POST-PANDEMIC WORKPLACE DESIGN AND THE PLIGHT OF EMPLOYEES WITH INVISIBLE DISABILITIES: IS AUSTRALIAN LABOUR LAW AND ANTI-DISCRIMINATION LEGISLATION EQUIPPED TO ADDRESS NEW AND EMERGING WORKPLACE INEQUALITIES?

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In 2020 and 2021 the COVID-19 pandemic reshaped the way we work. To help contain the virus employees made a mass migration from working in offices to working remotely from home, but this mass shift to working from home is expected to have a lasting impact on workplace design. Post-pandemic workplaces are expected to be increasingly 'hybrid' and use shared workspaces to permit worker fluidity between the office and the home. This article argues that shared and fluid working arrangements significantly disadvantage employees with 'invisible' disability in various ways, yet the outdated design of Australian labour law and anti-discrimination law is ill-equipped to deal with these new and emerging inequalities in the workplace. This article proposes law reform and policy solutions designed to enhance 'person-environment fit' in workplaces, which may help prevent these inequalities from arising in the post-pandemic world of work.

I INTRODUCTION

Due to government-announced lockdowns which attempted to contain the COVID-19 virus, many employers closed their physical offices and large numbers of employees in Australia were, and are, required to work from home. This mass shift to working from home has prompted this author to ask a number of questions. What will post-pandemic workplaces look like and how will they operate? What new and emerging equality issues will likely arise in these workplaces of the future? Is the law equipped to deal with these new and emerging equality issues, and does it need reform to be better positioned to deal with these issues?

This article will consist of several parts.

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Part II will rely on recent research and survey data to paint a picture of modern and post-pandemic office space design. Informed by this picture of modern and post-pandemic office space design, Part III will explain why, and detail the extent to which, people with 'invisible' disabilities face ableism[1] and are disadvantaged by this design, to reveal new and emerging inequalities in the workplace. Invisible disabilities are disabilities that are not immediately obvious or noticeable from looking at a person and they are explained in detail in this article. Having identified that modern and post-pandemic workplace design disadvantages and disproportionately affects people with invisible disability, Part IV will assess and critique Australian labour law and anti-discrimination legislation to determine whether the law is equipped to deal with these new and emerging equality issues. Part IV will also make suggestions for law reform which may modernise the legislative framework, to better equip the law to deal with the new and emerging workplace inequalities identified in this article.

Current scholarship with respect to Australian labour regulation and COVID-19,[2] workplace disability discrimination,[3] and issues of inequality in a post-pandemic world[4] does not address the implications of post-pandemic workplace design on employees with disability and disability discrimination laws. This article seeks to fill this gap in the literature. This research is particularly timely in light of the ongoing Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission'), which will deliver its final report to the Australian Government by 29 September 2023.[5]

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1 The word 'ableism' is used in this article to describe the 'unfair treatment of people because they have a disability': see *Cambridge Dictionary* (online at 5 May 2021) 'ableism'.

2 See, eg, Joo-Cheong Tham, 'The COVID-19 Crisis, Labour Rights and the Role of the State' [2020] (85) *Journal of Australian Political Economy* 71; Andrew Stewart, 'COVID-19 and the Future of Labour Research, Policy and Regulation' (2022) 32(1) *Labour and Industry* 10 <https://doi.org/10.1080/10301763.2021.1894634>; Sarah Kaine, 'Australian Industrial Relations and COVID-19' [2020] (85) *Journal of Australian Political Economy* 130; Anthony Forsyth, 'COVID-19 and Labour Law: Australia' (2020) 13(1S) *Italian Labour Law e-Journal* 1–9 <https://doi.org/10.6092/issn.1561-8048/10812>. This article refers to works which have been published as at the time of writing, 15 April 2021.

