Do I tell?

Disclosing disability in employment

By Ben Fogarty

People with disability are confronted by physical, psycho-social and attitudinal barriers in the Australian workforce. While their apprehension and reluctance to disclose their disability to an employer is understandable, it is contrary to workforce productivity and needs to be discouraged by cross-sector legal and practical reforms.

BACKGROUND

On 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities. On 30 March 2007, Australia and 81 other countries signed the convention. Article 27 of the convention calls for states parties to recognise 'the right to the opportunity [of persons with disabilities] to gain a living by work freely chosen and accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities'.[1]

It is estimated that people with disability comprise over 20% of the Australian population.[2] This statistic will continue to climb steadily with an ageing population. The legal definition of 'disability' covers a broad range of disability types – physical, psychiatric (or mental), behavioural, sensory, intellectual and learning.[3] Most people with disability have physical disability (83.9%), while 11.3% have psychiatric or behavioural disability,[4] and 4.8% have intellectual or developmental disability.[5]

Meaningful and remunerative work is fundamental to everyone's sense of independence, self-esteem and sense of societal participation. But people with disability face a

number of barriers when entering and seeking to remain in the Australian workforce. Using 'invisible disabilities' as a focal point, this article explores the practical and legal issues associated with disclosing disability in the workplace.

CAUSE FOR CONCERN

If we are to believe the media,[6] Australian unemployment levels are at a sustained record low and the economic buoyancy, minerals boom and consumer confidence mean access to the Australian workforce has never been easier. Or has it?

In 2003, 53.2% of people with disability participated in the workforce, compared with 80.6% of those without disability.[7] Since 1993, the workforce participation rate of people with disability has declined, while the rate for people without disability has risen.

Participation in the workforce varies considerably according to the nature of a person's disability.[8] The participation rate for people with psychiatric disability is only 29%.[9] In 2003, people with disability were more likely to work part-time (37%) than those without disability (29%).[10]

The overall levels of income earned by people with disability are also lower than those without disability. In 2003, the median gross personal income per week of people of working age with disability was $255, compared with $501 for those without disability.[11]

Lower workforce participation rates, lower incomes and greater likelihood of part-time employment is the reality for people with disability in Australia.

A NATIONAL INQUIRY AND RECOMMENDATIONS

In April 2005, Dr Sev Ozdowski, Human Rights Commissioner and Acting Disability Discrimination Commissioner, commenced a national inquiry into equal opportunity in employment and occupation for people with disability in Australia on behalf of the Human Rights and Equal Opportunity Commission (HREOC), under ss31(a), (b), (c) and (e) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

The HREOC inquiry investigated why people with disability of working age participate in the workforce at lower rates, are less likely to be employed, and earn less when they are employed. It did so by consulting broadly – with employers (both public and private sector), people with disability (both in and out of work), peak disability advocacy organisations, workplace regulators and other government employment agencies. An interim report, *WORKability I: Barriers*, identified three major sets of obstacles confronting people with disability in employment:

1. *Information*: absence of comprehensive and accessible information and advice for people with disability and employers about workplace obligations, rights and resources.
2. *Cost*: concern about costs (perceived and real) of participation in the workplace by people with disability.
3. *Risk*: concern about possible financial and personal impacts (perceived and real) on people with disability and their employer.

The final report, *WORKability II: Solutions*,[12] focused on how to address barriers to full participation. Some of the key recommendations for federal and state governments were:

1. develop and implement a National Disability Employment Strategy;
2. provide better support, services and incentives to ensure true equality of opportunity in employment;
3. set up a one-stop-information-shop;
4. establish benchmarking, monitoring and reporting for workforce participation; and
5. improve transition-to-work schemes.

Some of these recommendations have been implemented. One example is that the Department of Employment and Workplace Relations now hosts an online one-stop-information-shop.[13] However, the momentum has dissipated in regards to most of the recommendations, and the prospect of people with disability competing for jobs or promotions in a climate free from misinformation and stereotypical assumptions remains illusory. For these reasons, the question of whether or not to disclose one's disability to an employer is an acutely vexed one.

