



## SUBMISSION

Prepared by Springvale Monash Legal Service Inc for the Senate Community  
Affairs References Committee,

### **INQUIRY INTO THE PURPOSE, INTENT AND ADEQUACY OF THE DISABILITY SUPPORT PENSION**

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## **Our organisation**

Established in 1973, Springvale Monash Legal Service (**SMLS**) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal.

For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and people seeking asylum, particularly unaccompanied humanitarian minors and women escaping family violence.

## **SMLS and Employment Law**

SMLS recognises that there is an ongoing need within our local community for free employment law assistance for workers. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly for clients from culturally and linguistically diverse communities.

At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights.

We also understand that our clients may not always be in a position to self-help if, for example, a matter is complex or if a client is facing disadvantage due to factors such as limited English or disability. Some clients may feel intimidated by the employer and may not otherwise be willing to assert their rights in the absence of a legal advocate. We seek to redress these power imbalances by providing ongoing assistance which may include preparing applications to the Fair Work Commission and negotiating a settlement with employers.

Our employment law service may provide advice and assistance in relation to: Unfair treatment in the workplace or unfair dismissal, workplace bullying, discrimination, disputes regarding unpaid or underpaid wages, unpaid leave, redundancy, sham contracting and other entitlements.

In addition to our onsite employment law clinic, we operate a duty lawyer outreach service at the Fair Work Commission in partnership with Job Watch in response to ongoing need within our local community for free employment law assistance. We also deliver the International Students Accommodation and Employment Legal Clinic, in partnership with Study Melbourne, WEstjustice and Jobwatch.

## Terms of Reference

These submissions seek to address the following terms of reference:

- discrimination within the labour market and its impact on employment, unemployment and underemployment of persons with disabilities and their support networks;
- the appropriateness of current arrangements for supporting disabled people experiencing insecure employment, inconsistent employment, precarious hours in the workforce; and inequitable workplace practices; and
- any related matters.

### Acronyms:

AHRC	Australian Human Rights Commission
CLC	community legal centre
DSP	Disability Support Pension
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
SMLS	Springvale Monash Legal Service Inc

*\*Client names have been changed to protect client confidentiality.*

## SUMMARY OF RECOMMENDATIONS

1. Implement a well-resourced and enhanced role for a regulator such as the Australian Human Rights Commission to take proactive steps to enforce anti-discrimination laws, including engaging in strategic litigation, gathering intelligence and prosecuting employers.
2. Create a more robust and meaningful anti-discrimination legal framework through expanding and enforcing the positive obligations on employers to eliminate discrimination in the workplace and by introducing a reverse onus of proof in discrimination claims.
3. That there be a statutory definition of an employee, with a presumption that all workers are employees unless proven otherwise.
4. That there be a statutory presumption that in the absence of an express agreement between the employer and employee, it is presumed the employment is on a permanent basis unless proven otherwise.
5. Introduce government support for jobseekers on temporary visas.
6. Free legal assistance and legal education continue to be accessible to persons with a disability who may not otherwise have the resources to seek assistance from a private lawyer or union.
7. That the administration of government support such as DSP be person-centred and trauma-informed and be well-coordinated with other services that victim-survivors of sexual harm may typically interact with.
8. That the community legal centre sector be supported to explore the potential to convert its administrative data into data that could be used for research purposes, for the ongoing evaluation of the existing laws, regulations and policies relevant to the experiences of persons with a disability.

## INTRODUCTION

We thank the Senate Community Affairs References Committee for this opportunity to make a submission to the inquiry into the purpose, intent and adequacy of the Disability Support Pension (**DSP**).

These submissions are based on our Centre's long history of assisting clients experiencing disadvantage, including clients living with a disability.

Between 1 March 2020<sup>1</sup> to the end of June 2021, approximately 739 clients assisted by SMLS are recorded as reporting to have a disability. This makes up approximately 11% of the total number of clients assisted by SMLS during that period.

Out of those 739 clients, approximately:

- 61% were unemployed
- 27% were receiving the disability support pension
- 8% reported as receiving no income
- 18% indicated they were at risk of homelessness
- 37% reported as having child dependents
- 39% indicated as having experienced family violence
- 3% reported as being Aboriginal and/or Torres Strait Islander
- 35% indicated that their main language was a language other than English
- 5% reported as being neither an Australian Citizen nor a permanent resident

The most common legal issue impacting this cohort of clients during that period is overwhelmingly family violence, at approximately 26%. 9% of those clients with a disability sought legal assistance in relation to an employment matter.