3 See, eg, Paul David Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (Cambridge University Press, 2020) <https://doi.org/10.1017/9781108667371>. Whilst current scholarship with respect to disability discrimination does not address the implications of post-pandemic workplace design on employees with disability, there is growing literature on the implications which certain features of education and health care during the COVID-19 pandemic have had on people with disability. See, eg, Eliana Close et al, 'Legal Challenges to ICU Triage Decisions in the COVID-19 Pandemic: How Effectively Does the Law Regulate Bedside Rationing Decisions in Australia?' (2021) 44(1) *University of New South Wales Law Journal* 9, 51–4 <https://doi.org/10.53637/FSJG1698>; Natalie Brown et al, *Learning at Home during COVID-19: Effects on Vulnerable Young Australians* (Independent Rapid Response Report, April 2020).

4 Kristin van Barneveld et al, 'The COVID-19 Pandemic: Lessons on Building More Equal and Sustainable Societies' (2020) 31(2) *Economic and Labour Relations Review* 133 <https://doi.org/10.1177/1035304620927107>; Alysia Blackham, 'Discrimination in a Pandemic', *Pursuit* (Commentary, 3 May 2020) <https://pursuit.unimelb.edu.au/articles/discrimination-in-a-pandemic>.

5 'About the Royal Commission', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <https://disability.royalcommission.gov.au/about-royal-commission>.

II THE MODERN & POST-PANDEMIC WORKPLACE

In 2019, before the outbreak of the COVID-19 virus, 'agile' working methodology (which involves employees physically moving around to different workspaces or workstations to complete certain tasks) had a significant impact on the way Australian workplaces were designed.[6] Activity based work ('ABW') has existed in Australia in various forms for over a decade[7] and is one example of agile working methodology. ABW involves assigning spaces (such as workstations, rooms, etc) which are 'each designed to support a specific type of work activity, for example places for collaboration, concentration, communication, creativity, confidentiality and contemplation'.[8] Instead of being assigned to a fixed desk, workers float around the workplaces and 'transit between different settings according to the task they are doing'.[9] For example, the New South Wales ('NSW') Government's Fitout Design Principles (Office Workplace Accommodation) ('FDP')[10] requires new and upgraded government accommodation to adopt '[a]ctivity based planning',[11] which is defined as a 'customised but shared modular workplace'.[12] Whilst there is scope for fixed or permanent workspaces under the FDP,[13] the policy promotes agile working and discourages enclosed offices,[14] and a fundamental principle of ABW is that 'spaces are shared'.[15] To permit desk sharing, employers make use of 'hot-desks' which are desks fitted with a computer and a telephone but, rather than being permanently assigned to a staff member, they are shared among all or some staff members.[16]

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6 See, eg, CBRE Australian Research Team, *Australian Office Occupier Survey: What Occupiers Want* (Report, 2019) 18.

7 Ibid 21.

8 Jan Gerard Hoendervanger et al, 'Flexibility in Use: Switching Behaviour and Satisfaction in Activity-Based Work Environments' (2016) 18(1) *Journal of Corporate Real Estate* 48, 49 <https://doi.org/10.1108/JCRE-10-2015-0033>. See also CBRE Asia Pacific Research Team, *Asia Pacific Occupier Survey 2018: Driving Growth amidst Disruption* (Report, 2018) 23.

9 Peter Wollmann and Mersida Ndrevataj, 'Modern Architecture Supporting Organization Design' in Peter Wollmann, Frank Kühn and Michael Kempf (eds), *Three Pillars of Organization and Leadership in Disruptive Times: Navigating Your Company Successfully through the 21st Century Business World* (Springer, 2020) 89, 95 <https://doi.org/10.1007/978-3-030-23227-6_11>.

10 Property NSW, New South Wales Government, 'NSW Government Fitout Design Principles (Office Workplace Accommodation)' (July 2018) <https://web.archive.org/web/20190312170414/http://www.asmofnsw.org.au/NSW%20Gov%20Office%20Fitout%20Design%20Principles%20180722%20July%202018.pdf>.

11 Ibid 3, 5, 8.

12 Ibid 5.

13 Ibid.

14 *Australian Salaried Medical Officers Federation (NSW) v Ministry of Health* [2019] NSWIRComm 1041, [6] (Commissioner Sloan).

15 See *Australian Salaried Medical Officers Federation (NSW) v Ministry of Health [No 2]* [2019] NSWIRComm 1063, [68] (Commissioner Sloan).