INVISIBLE DISABILITY

The fraught question of disclosure of disability particularly affects people with disabilities that are not visible or apparent >>

People with 'invisible' disabilities can often choose whether to disclose their disability to their employer.

to others. There are many so-called 'invisible' disabilities – depression,[14] schizophrenia, chronic fatigue syndrome, blood-borne diseases, anxiety disorder, attention-deficit hyperactivity disorder, multiple sclerosis and diabetes are but some. At times, there may be external indicators or signs suggesting that a person has such a disability, but this is not always the case. Moreover, a number of these disabilities are episodic, meaning that at most times a person is not in any way affected by their disability or confronted by any barriers to full participation in their daily lives.

People with invisible disabilities can usually choose whether to disclose their disability to their employer. Before deciding to disclose, however, a person should contemplate a number of practical and legal considerations.

PRACTICAL CONSIDERATIONS AROUND DISCLOSURE

There are several practical reasons why a person might choose to disclose their disability. Some of the more common are:

- The job application requests disclosure of all 'medical conditions', and I feel obliged.
- I need an adjustment in the workplace to accommodate my disability.
- I think it is better to be open and frank with my employer to avoid misunderstanding or labelling later on.
- It is important to protect my rights under disability discrimination law and also to respect my employer's occupational health and safety obligations.

Conversely, there are a number of reasons why a person might choose not to disclose their disability:

- I am worried that there will be negative responses and stereotype-labelling from my employer and co-workers.
- My disability does not affect the way I do the job, so it is simply none of my employer's business.
- I don't need any adjustment to accommodate my disability now or in the foreseeable future.
- I am concerned that my employer will sack me or deny me training and promotion opportunities because I'll be seen as 'a liability'.

All of these reasons and concerns are valid and need to be carefully considered, but ultimately it will be the reaction of the employer that determines the impact of disclosure on the employee or job applicant. So much depends on the equal opportunity employment practices and history of the employer, the employer's and co-workers' attitudes to disability, the flexibility of workplace resources and arrangements, and the relationship between the person with disability and the employer.

THE LAW SURROUNDING DISCLOSURE

The question of whether a person applying for a job or already in a job should disclose their disability traverses quite a number of areas of law. These do not necessarily fit neatly together, nor have the courts settled some of the apparently conflicting rights and obligations that can arise.

Disability discrimination law

It is not strictly necessary to show that an employer had a motive or intention[15] to discriminate to make a finding of unlawful discrimination under disability discrimination law. However, logic and case law[16] demand that an employer must have had knowledge of an employee's disability before it can be contended that they discriminated against that employee because of his/her disability. Disability discrimination law[17] requires that, for unlawful direct discrimination to occur, an employer must treat the employee with disability less favourably than an employee without disability (the comparator) in circumstances that are the same or not materially different, and do so because of the employee's disability (the causal link). Without actual knowledge of an employee's disability, it would be impossible for that employee to prove the causal link between the alleged discriminatory act and their disability, on the balance of probabilities.

Disclosure is also relevant to disability discrimination law because, in some circumstances, failure by an employer to make a reasonable adjustment[18] for an employee's disability – to the extent that it does not cause the employer unjustifiable hardship[19] – will amount to less favourable treatment and unlawful conduct. So, where an adjustment is required to accommodate their disability, employees need to disclose to their employer. Ideally, the adjustment would then be made, or there would be further discussion and consultation about the most appropriate adjustment to be made with external workplace modification experts – for example, occupational therapists.

A special exception to discrimination in the area of employment arises where it can be shown that an employee with disability cannot meet the inherent requirements[20] of a job, even where the employer provides reasonable adjustments. In this instance, disclosure poses a risk for an employee or job applicant that the 'inherent requirements defence' will be invoked to permit an employer to dismiss an employee or deny a job applicant a job because of disability. Given that an inability to carry out the inherent requirements of a job is likely to become evident to an employer at some stage, it is prudent to disclose one's disability, if work performance difficulties are being experienced, with a view to requesting reasonable adjustments in the workplace and avoiding poor (and unexplained) work performance assessments. Equally, a prudent employer will ensure that independent experts, with a sound knowledge of the particular workplace and job and the employee's disability,

carry out assessments about the capacity of an employee to meet inherent requirements.