We acknowledge that the focus of this inquiry is into the DSP. However, we see that this is inextricably linked to the goal of ensuring that persons with a disability have access to a liveable income, whether it be through employment or through government support. Any reforms to the DSP must invariably coincide with reforms to our industrial relations and anti-discrimination legal framework.

Fundamentally, there needs to be an eradication of the immense disparities in wealth and income in our society and elimination all forms of discrimination, including discrimination based on race, gender, disability and age. Reforms must be working towards removing systemically entrenched barriers for certain cohorts of workers from achieving secure and decent work. In instances where for reasons of the person's disability, they are unable to engage in work, the government must ensure that the DSP is the equivalent to a liveable wage based on contemporary costs of living and housing.

We believe that poverty is a policy choice. Through evidence-based policy and legislative change informed by the lived experiences of persons with a disability, there is a pathway out of poverty for many of our clients.

We highlight that any disadvantage experienced by persons with a disability may be compounded by other experiences of vulnerability, including for example if the client is also a migrant worker, visa holder, a women and/or speaks English as a second language. What this means is that any policy and legislative reforms must be capable of a tailored and effective response to meet what may be multiple, intersectional layers of disadvantage.

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<sup>1</sup> March 2020 coincides with the beginning of government-imposed restrictions as part of the national public health response to managing the COVID-19 pandemic.

## **Discrimination within the labour market and its impact on employment, unemployment and underemployment of persons with disabilities and their support networks**

SMLS has assisted clients with disabilities experiencing exploitation and discrimination at work. Being able to complain and being taken seriously when they do complain are common concerns we have heard from clients. As mentioned, that experience of vulnerability is further compounded if the client is also a migrant worker, visa holder, a woman and/or speaks English as a second language. These cohorts are disproportionately over-represented in low-paying and precarious jobs.

We also understand that our clients may not always be able to self-help if, for example, a matter is complex or if a client's disability impacts their legal capability to resolve their legal issue without support. Some clients may feel intimidated by the employer and may not otherwise be willing to assert their rights in the absence of a legal advocate. Some clients find the prospect of litigation far too overwhelming and opt not to pursue what may otherwise be a meritorious claim. Employers may not take the client's complaint seriously due to misconceptions or biases regarding the person's disability.

*One client, Steven\*, suffered serious albinism in addition to a mild learning disability. He struggled to find work and had minimal family support. He tried to apply for the disability support payment through Centrelink, however, was denied. He eventually found night work at a factory, who paid him \$5.00 per hour. He attended a legal education session with SMLS one day, and yet decided not to get legal help with his underpayments, as 'it isn't worth it. I know I have problems, so why should they pay me properly- if I complain I won't have a job at all.'*

We see change can better be achieved through the implementation of a proactive regulator to enforce anti-discrimination laws. The Australian Human Rights Commission ('**AHRC**') for example may be well placed to have an enhanced role in enforcing discrimination laws. The AHRC may be expanded to engage in strategic litigation, gathering intelligence and prosecuting employers, as the Fair Work Ombudsman ('**FWO**') is similarly empowered to do. Currently, there is little incentive for employers to take positive steps to reduce discrimination in the workplace.

Additionally, we see a need to create a more robust and meaningful anti-discrimination legal framework through:

- Expanding the positive statutory duty on employers to take active steps to prevent discrimination occurring in the workplace and implementing more effective enforcement of these obligations; and
- Introducing a reverse onus of proof similar to the general protections regime under the *Fair Work Act* 2009, that is, a presumption that an employer had treated a complainant unfavourably on the basis of a protected attribute such as a disability unless proven otherwise.

**Recommendation one:** Implement a well-resourced and enhanced role for a regulator such as AHRC to take proactive steps to enforce anti-discrimination laws, including engaging in strategic litigation, gathering intelligence and prosecuting employers.

**Recommendation two:** Create a more robust and meaningful anti-discrimination legal framework through expanding and enforcing the positive obligations on employers to eliminate discrimination in the workplace, and introducing a reverse onus of proof in discrimination claims.

## **The appropriateness of current arrangements for supporting disabled people experiencing insecure employment, inconsistent employment, precarious hours in the workforce; and inequitable workplace practices**

For the purpose of this inquiry, we have taken insecure and precarious employment to include:

- Casual workers;

- ‘Gig economy’ or on-demand workers and other workers who find work through digital platforms such as Gumtree or Facebook;
- Workers employed by labour-hire companies placed on short-term or non-ongoing assignments; and
- Employees on fixed-term contracts.

Many of our clients are in precarious or insecure jobs and working in low-paying industries. By and large for the clients we see, opting for insecure or precarious employment is not a matter of choice but often as a result of having no other alternatives. This may be especially so for clients living with a disability.