16 See, eg, *Australian Municipal, Administrative, Clerical and Services Union v Commonwealth* (2018) 277 IR 250, 252 [1] (Ross P, Beaumont DP and Saunders C).

After the outbreak of the COVID-19 virus globally,[17] and in Australia,[18] the use of offices (and therefore agile working, ABW and hot-desks) came to a grinding halt. The short-term response to the COVID-19 virus was to introduce flexible workplace policies which allowed employees to work from home[19] (which was aimed at slowing infection rates). In 2020 and 2021 people living in various regions of Australia were subjected to numerous COVID-19 lockdowns,[20] thus making working from home the norm for many. The availability of COVID-19 vaccines (the AstraZeneca, Pfizer and Moderna vaccines) allowed the population to gradually move out of lockdown and enjoy more freedoms as certain vaccination targets were reached at the end of 2021, and workers are now permitted to return to the workplace under certain conditions (for example in Victoria only fully vaccinated workers can return to work[21] whilst in NSW workers in certain industries must be fully vaccinated to attend their workplace).[22] Due to the potential for shared workspaces to spread germs,[23] it seems intuitive that employers would avoid the use of ABW and hot-desks moving forward but recent research and survey data (detailed below) suggests that shared working arrangements will play a key role in modern and post-pandemic workplace design.

Post-pandemic workplaces in Australia will, for reasons that will now be explained, predominately be 'hybrid' working environments. Hybrid working combines remote working (such as from home) with in-office work to allow for worker fluidity between locations[24] and it is made possible by developments in

17 'WHO Coronavirus Disease (COVID-19) Dashboard', *World Health Organization* (Web Page) <https://covid19.who.int/>.

18 See 'Australia Situation', *World Health Organization* (Web Page) <https://covid19.who.int/region/wpro/country/au>.

19 Ada Choi, Connie Chak and Felix Lee, CBRE Research, *Workplace Wellness in 2020: Office Hygiene, Flexible Working and Indoor Air Quality Rise up the Agenda* (Report, March 2020) 2.

20 See, eg, Department of Education, Skills and Employment (Cth), 'ECEC COVID-19 Timeline' (Web Page, 20 December 2021) <https://www.dese.gov.au/covid-19/resources/ecec-covid19-timeline>; Joseph Dunstan, 'Melbourne Marks 200 Days of COVID-19 Lockdowns since the Pandemic Began', *ABC News* (online, 19 August 2021) <https://www.abc.net.au/news/2021-08-19/melbourne-200-days-of-covid-lockdowns-victoria/100386078>.

21 See Victorian Government, 'Victoria's Roadmap: Delivering the National Plan' (Brochure, 19 September 2021). From 12 January 2022, the government required workers in key industries to have a third, or 'booster', vaccination dose. See 'Worker Vaccination Requirements', *Victorian Government* (Web Page, 20 January 2022) <https://www.coronavirus.vic.gov.au/worker-vaccination-requirements#update---third-dose-vaccination-requirements>.

22 See 'Vaccination Requirements for Workers', *NSW Government* (Web Page, 15 December 2021) <https://www.nsw.gov.au/covid-19/vaccination/requirements-for-workers#toc-requirements-by-industry>.

23 On the health risks of shared workplaces, see Ann Richardson et al, 'Office Design and Health: A Systematic Review' (2017) 130(1467) *New Zealand Medical Journal* 39, 46; Jan H Pejtersen et al, 'Sickness Absence Associated with Shared and Open-Plan Offices: A National Cross Sectional Questionnaire Survey' (2011) 37(5) *Scandinavian Journal of Work, Environment and Health* 376 <https://doi.org/10.5271/sjweh.3167>; Anne Lise Stranden, 'People Who Work in Open-Plan or Shared Offices Get Sick More Often', *Sciencenorway* (online, 4 February 2020) <https://sciencenorway.no/diseases-sick-leave-work/people-who-work-in-open-plan-or-shared-offices-get-sick-more-often/1629678>; Owen Gough, 'Hot or Not? Hot-Desking Offices Have Dirtier Desks, Study Finds', *smallbusiness.co.uk* (online, 21 June 2017) <https://smallbusiness.co.uk/hot-desking-dirtier-desks-2539208/>.