Occupational health and safety law and negligence

The *Occupational Health and Safety Act* 2000 (NSW) (OHSA) (and other equivalent pieces of OHS legislation throughout Australia) aims to reduce (and, where practicable, eliminate) foreseeable risk of injury in the workplace through transparent consultation and co-operation between employees and employer. An employer must[21] ensure the health, safety and welfare at work of all employees and persons lawfully at the workplace.[22]

If an employee chooses not to disclose a disability that effectively puts them or others at risk of harm in the workplace, or if their workplace or work practices exacerbate their disability, then the employer may be liable under OHS laws[23] and in negligence. The employee may themselves be in breach of OHS laws for failing to take reasonable care for the health and safety of people at the workplace[24] or for failing to co-operate with their employer for the purposes of compliance with OHS laws.[25]

A number of judgments in disability discrimination jurisprudence[26] consider an employer's OHS obligations. These obligations are but one consideration to be taken into account when determining the reasonableness of a requirement or condition imposed in the workplace, and when determining whether making an adjustment would impose unjustifiable hardship on an employer.

Workers' compensation law

Closely connected to OHS law are workers' compensation schemes and attendant rights for workers to be compensated for work-related injuries. For a worker to be granted compensation they must prove, among other things, that work was a substantial contributing factor to the injury. A pre-existing disability (the common example being a pre-existing back injury) may be relevant to a workers' compensation claim and, if not disclosed, may complicate the claim and its resolution.

In *Latham v Horan Steel Pty Ltd*,[27] Bagnall AJ succinctly set out the issue facing people having to disclose in the workplace:

> 'He [the applicant] has agreed in evidence that he filled in the application form inaccurately, in that he did not disclose the compensation claim that he had made against Croovel. Whilst the court cannot condone inaccuracy in employment forms, nevertheless the court is not unaware of the realities in the labour market whereby workers fear that their prospects of obtaining further employment may be jeopardised if they reveal their prior injuries.'

His Honour refused to draw an adverse inference as to the applicant's credit, and went on to award him full compensation.

Privacy law

The *Privacy Act* 1988 (Cth) (including, importantly, the Information and National Privacy Principles) also applies to the information disclosed when an employee or job applicant informs an employer about their disability. Considering that a disability appertains to health, information about it would be classified as sensitive[28] – a classification that attracts more stringent protection on how it is collected, used and disclosed. While employee records are largely exempt[29] from the protective regime of the Privacy Act, employers should have transparent and procedurally fair privacy policies and procedures in place, and apply them equitably to all employees. Employers should also be sensitive about whether and, if so, how to inform co-workers about an employee's disability and any workplace adjustments required. Ideally, this should be done only after consulting the employee and obtaining their consent. There is a compelling argument that information disseminated to co-workers by an employer no longer attracts the employee records exemption and its misuse by co-workers could result in an employer being held vicariously liable for that misuse.

Of course, these privacy law implications also extend to recruitment agencies and human resources departments. Moreover, in some cases, they may be more restrictive, as the employee records exemption will not apply where there is no direct employment relationship.

Industrial relations law

An employer might choose to use an employee's failure to disclose their disability as a ground (or one among several >>

other grounds) for dismissal, particularly where there has been absence from work because of injury or illness associated with that disability. Furthermore, an employer may find an employee's work performance to be unsatisfactory, which could be because of the employee's disability and a lack of appropriate adjustments in the workplace. Where an employee's work performance is affected because of their disability, they should disclose their disability to their employer and consult them about appropriate adjustments. Otherwise, any ongoing unsatisfactory work performance may constitute valid grounds for dismissal.

In *Britax Rainsfords Pty Ltd v D Jones*,[30] a full bench of the Australian Industrial Relations Commission (AIRC) upheld a ruling that the failure by an employee to disclose a 10-year-old workplace injury on an employment application form[31] did not constitute a valid reason for summary dismissal.[32] However, the judgment turned very much on the form and wording of the declaration, the fact that the employee had already worked with the employer for some time on a contractual basis, and the findings that the non-disclosure was an isolated and trivial act that did not destroy the mutual trust between employer and employee.