The sudden loss of income for those already receiving low income can lead to a serious financial crisis and have a crippling domino effect on all aspects of the person’s life. It may lead to a real risk of homelessness, spiralling debts and may impact significantly on mental health. This may have particularly serious implications for clients with dependent children or other dependents. As mentioned above, 37% of our clients reporting to have a disability in the period 1 March 2020 to end of June 2021 had child dependents.

The lack of job security has implications for clients experiencing family violence. Family violence continues to be overwhelmingly one of the most common issues facing our clients living with a disability. As mentioned above, of the approximately 739 SMLS assisted between March 2020 to June 2021, 39% indicated having experienced family violence and 26% sought legal assistance in relation to family violence intervention orders. Without a steady income, it becomes difficult for workers experiencing family violence to leave an unsafe home environment.<sup>5</sup>

For workers experiencing disadvantage, it may well take a prolonged period of time to recover from the financial crisis of job loss if finding comparable alternative work is limited. This may be especially so for persons with a disability.

As our clients are predominantly working in low-paying jobs, there may be limited scope to set aside savings to cushion against unexpected loss of income either due to illness or job loss. For the casual worker working for example in hospitality or in the cleaning industry, the weekly income may be just enough to make ends meet.

The process of recovering from such a crisis can be a long and complex one, requiring significant support from services, including legal services.

There must be statutory reforms to better regulate the impact of insecure employment.

Firstly, we reiterate our recommendation that there be a statutory definition of an employee. Currently, an individual’s employment status is determined by the court through the common law ‘multi-factor test’. This test is complicated and ambiguous, and leaves employees with little clarity as to what their employment status and legal entitlements are.

We are pleased to see the recent changes to the *Fair Work Act* introducing pathways to casual conversion. We see that this needs to go further and include the introduction of clear statutory definition of what constitutes casual employment. We see there is indeed significant confusion amongst employees and employers as to whether the terms of employment is on a casual or permanent basis. It is often not expressly discussed, and the conduct of the parties is not necessarily consistent with either type of employment.

Given the immense power imbalance that often exists between the employer and an employee living with a disability, we reiterate our recommendations that there be a statutory presumption of an employment relationship and that the employment is on a permanent basis. A statutory presumption of permanent employment should be created to deter unscrupulous employers and remove the significant burden from mistreated employees to prove their employment status.

**Recommendation three:** That there be a statutory definition of an employee, with a presumption that all workers are employees unless proven otherwise.

**Recommendation four:** That there be a statutory presumption that in the absence of an express agreement between the employer and employee, it is presumed the employment is on a permanent basis unless proven otherwise.

In times of economic downturn, such as that brought on by the pandemic, it is no surprise that those in insecure or precarious work are likely to be the first to lose their job, with little to no notice and with no eligibility for a redundancy payment.

The impact of sudden job loss for those already experiencing disadvantage can be devastating, especially for visa holders who are not eligible for Centrelink payments or government support. Approximately 5% of the clients SMLS assisted between 1 March 2020 to the end of June 2021 who reported as having a disability were also on temporary visas.

In these current times where returning to a person's home country is not a real option, we urge the government to introduce basic temporary safety nets to allow jobseekers on temporary visas to survive whilst seeking employment. These clients otherwise face destitution. This may be especially needed for persons living with a disability where job options may be more limited.

**Recommendation five:** Introduce government support for jobseekers on temporary visas.

From our casework, we have seen widespread instances of clients being underpaid or not receiving payment at all. Many have unpaid superannuation owing. We have seen employers purporting to shirk their obligations by creating sham contracting arrangements. The lack of job security also places workers at a greater risk of being bullied and/or sexually harassed. For our clients, remaining in gainful employment is the priority and so are less willing to complain about work conditions or entitlements for fear of compromising their job. This contributes to an unwillingness to complain of an employer's unlawful conduct. Many of our clients are reluctant litigators and may not have the means or confidence to enforce their rights out of their initiative.

Many of our clients are unwilling or unable to advocate for themselves due to a range of complex and interconnected reasons. Employment relationships almost always have a significant power imbalance between employer and employee. This imbalance is further deepened if the employee has other indicators of disadvantage or vulnerability in their lives.

As many of our clients do not have the means or confidence to enforce their rights without support, we prioritise any measures which as far as possible, relieves workers of the burden of enforcing statutory rights and entitlements. Any legislative reforms need to acknowledge the power imbalances between our clients and employers and the resultant inequality of bargaining power. We support measures which maximises the employee access to justice.

For workers experiencing disadvantage which include our clients living with a disability, the effectiveness of enforcement mechanisms cannot be done without access to independent legal assistance and legal education. Many of our clients do not have the means or confidence to self-advocate and certainly are not able to engage a private solicitor. Many opt not to join a union as the cost of the fees is prohibitive.