24 CBRE Research, *2020 Global Occupier Sentiment Survey: The Future of the Office* (Report, June 2020) 10 ('*The Future of the Office*').

technology and infrastructure (such as fast internet access, cloud storage, easy access to videoconferencing, etc).[25] Following the outbreak of COVID-19, surveys of Australians consistently find that hybrid working is either the preferred model for many employees[26] or that it is reported to be the most productive working model.[27] Hybrid working models now seem to be the way forward for many employers in Australia[28] – for example, National Australia Bank plans to consolidate its Melbourne office space 'with more colleagues expected to adopt a flexible and hybrid approach to working over the longer term'.[29] Many other Australian employers have also announced to their employees that they plan to adopt hybrid working arrangements going into 2022, but these announcements are not publicly available. Interestingly, enterprise agreements created during the pandemic contain 'mobility payments'[30] to reward employees for their commitment to new ways of working.[31] Using a hybrid working model therefore appears to be part of the long-term real estate strategy of many Australian employers.

This trend towards hybrid working signals that hot-desks and ABW will play a key role in future workplace design in view of research which 'indicates that as more workers adopt a hybrid way of working, a common way to increase space

25 See also Ian Anderson et al, CBRE Research, *Global Outlook 2030: The Age of Responsive Real Estate* (Report, 2020) 6–7.

26 Chris Mattey et al, Boston Consulting Group, *Personalisation for Your People: How COVID-19 is Reshaping the Race for Talent* (Report, June 2020) 4. This Boston Consulting Group online workforce sentiment employee survey of 1,002 people from 22 to 25 May 2020 explored the attitude of Australians towards work during the COVID-19 pandemic and found that hybrid working is the preferred working model. See also Daniel Ziffer, 'Most Workers Want "Hybrid" Jobs at the Office and at Home after Coronavirus, Study Finds', *ABC News* (online, 23 June 2020) <https://www.abc.net.au/news/2020-06-23/most-workers-want-hybrid-of-home-and-office-post-coronavirus/12381318>; Christoph Hilberath et al, Boston Consulting Group, *Hybrid Work Is the New Remote Work* (Report, 22 September 2020).

27 A Hays survey of 2,557 Australian working professionals found that 61% of respondents reported that a hybrid working model is the most productive whilst only 21% said that the central office model is most productive and 18% nominated exclusive remote working: see Hays, 'Hybrid Working Boosts Productivity, Says Employees' (Press Release, 17 November 2020).

28 See Sean Gallagher, *Hybrid Working 2.0: Humanising the Office* (Report, December 2021) 3, 5–7; Steph Scott, 'The Road to a Hybrid Workforce Future', *Spencer Maurice* (Web Page, 6 October 2020) <https://spencermaurice.com/2020/10/06/the-road-to-a-hybrid-workforce-future/>; Ry Crozier, 'Telstra, ANZ, NAB Redefine Their Future Workspaces', *iTnews* (online, 19 November 2020) <https://www.itnews.com.au/news/telstra-anz-nab-redefine-their-future-workspaces-557908>; Shelley Dempsey, 'Workplace 2021: The New Hybrid Office Model', *Australian Institute of Company Directors* (Web Page, 19 October 2020) <https://aicd.companydirectors.com.au/membership/membership-update/workplace-2021-the-new-hybrid-office-model>; Jess Bell, 'King & Wood Mallesons Unveils Roster Structure of Hybrid Working', *Human Resources Director* (Web Page, 14 November 2020) <https://www.hcamag.com/au/specialisation/workplace-health-and-safety/king-wood-mallesons-unveils-roster-structure-of-hybrid-working/239037>; Jennifer Hewett, 'Hybrid Work Is the Way of the Future', *Australian Financial Review* (online, 21 October 2021) <https://www.afr.com/work-and-careers/workplace/hybrid-work-is-the-way-of-the-future-20211021-p5922x>.

29 National Australia Bank, *Annual Financial Report* (Report, 2020) 15.

30 'Victorian Public Service Enterprise Agreement 2020' (Enterprise Agreement, 2 October 2020) s 1 pt 4 cls 15–16.

