider this week with respect to attitudes and ableism. We thank you Oliver Collins.

Commissioners, you heard oral evidence with respect to Public hearing 9 in March this year. At that hearing, we submitted there were recurring and common barriers to the employment for people with disability. These barriers may be grouped in four broad areas:

- attitudinal barriers
- physical and environmental barriers
- organisational
- structural barriers.

Chair, you have touched on these barriers in your opening remarks.

These barriers impair a person's enjoyment of human rights of which the right to work is recognised as a core economic and social right. For some people with disability, these barriers result in violence, abuse, neglect and exploitation.

We concluded Public hearing 9 by proposing a further hearing to provide you, the Commissioners, with the opportunity to hear from private and public sector employers, from governments and other key bodies involved in the regulation of labour force markets in Australia.

We suggested the Royal Commission may wish to inquire how employers and governments have addressed the systemic barriers we have identified. This would

require an examination of the practices, policies and regulation of both public and private sector employers, as well as governments and institutions responsible for regulating the labour market.

We suggested the intended purpose of a further public hearing could be two-fold:

- First, to explore what employers and other key actors in this area are doing or not doing to address the systemic barriers identified in the hearing.
- Secondly, to explore potential measures to eliminate the barriers to open employment that cause or contribute to violence, abuse, neglect and exploitation of people with disability.

So this is the purpose of this public hearing. The focus is on private and public sector employers. This means there will only be a few witnesses with disability participating in this hearing to tell you about their personal experiences finding and retaining employment.

So addressing the systemic barriers will not require you, Commissioners, to identify anything new. In fact, the issue is not what should be done, but rather the issue is why hasn't what we already know been done.

To put it another way, there has been a lot of 'talking the talk' and at this hearing we will ask if there has been any 'walking the walk'.

Previous inquiries and reports that have identified and considered what needs to be done. These reports have made recommendations. Commissioners, you should ask: why have the recommendations of past reports been ignored or failed?

In March 2007, the Australian Safety and Compensation Council published a report called, 'Are People with Disability at Risk at work? A Review of the Evidence'. In March 2007, the findings were as follows:

- First, contrary to the common perception of increased occupational health and safety risk for people with disability, a national study of employers in Australia found that workers with disability have a lower number of occupational health and safety incidents compared to average employees.
- Secondly, with respect to workers compensation costs and occupational health and safety costs for employers, employees with disability are much lower compared to the average employee.

- Thirdly, the productivity of employees with disability is similar to that of employees with no disability.
- Employees with disability are longer serving and have less turn over.
- The report found that the actual cost of workplace accommodations was quite low, and the economic benefits of employing people with disability exceed the costs of those accommodations.
- The accommodations reported in literature are related to access, not safety.
- A third to half of people with disability requiring accommodation were not receiving the accommodations, and this was despite anti-discrimination legislation that required employers to make 'reasonable' accommodation for people with disability.

Two years later 2009, the data tells us 54.8% of people with disability of working age, being between the age of 15 and 64 years, were employed.

In 2009, the National People with Disabilities and Carer Council on behalf of the Government of Australia published its report 'Shut Out: The Experience of People with Disabilities and their families in Australia'. This report found employer attitudes posed the biggest barrier and in 2009, the following matters were identified:

- First, entrenched discrimination and misconceptions about the adjustments required for some people with disabilities.
- Secondly, that the cost of making workplace adjustments was often overestimated and based on inaccurate estimates of cost.
- Thirdly, other qualified candidates for jobs were 'screened out' or simply overlooked because of their disability; and concerns were expressed about mandatory medical assessments being used in a way to 'screen out' candidates with disabilities.
- Next, occupational health and safety requirements are also sometimes used as an excuse for both refusing and restricting employment opportunities. But at the same time there was confusion about those obligations.

The 'National Disability Strategy 2010 – 2020' noted the vast majority of people with a disability can and do want to work and they wish to be as financially independent as possible.

In 2011, in a report commissioned by the Australian Disability Network, Deloitte Access Economics undertook economic modelling that found that Australia will forego substantial

economic benefits if labour market disadvantages faced by people with disability are not addressed. The modelling showed that if the gap between the participation rate and unemployment rate for people with and without disability could be reduced by just one third, phased in up to the present year, 2021, the cumulative impact on GDP would be in the order of \$43 billion. The modelling showed the economic benefits for increasing labour force participation of people with disability could be significant.