So, too, in *Arthur Smith and Brett Kimball v Moore Paragon Australia Ltd*,[33] a full bench of the AIRC pointed out that 'where the reason for termination is that an employee has a WorkCover history, that reason without more will not be a valid reason for termination'.[34]

As illustrated by *Britax* and *Moore Paragon*, avenues of recourse under industrial relations laws for employees dismissed for a reason relating to their disability include:

- unlawful termination on the grounds of physical or mental disability;[35]
- unlawful termination on the grounds of temporary absence from work;[36]
- unfair dismissal[37] – it being alleged that the dismissal is 'harsh, unjust or unreasonable' on disputed grounds concerning the employee's capacity or conduct (including any effect on the safety and welfare of other employees); and
- unfair dismissal[38] – it being alleged that the dismissal is 'harsh, unjust or unreasonable' on the disputed grounds of unsatisfactory work performance and previous warnings.

Mutual obligation to co-operate in good faith (express or implied contractual term)

An employment contract may expressly cast a duty on both employer and employee to act in good faith in the performance of their contractual obligations. Judicial opinion is somewhat divided as to whether such a duty is an implied term of an employment contract, and the matter appears to require definitive clarification at the appellate level.

Recently, in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor*, Rothman J noted:

> 'the assertion is made, somewhat boldly, that the obligation to act in good faith has been recognised as implied in contracts of employment in Australia. I am unaware of such recognition. There has been muted acceptance …'[39]

Despite this precariousness, his Honour proceeded[40] to review some High Court judgments[41] that have acknowledged implied duties of mutual trust, good faith and confidence in contracts of employment. While the duty is not a fiduciary duty[42] or *uberrimae fidei*, most Australian courts have willingly and unquestioningly implied it in employment contracts. It certainly warrants attention in the context of the non-disclosure of disability.

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It could be argued that the failure to disclose disability is a breach of such a duty, particularly where that refusal or its consequences are somehow causally linked to an event that attracts liability for an employer or otherwise denies an employer a benefit arising from an employment contract. Much will depend upon the wording of the employment contract, the conduct of the employer and employee, and the individual circumstances of the particular case.

SOLUTIONS TO THE DISCLOSURE DILEMMA AND IMPROVING WORKFORCE PARTICIPATION OF PEOPLE WITH DISABILITY

At a macro-level, the key recommendations made in HREOC's final report on the national inquiry, *WORKability II: Solutions*, must be adopted and implemented. Essentially, this requires accessible information and education and training for employers; clarification of employers' legal and compliance obligations; public sector best practice leadership; and government incentives, expertise and resources to support and encourage private and public sector employment of people with disability.

At a micro-level, people with disability should be required to disclose their disability only if it affects their capacity to do their job (for example, if they need an adjustment). The timing of this disclosure is critical and needs to be approached with caution. When disclosure occurs, an employer should consult with the employee in a confidential manner and together they should determine how best to make the necessary workplace adjustments. Only employees who need to know about a co-worker's disability should be made privy to the information and consultation process; it should not just be broadcast throughout the workplace. Also, where the employee and employer cannot agree on the adjustment to be made, the employer should engage independent experts (with expertise in the workplace, disability and occupational therapy) to reach a resolution.

The stark conclusion is that, until Australian employers are better educated and supported to employ and retain people

with disability in their workplaces, people will continue to be reluctant to disclose their disability and to ask for any necessary, reasonable and workable adjustments. Employers, workers and legal practitioners will be left to negotiate the overlapping and, at times, irreconcilable raft of rights and obligations that litter the legal landscape surrounding disclosure of disability in employment. ■