31 'Proposed New Enterprise Bargaining Agreement', *Victoria State Government, Justice and Community Safety* (Web Page, 28 July 2020) <http://web.archive.org/web/20210327011004/https://www.justice.vic.gov.au/proposedEBA>.

utilization and efficiency is to use a shared-space model'.[32] This is consistent with research which finds that flexible office space is now part of the long-term real estate strategy of many companies[33] and that traditional assigned or fixed workstations for every employee are expected to be phased out (CBRE predicts that by 2030 'nearly all employees will be mobile and require a network of locations to make them as productive and engaged as possible').[34] Boston Consulting Group also suggests that, in the Australian COVID-19 context, office space design should be tailored 'to meet the new hybrid work needs (eg, trade single desk space for team alignment rooms)'.[35] Whilst desk sharing will be a feature of hybrid post-pandemic workplace design, certain precautions still need to be taken when using shared desks such as hot-desks. There will need to be more distancing, 'staggered start times and finish times' to avoid crowding, use of hand sanitiser and 'frequent cleaning', according to Professor Brendan Murphy.[36]

Whilst working from home has been relatively successful for many employees, it is not workable or a viable option for some employees. Some surveyed Australian respondents have reported that they 'cannot work remotely'.[37] Working from home can result in social isolation, a lack of networking, mentoring and collaborative opportunities, and a blurring of the lines between work–life balance.[38] It may disproportionally impact parents with young children,[39] and be practically impossible for single parents. It may not suit people who live in small apartments, townhouses or units. The hybrid working trend appears to solve some of these problems with working from home and also provide some of the flexibility that comes with working from home. Yet, post-pandemic workplace design, defined largely by a hybrid working model, is not without its disadvantages for reasons that will now be explained.

This article will now argue that the characteristics of post-pandemic workplaces identified above – whether that be more novel characteristics such as widespread hybrid working and worker fluidity or more familiar characteristics such as hot-desking and ABW which form part of a hybrid working model – create workplace inequalities and risks of unlawful discrimination on the basis of invisible disability.

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32 *The Future of the Office* (n 24) 14. See also CBRE Asia Pacific Research Team, *Asia Pacific Major Report: Future of Office Survey* (Report, July 2021) 20.

33 *The Future of the Office* (n 24) 12. See also CBRE Asia Pacific Research Team, *2021 Asia Pacific Flexible Office Market Overview* (Report, 22 February 2021).

34 Ian Anderson et al, CBRE Research, *Global Outlook 2030: The Age of Responsive Real Estate* (Report, 2020) 8.

35 Mattey et al (n 26) 14.

36 Department of Health (Cth), 'Chief Medical Officer's Press Conference about COVID-19 on 5 May 2020' (Press Conference Transcript, 6 May 2020) <https://www.health.gov.au/news/chief-medical-officers-press-conference-about-covid-19-on-5-may-2020>.

37 The Boston Consulting Group online workforce sentiment employee survey of 1002 people (mentioned above) found that 29% of the Australian respondents 'cannot work remotely'. See Mattey et al (n 26) 4.

38 See also *The Future of the Office* (n 24) 18.

39 See, eg, Mattey et al (n 26) 5–6.

III NEW WAYS ABLELISM MAY MANIFEST IN MODERN AND POST-PANDEMIC WORKPLACES

Post-pandemic workplaces will, based on the above discussion, likely be shared workplaces which permit hybrid and fluid working. Criticisms of shared workplaces are nothing new. Claims that shared office space increases collaboration, teamwork, innovation and friendships have been shown to be unfounded.[40] To the contrary, shared office spaces have been shown to result in social withdrawal and reduced face-to-face communication and collaboration,[41] inefficiencies and additional work due to moving around,[42] marginalisation,[43] and 'increases in distraction, negative relationships, uncooperative behaviours and distrust'.[44] Shared office environments may therefore offer few benefits other than to reduce an employer's office space costs.[45]

This article builds on this literature which identifies various problems with open plan and shared office design,[46] to highlight that a commonly overlooked problem is the way these working environments, for reasons that will be explained below, specifically disadvantage people with invisible disabilities, give rise to ableism and create risks of disability discrimination.