In 2014, the Australian Chamber of Commerce and Industry (ACCI)'s issued its report, 'Employ Outside the Box: *The Business case for employing people with disability*' and, perhaps unsurprisingly, it found:

If the business community does not take action now [that's back in 2014] all businesses will be threatened in future years by increasing cost of labour[.]

Then in October 2015, the Business Council of Australia (BCA) released its report, 'Recognising Ability: Business and the Employment of People with Disability'. The BCA undertook a survey of its members with respect to the approaches of business to the employment of people with disability. It found this:

boosting the active participation of people with disability will deliver individual, social and economic returns[.]

Then as the Chair has noted this morning, in May 2016, the Australian Human Rights Commission published the 'Willing to Work Report'. The 'Willing to Work Report' found that employers, businesses and organisations that represent them have a critical role to play in recruiting, retaining and training people with disability. It also noted the importance of there not being a one size fits all approach.

The 'Willing to Work Report' made a number of overarching recommendations to address systemic issues related to the employment of people with disability.

Notwithstanding the 'Willing to Work Report' and subsequent reports and inquiries, there appears to be little improvement.

Commissioners, may I remind you of some the available data concerning people with disability and employment in Australia. The most recent data is in 2018. That data tells us:

- That there were 4.4 million Australians with disability representing 17.7% of the Australian population.

- Of that group there were around 2.1 million people with disability who were of working age, that is, between 15 and 64.
- Labour force participation for that group was 53.4%. That is lower than 2009. It stood in contrast to an increase in the participation rate for people without disability then in 2018 being 84.1%.
- The labour force participation rate was 38% among the people of working age living with autism spectrum disorders.
  - The unemployment rate for people with autism spectrum disorders was 34%, more than three times the rate for people with disability (10.3%) and almost eight times the rate of people without disability (4.6%).

In preparation for this hearing we asked the Australian Government why the rate of employment for people with disability has not improved. Their answer was to refer us to the various reports, such as the 'Willing to Work Report'.

So Commissioners, we must ask why the investment in the various strategies and initiatives have not succeeded and whether a different approach is now required.

One of those questions will be to ask if taking a human rights approach might make a difference. This is an approach that takes into account the *Convention on the Rights of Persons with Disabilities*. Commissioners as you heard at the recent public hearing 18, there are a range of initiatives concerning employment of people with disability, including the work done by the International Labour Organisation and the approach described in the UN Guidelines on Business and Human Rights. So we ask whether those approaches could make a difference.

Commissioners, tomorrow you will hear from the Australian Council of Trade Unions (ACTU) about its recently adopted workers with disability policy. The policy acknowledges unemployment, sub-minimum wages, insecure work, discrimination, violence and harassment, and minimal retirement leads to high rates of poverty. These are matters that are entrenched and systemic for working people with disability.

The ACTU's policy identifies a range of areas for improvement, from worker representation, wage fixing tools, flexible working arrangements, superannuation, insurance and broader supports.

You will also hear from the Business Council of Australia. Ms Jennifer Westacott, the CEO, will tell you that the Australian economy has undergone an unprecedented period of sustained growth for almost 30 years. Despite the overall strength of the labour

market, policies, legislation and raft of government programs, the labour force participation of people with disability has fallen behind the rest of the population. She said there is a compelling economic case for increasing the labour force participation of people with disability.

Commissioners, over the next 5 days you will hear from 12 of Australia's leading companies. Indeed, they are iconic brands. You will hear about their recruitment practices, policies and how they approach workplace adjustments for employees with disability. We will examine whether their recruitment and employment practices are accessible for people with disability; what actions are they are taking to provide accessible, safe and inclusive workplaces for employees with disability?

But obviously 12 employers is a small snapshot of all Australian employers. However, based on the information provided to the Royal Commission, these 12 companies employ over 485,000 people.

We asked each of these companies to tell us how many employees with disability are recorded in their employment records in their HR system; and taking these companies together, only about 1.15% of all of their employees identify as people with a disability.