Some clients may not even be aware that they have a claim against an employer. The community legal centre (**CLC**) sector plays a critical role in ensuring that persons experiencing vulnerability or disadvantage are empowered with knowledge of their legal rights and responsibilities. SMLS for example engages in community legal education and is a trusted source of help for some of the hardest to reach members of the community. Our embedded and multidisciplinary service delivery models (for example, by having lawyers provide outreach services at Study Melbourne, the Fair Work Commission, in schools, youth hubs, hospitals and other community organisations) also optimises our accessibility to the community.



**Recommendation six:** Free legal assistance and legal education must be accessible to persons with a disability who may not otherwise have the resources to seek assistance from a private lawyer or union.

### **Any related matters**

#### *The need for a trauma-informed response*

SMLS has significant experience and expertise providing legal support for individuals who have experienced sexual assault. For over 25 years, we have been working in partnership with the South Eastern Centre Against Sexual Assault assisting victims of sexual assault to navigate the legal system through our Integrated Services for Survivor Advocacy (ISSA) program.

Out of approximately 739 clients seen by SMLS between March 2020 and June 2021 reporting as having as a disability, 3% sought assistance in relation to a victims of crime application or required assistance in relation to sexual offences.

Research suggests that persons with a disability are more likely to experience sexual assault (Australian Institute of Health and Welfare 2020).

From the perspective of our clients who have experienced sexual harm, it is crucial that the administration of any government payments like the DSP, is trauma informed.

Clients who have experienced sexual harm have diverse needs and may require support from different agencies at different times. The impact of the sexual harm may have a flow on effect on many aspects of their lives so that the person experiencing sexual harm may need to interact with services such as Centrelink, Medicare, NDIA, Office of Housing, Child protection, Department of Home Affairs. (Centre for Innovative Justice 2020:13)

Persons who experience sexual harm may not necessarily differentiate between those services which specialise in dealing with sexual harm and those other government agencies. According to the Centre for Innovative Justice (CIJ), ‘...research indicates that victims of crime tend to perceive all the services and agencies with which they interact as contributing to the ‘system response’ that they receive following an experience of crime. As such, from a victim’s perspective, all these services can be understood as forming part of the victim services system.’ (Centre for Innovative Justice 2020:13)

A more person-centred response would take a broad understanding of what constitutes the ‘sexual assault system’ so that it is not limited to those agencies and services which are expressly dedicated to dealing with sexual harm. Collaboration and clear referral pathways should exist between all agencies forming the ‘sexual assault system’ so that it best responds to those victim/survivors of sexual harm.

**Recommendation seven:** That the administration of government support such as the DSP be person-centred and trauma-informed and be well-coordinated with other services that victim-survivors of sexual harm may typically interact with.

#### *The potential for CLCs to contribute to data and research*

The laws, regulations and policies relating to the DSP and related matters must be continually monitored and evaluated to ensure that it keeps evolving with contemporary issues.

CLCs have the potential to contribute to ongoing review of existing laws especially impacting persons with a disability through its administrative data. As outlined by McDonald et al (2020:10) ‘[a]dministrative data is information collected and stored as part of the everyday functions of organisations.’ It is data which is ‘... not primarily collected for research purposes’ but may offer an efficient and cost-effective way to build evidence and gain insights to inform policy. (McDonald et al, 2020: 14) In 2017, the Australian Productivity Commission’s *Data Availability and Use report* recommended increased use of administrative data to improve the delivery of government services and policy. (Productivity Commission, 2017:111 and 113)

We highlight that SMLS is currently undergoing a research project mapping out the client journey in recovering income from unpaid work. The research will also consider the extent that our administrative data can be used for research purposes.

**Recommendation eight:** That the CLC sector be supported to explore the potential to convert its administrative data into data that could be used for research purposes, for the ongoing evaluation of the existing laws, regulation and policies relevant to the experiences of persons with a disability.

### Reference list

Australian Institute of Health and Welfare (2020) *Sexual Assault in Australia*, Australian Institute of Health and Welfare, Australian Government, accessed 11 June 2021.

Centre for Innovative Justice (2020) *Strengthening Victoria's Victim Support System: Victim Services Review Final Report*, Centre for Innovative Justice, accessed December 2020.

McDonald H, McRae C, Balmer N L, Hagland T and Kennedy C (2020) *Apples, Oranges and Lemons: The use and utility of administrative data in the Victorian legal assistance sector*. Victoria Law Foundation, accessed January 2021.

Productivity Commission (2017) 'Data Availability and Use', Productivity Commission, Australian Government, Canberra, accessed January 2021.