A Invisible Disability and Employment

Often, disability is perceived as something which is easily identifiable and obvious when, in fact, it is usually not. Approximately 4.3 million or 18% of Australians have a disability, and '90% of disabilities are "invisible" disabilities such as chronic pain disorders, diabetes and depression'.[47] In most cases therefore, disability is 'invisible' or hidden.[48]

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40 See Rachel L Morrison and Keith A Macky, 'The Demands and Resources Arising from Shared Office Spaces' (2017) 60 (April) *Applied Ergonomics* 103, 111–12 <https://doi.org/10.1016/j.apergo.2016.11.007>.

41 Ethan S Bernstein and Stephen Turban, 'The Impact of the "Open" Workspace on Human Collaboration' (2018) 373(1753) *Philosophical Transactions* 1, 5–6 <https://doi.org/10.1098/rstb.2017.0239>.

42 Alison Hirst, 'Settlers, Vagrants and Mutual Indifference: Unintended Consequences of Hot-Desking' (2011) 24(6) *Journal of Organizational Change Management* 767 <https://doi.org/10.1108/09534811111175742>.

43 Ibid.

44 Morrison and Macky (n 40) 112.

45 See Libby Sander, 'The Research on Hot-Desking and Activity-Based Work Isn't So Positive', *The Conversation* (online, 12 April 2017) <https://theconversation.com/the-research-on-hot-desking-and-activity-based-work-isnt-so-positive-75612>; Michael Pelly, 'No Open Plan: We're Lawyers, Not "Battery Hens"' *Australian Financial Review* (online, 8 August 2019) <https://www.afr.com/companies/professional-services/no-open-plan-we-re-lawyers-not-battery-hens-20190806-p52e8h>. See also Richardson et al (n 23) 46–7.

46 See, eg, Sander (n 45).

47 City of Sydney, 'A City for All: Inclusion (Disability) Action Plan 2017–2021' (Action Plan, July 2020) 16.

48 One recent study from the United States found that 'most employees with disabilities have conditions that are invisible'. See Laura Sherbin et al, Center for Talent Innovation, *Disabilities and Inclusion: US Findings* (Report, 2017).

Invisible disabilities can include a range of sensory, neurological, immunological, mental and learning disabilities.

People who are blind or vision impaired may not use a cane, a guide dog and/or dark glasses, and they may not have obvious mobility issues (for example, people with diabetic retinopathy and keratoconus may experience blurred and distorted vision whilst people with glaucoma may have a limited field of vision, but an onlooker may not be aware of the difficulties and challenges posed by their conditions). People who are deaf or hearing impaired may not use cochlear implants, hearing aids and/or sign language (for example, a person may be deaf in one ear and they can 'get by' with the use of only one ear). People with damaged spines or mobility impairment may not use wheelchairs or crutches (for example, a stoic person with a spinal injury may conceal their pain when moving around). People with viral infections, such as HIV, may appear healthy because they use appropriate medication. People with mental disabilities, such as anxiety, depression or post-traumatic stress disorder, may choose to not exhibit signs of such disability, and they may do their best to 'put on a brave face'. Dementia may, unfortunately, come across as forgetfulness or 'mental slipping'. People with learning disabilities such as dyslexia may have trouble reading or spelling, but they may be misunderstood as unintelligent. Additionally, people with certain brain injuries may not 'appear' to have a disability. Some conditions may be episodic which means that, sometimes, a person may not be affected by their condition.[49]

The non-exhaustive examples of invisible disabilities just discussed demonstrate that numerous physical and psychological conditions may be debilitating yet hidden and invisible to onlookers within workplaces (such as colleagues, supervisors or human resources).