I am going to show you now a table that breaks down the rates of employment for our large Australian employers. [Graphic shown]

- Commissioners, you will see the lowest rate identified in the 12 employers we identified was IBM. You will see out of a total of 3,110 employees, only five people with disability was recorded in the HR system. That constitutes 0.16% of employees at IBM who identify as people with disability.
- You will see we have tracked through organisations such as Lendlease. It records 0.17%.
- RMIT has employees in the order of 7,700. It employs 22 people with disability; 0.29%.
- Medibank, 0.46%
- Kmart, half a per cent (0.5%)
- Accenture, 0.74%.
- Woolworths, which is the largest employer amongst this group, employing over 200,000 Australians, has 1,705 people with disability recorded in its HR system constituting 0.85%.
- Telstra, another large employer in Australia, is close to 1% at 0.99%.

- Two of these employers make it over 1% mark:
  - The Compass Group at 1.90% and
  - Australia Post at 3.91%.

Commissioners, we also asked McDonalds and the National Australia Bank. McDonalds collectively, through its own organisation and its franchises employs over 110,000 people but its HR system did not record the number of people with disability, and the same for the National Australia Bank.

So the rates of employment among some of our large and iconic employers and brands in Australia is disturbingly low.

The employers will tell you over the course of this hearing that these numbers might change if we look, for example, at the surveys that are done in workplaces or the census that might be undertaken. We accept, and we will explore during the course of this hearing, that when people are asked to disclose whether they have a disability on an anonymous basis, the numbers tend to be higher. Collectively looking at all of this information, none of these brands exceed 5%.

Commissioners, data is a key issue. Likewise, record keeping. There is a lack of a consistent approach to recording and tracking data with respect to employees with disability.

Commissioners, though, you will be aware of the impact of the *Workplace Gender Equality Act 2012* (Cth), a piece of Commonwealth legislation that deals with the collection and publication of data that identifies trends relevant to the participant of women in the labour force. Non-public sector employers with 100 or more employees must report annually against six gender equality indicators. But there is no equivalent requirement for reporting for employees with disability or any disability equality indicators. So the absence of mandatory reporting requirements for disability means there is limited, patchy and unreliable data.

It is not just the private sector. This week, you will hear from the public service commissioners of the Australian Government, Victorian Government and the Government of the Northern Territory about what the public sector is doing to attract, retain and promote employment for people with disability. It is beyond the scope of this public

hearing to address the data, policies and indeed practices of each Australian States and Territories.

By reference to these three governments, we will examine how the public sector approaches recruitment, their practices with respect to making workplaces accessible for people with disability, and what actions they are taking to provide a safe and inclusive workplace.

We will also examine important employment concepts such as inherent requirements of the job and the approach to making reasonable adjustments.

So let me tell you what the data tells us in relation to the employment rates of people in the public sector. I will put up a small graphic on this. [Graphic shown].

- With respect to the Australian Public Service, the numbers of people with disability in the HR system is 4%.
- For the Northern Territory, it is 1.2%.
- For the Victorian Public Service it is 0.4%.

Commissioners, I give you this data with a cautionary note, and that is that each of the Public Services Commissioners will talk about the way in which data is collected. Particularly for Victoria, the collection of data last year with respect to the impact of COVID-19 and lockdowns, and the response rate to various surveys, means that we have to treat the numbers that I've given you with respect to Victoria with some degree of caution.

Commissioners, the ideal from the targets set by the Commonwealth Public Service was to achieve 7% of employment of people with disability in the Australian Public Service in the period of 2020 to 2025. There is a long way to go to reach that 7% target before 2025.

Commissioners, I now turn to how this hearing will be conducted over the next 5 days.

This morning you will hear from Graeme Innes AM, the former Disability Discrimination Commissioner. He will tell you about his career and his experiences in seeking employment. We asked him to address a range of matters that are likely to be key themes and indeed recurrent themes arising in this hearing. He will address what needs to be done to increase labour force participation for people with disability.

Then you will hear from Robin Banks, the former Tasmanian Anti-Discrimination Commissioner. She will tell about her experience working with Australian laws and processes for addressing disability discrimination in employment.

Later today you will hear from Peter Olivieri and a panel of experienced lawyers from AED Legal and the Victorian Legal Aid. They all work on the front-line. They provide advice and representation to people with disability. Mr Olivieri is a client of one of the services and he will tell you about his experience in addressing disability discrimination at work.

Later this week you will hear from Sandra Parker PSM, the Fair Work Ombudsman. We will ask her about the responsibilities of the Ombudsman under the *Fair Work Act* and the protection for workers with disability, such as Mr Olivieri. You will also hear from Emily Howie and Lauren Matthews. They represent the Victorian Equal Opportunity and Human Rights Commission. They will also tell you about the rights and remedies provided by the Victorian *Equal Opportunity Act*.