Notes: **1** The complete text of the Convention is available at: www.un.org/esa/socdev/enable/rights/convtexte.htm **2** Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers: Summary of Findings*, 2003, 4430.0. These are the most recent comprehensive national statistics on disability and employment participation. **3** Section 4, *Disability Discrimination Act* 1992 (Cth) (DDA); s4 *Anti-Discrimination Act* 1977 (NSW) (ADA). **4** The Wesley Report, *Living with Mental Illness – Attitudes, Experiences and Challenges*, July 2007, reported that 36% of survey participants had a mental illness, and 72% had a member of their family or a friend with a mental illness (p21). **5** See above Note 2, ABS, 2003, p6. **6** See, for example, Jessica Irvine, 'Howard lauds unemployment rate', *Sydney Morning Herald*, 9 August 2007, and David Uren, 'Commodities boom hurts so good', *The Australian*, 8 August 2007. **7** See above Note 2, ABS, 2003, p26. **8** See above Note 4, *The Wesley Report*, July 2007, reported that 75% of survey participants with a mental illness were jobless (p39). **9** Mental Health Council of Australia, *Investing in Australia's Future: the Personal, Social and Economic Benefits of Good Mental Health*, September 2004, p5. **10** See above Note 2, ABS, 2003, p5. **11** *Ibid*, ABS, 2003, p3. **12** Each *WORKability* report can be found at: www.hreoc.gov.au/disability_rights/employment_inquiry/index.htm **13** Known as 'JobAccess – help and workplace solutions for the employment of people with disability': www.jobaccess.gov.au/joac/home. **14** Beyondblue, the National Depression Initiative, currently reports that 'around one million Australian adults and 100,000 young people live with depression each year. On average, one in five people will experience depression in their lives.' See www.beyondblue.org.au. **15** *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Mason CJ and Gaudron J at [359]; *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133 per McHugh and Kirby JJ at [160]. **16** *Tate v Rafin* [2000] FCA 1582 per Wilcox J at [67]; *New South Wales (Department of Education and Training) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199 per Emmett J at [35]. **17** Sections 5 and 15 DDA and ss49B and 49D ADA. **18** Common adjustments include: flexible work hours, modifications to workstations or equipment, alternatively formatted documents and material, assistive technology and augmentative communication devices. **19** Guidance on what must be considered in determining 'unjustifiable hardship' is found in s11 of the DDA and s49C ADA. **20** Section 15(4) DDA and s49D(4) ADA; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177. **21** On the strictness of the obligation, see *Gardiner v Bluescope Steel (AIS) Pty Ltd* [2005] NSWIRComm 1034 per Connor C at [43]. **22** For example, s8 OHSA. The telling consequences of failing to do so have recently been emphasised by the relief granted in *Naidu v Group 4 Securitas Pty Ltd and Anor* [2005] NSWSC 618 (currently on appeal) and *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120. **23** *Barry Johnson v State of New South Wales (Department of Education and Training)* [2006] NSWIRComm 109. **24** For example, s20(1) OHSA. **25** For example, s20(2) OHSA. **26** A good example is *Daghlian v Australian Postal Corporation* [2003] FCA 759 per Conti J at [111]. **27** Matter No. 30752 of 1999 (14 July 2000) at [8]. **28** Section 6 of the *Privacy Act* 1988 (Cth) and National Privacy Principle 10. **29** The employee records exemption is limited to acts and practices directly related to current and former employment relationships – s7B(3) *Privacy Act* 1988 (Cth). **30** PR904285 [2001] AIRC 461. **31** It is worth noting that questions seeking information about a person's disability must be asked of all job applicants and must be sought for legitimate and necessary reasons (for example, for making necessary workplace adjustments) – s30 of the DDA. **32** For a contrary view, see *Gardiner v Bluescope Steel (AIS) Pty Ltd* [2005] NSWIRComm 1034 per Connor C at [41 and 43]. **33** PR942856 [2004] AIRC 57. **34** *Ibid*, at [44]. **35** Section 659(2)(f) *Workplace Relations Act* 1996 (Cth) (WRA). **36** Section 659(2)(a) WRA. **37** Section 652(3)(a) WRA. Similar unfair dismissal provisions also exist in Part 6 of the *Industrial Relations Act* 1996 (NSW). It should be noted that recent amendments to the WRA under the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) have significantly reduced the number of workers in Australia covered by these unfair dismissal provisions. **38** Section 652(3)(d) WRA. **39** [2007] NSWSC 104 at [97]. **40** *Ibid*, at [129-31]. **41** *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 (Dixon and McTiernan JJ) and *Concut Pty Ltd v Worrell* [2000] HCA 64 (Gleeson CJ, Gaudron and Gummow JJ, and Kirby J). **42** Note 39, at [112-13].

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