People with invisible disabilities may face a number of challenges, barriers and disadvantages in workplaces which people with visible or noticeable disabilities may not face. In particular, employees with invisible disability:

- appear able-bodied and thus they may not be able to meet the expectations of others;[50]
- may avoid situations which they know they will find difficult because of their invisible disability, but because they appear able-bodied they risk being misunderstood and viewed negatively by their colleagues;[51]
- may deny having a disability because the disability is invisible or they may try to conceal their difficulties thus perpetuating the image of being able-bodied when, in fact, they are not;[52]

49 See Ben Fogarty, 'Do I Tell? Disclosing Disability in Employment' [2007] (83) *Precedent* 22, 24.

50 See, eg, Sharon Dale Stone, 'Reactions to Invisible Disability: The Experiences of Young Women Survivors of Hemorrhagic Stroke' (2005) 27(6) *Disability and Rehabilitation* 293, 300, 302 <https://doi.org/10.1080/09638280400008990>.

51 See, eg, ibid 303.

52 See, eg, ibid 302–3.

- may, along with the people around them, downplay invisible disabilities and hold the view that invisible disabilities should not be taken as seriously as visible disabilities;[53]
- may feel that their invisible disability is stigmatised (for example, if they have HIV or a mental illness), and thus they may choose not to disclose it to an employer;[54]
- may after disclosing their disability experience differential treatment[55] and negative long-term consequences in their working life;[56]
- may feel 'fraudulent' when seeking support for an invisible disability,[57] which is consistent with the position that people also 'tend to believe' that 'invisible' or 'hidden' disabilities 'are not bona fide disabilities needing accommodation'.[58]

As such, people with invisible disabilities may be treated as they appear (able-bodied) and they may not ask for support or reasonable adjustments from an employer for a variety of reasons. They may feel denial, shame, or embarrassment. Additionally, or alternatively, they may feel that they do not have a 'real' disability, or that people around them may think they do not have a real disability, so disclosure may make them feel deceitful or like an 'imposter'.

Employees with invisible disability are therefore unlikely to self-identify as having a disability,[59] disclose their disability or seek reasonable adjustments. One United States survey of 3,570 respondents (which included 1,083 people with disability) aged between 21 and 65 who were employed full-time in white-collar occupations[60] revealed that only 13% of employees with invisible disabilities disclosed their disability to human resources.[61] Additionally, recent research by the University of Melbourne's Centre for Workplace Leadership found that '[r]easonable adjustments on the basis of invisible disability, such as mental illness, are underrepresented' and that 'organisations tend to focus on more visible and physical disabilities'.[62] As

53 See, eg, ibid 303.

54 See, eg, Marlena Raymond et al, 'Improving Access and Inclusion in Employment for People with Disabilities: Implementation of Workplace Adjustments in "Best-Practice" Organisations' (Research Report, University of Melbourne, Centre for Workplace Leadership, July 2019) 13.

55 See Maria Norstedt, 'Work and Invisible Disabilities: Practices, Experiences and Understandings of (Non) Disclosure' (2019) 21(1) *Scandinavian Journal of Disability Research* 14, 22 <https://doi.org/10.16993/sjdr.550>.

56 See ibid, citing Sarah von Schrader, Valerie Malzer and Susanne Bruyère, 'Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate' (2014) 26(4) *Employee Responsibilities and Rights Journal* 237 <https://doi.org/10.1007/s10672-013-9227-9>.

57 See Stone (n 50) 303.

58 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Social Inclusion and Victorians with Disability* (Parliamentary Paper No 356, September 2014) 6-41, citing 'Attitudinal Barriers for People with Disabilities', *National Collaborative on Workforce and Disability for Youth* (Web Page) <http://web.archive.org/web/20220128050301/http://www.ncwd-youth.info/publications/attitudinal-barriers-for-people-with-disabilities>.

59 See also Katie Eyer, 'Claiming Disability' (2021) 101(2) *Boston University Law Review* 547, 564–8.

60 Sherbin et al (n 48).

61 Ibid.

62 Raymond et al (n 54) 13.

such, the analysis in this article considers the situation where workers with invisible disabilities do not disclose those disabilities to employers.[63]

It will now be argued that the propensity of employees with invisible disability to conceal and not disclose their disability puts them at a significant disadvantage in modern and post-pandemic workplaces which use hybrid, agile and shared working arrangements.