Commissioners, the evidence over the course of this week is likely to expose

- The need for better education and awareness about the rights of people with disability in the workplace.
- It will expose the need for practical guidance for employees with disability about how to exercise those rights.
- It will expose the need for practical guidance for employers to comply with their obligations and also what to do in circumstances where no adjustments can be made or there is a perceived or real clash of legal obligations such as work health and safety and the non-discrimination.
- There is also a need for practical tools for building, maintaining and committing to inclusive workplaces that come from and are led by people with disability.

Our final session today will be the opportunity to hear about some practices that have worked, and with Kristy Masella from the Aboriginal Employment Strategy, specifically about what needs to be done to increase meaningful and sustainable employment.

I have mentioned earlier that you will hear from the peak union and business organisations. Tomorrow, Scott Connolly, the Assistant Secretary of the ACTU, will appear and he will tell you that one of the objectives of the ACTU is to take all appropriate measures necessary to ensure secure jobs and income in decent employment. This includes protection from unfair treatment.

He will be joined by Melissa Donnelly. She is the National Secretary of the Community and Public Sector Union (CPSU), which is the major union for workers in the Australian Public Service, the ACT and the Northern Territory public services. Together they will address a range of issues concerning the protection of worker rights, the experience of workers in the public sector, the development of government policies and why past initiatives have failed to achieve their objectives.

You will also hear from Business Council of Australia tomorrow and some specific initiatives focused on increasing labour force participation for people with a disability.

Commissioners we will then turn our attention to the private sector employers, who I've mentioned earlier. Tomorrow and on Wednesday this week, there will a number of panels focusing on recruitment practices and approaches to making workplace adjustments. You will hear from representatives from Kmart, Woolworths, Compass, IBM, Telstra, McDonalds, National Australia Bank, Accenture and RMIT. On the issue of workplace adjustments you will also hear how the public sector approaches these issues. You will hear from the Australian Taxation Office, the National Disability Insurance Agency and the Department of Social Services.

On Wednesday, we will examine work health and safety in workplaces in Australia. Employers must manage the risks to the health and safety of workers, customers, visitors and suppliers. There are comprehensive work, health and safety laws in Australia to address workplace risk and prevent death and injury. That includes workers with disability. Employers who fail to provide safe workplaces and breach work health and safety laws can be open to prosecution.

Related to work health and safety is a requirement for employer to have workers compensation insurance. For persons who acquire a disability in the course of their employment, who want to understand the support for rehabilitation and returning to work, and whether indeed the approach to the treatment of workers who acquire a disability has been different.

You will hear from Lendlease and Australia Post as employers with respect to their response to work health and safety. You will also hear from the Commonwealth and Victorian agencies responsible for developing policy and regulating work health and safe in workplaces. We want to understand whether and how these regulators have addressed disability issues and specifically addressed the health and safety of workers with disability.

On Friday you will hear from the Department of Social Services and the NDIA about the Australian Government's overarching strategy.

Commissioners we also want to consider a way forward.

You will hear from representatives from Telstra, Medibank and Australia Post about their experience in building an inclusive workplace culture and will examine what specific actions employers should or could be taking to employ, retain and promote people with disability.

You will also hear from Ms Christina Ryan from the Disability Leadership Institute. She gave evidence at the recent public hearing concerning the *Convention on the Rights of Persons with Disabilities* and she will build on her evidence from that hearing to focus on what needs to happen in Australian workplaces to prevent people with disability experiencing violence, abuse, neglect and exploitation in employment.

As always Commissioners, there may be information and evidence presented at this hearing that some people may find distressing and I'll put up now the slide with the relevant contact numbers. [Content warning shown].

While that slide is up, I also remind those following this proceeding of provisions in the Royal Commissions Act 1902 (Cth) that have the clear object of protecting people who give evidence before the Royal Commission. I particularly want to draw attention to section 6M of that Act which provides that:

Any person who uses, causes, or inflicts, any violence, punishment, damage, loss or disadvantage to any person on account of the person having appeared as a witness before the Royal Commission, or given evidence before the Royal Commission, or producing documents to the Royal Commission, commits an indictable offence.

The maximum penalty for committing such an offence is imprisonment.

Thank you Commissioners.