B Hybrid, Agile and Shared Working Arrangements Significantly Disadvantage Employees with Many Invisible Disabilities

Paul Harpur has drawn attention to the way open plan workplaces can disadvantage people with autism, low hearing and print disabilities due to distractions inherent in such workplaces.[64] Hybrid and shared working models that will likely be central to post-pandemic workplace design create new challenges for people with disability, particularly invisible disability, for reasons that will now be explained.

The first problem is the 'one size fits all' approach of hybrid working. Hybrid work will make use of shared workplace design (such as hot-desks and ABW) to maximise efficiencies in an employer's real estate footprint, but the difficulty is that this design presupposes everyone can be agile and access shared workstations without issue. In fact, many people with invisible disabilities will often require personalised workstations with certain adjustments.

Many people with vision impairment, for example, cannot fluidly move between locations or workstations without issue because these workstations are equipped for people with normal vision (with standard screens, no particular lighting levels, etc). Likewise, people with chronic pain or injuries, such as back and spinal injuries, may need special chairs and particular ergonomic arrangements whereas shared working environments will often be fitted with standard chairs.

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63 Alternative situations, such as where workers with invisible disability do not disclose their disability to employers but make requests for adjustments will not be considered for two reasons. First, based on the research discussed above in this article, this situation is very unlikely to occur in practice because employees with invisible disability are unlikely to self-identify as having a disability or seek adjustments. Rather, they tend to hide their disability. Second, in the unlikely event an employee with an invisible disability does request a reasonable adjustment, that request for a reasonable adjustment would itself disclose the disability (thus the disability would cease to be 'invisible') because medical evidence and/or disclosure of disability is required for the provision of adjustments and to determine whether they are 'reasonable'. On the second of these points see, eg, *Muller v Toll Transport Pty Ltd (2) (Human Rights)* [2014] VCAT 472, [51], [74] (Senior Member Megay); *Watts v Australian Postal Corporation* (2014) 222 FCR 220, 228–9 [24] (Mortimer J) ('*Watts*'). See also 'Reasonable Adjustment Policy', *Australian Public Service Commission* (Web Page, 15 July 2019) <https://www.apsc.gov.au/about-us/working-commission/what-we-offer/diversity-policy/reasonable-adjustment-policy>; Australian Institute of Health and Welfare, 'Reasonable Adjustments (*Disability Discrimination Act*) Policy and Procedures' (Policy Statement, 14 September 2015); Monash University, 'Reasonable Workplace Adjustments Procedure' (Procedure Statement, 12 June 2021) cl 4; 'Employment Assistance Fund (EAF)', *Australian Government Job Access* (Web Page, 2 November 2021) <https://www.jobaccess.gov.au/employment-assistance-fund-eaf>.

64 See Harpur (n 3) 9. Harpur cites Janine Booth, *Autism Equality in the Workplace: Removing Barriers and Challenging Discrimination* (Jessica Kingsley Publishers, 2016) 43. Harpur writes that open plan offices can make it difficult for people with low hearing to use telephones, for people with print disabilities to hear audio from screen readers, and 'reduce the efficiency of people with autism who struggle with distractions'.

Additionally, people with such conditions may not be able to maneuver around shared environments without pain. Employees with certain immunological disabilities are also disadvantaged by sharing workstations because illnesses may be more easily spread in these environments[65] and this may lead them to take more sick leave (which may make them incorrectly labelled as lazy). People with autism and other neurodiversity may also be detrimentally affected by the forced use of shared office spaces because (as Harpur has already argued, as noted above) noises in shared workplaces may result in sensory and information overload for people with autism.[66]

The second problem is that whilst employees with invisible disability are already unlikely to disclose their disability, in hybrid and shared workplaces there are even greater incentives to not disclose disability or seek reasonable adjustments. In shared workplace environments requests for many reasonable adjustments will often require not only the adjustment itself but also a fixed desk on which that adjustment can be installed. In effect, many reasonable adjustment requests would also carry with them a request for a permanent or fixed desk. This would disrupt an employer's plans to maximise space utilisation through shared working arrangements, and it is doubtful that many employees will purposely be this disruptive. This may be especially true now in light of the economic fallout of dealing with the COVID-19 crisis, and for employees in precarious employment (less than half of working Australians 'work in a permanent full-time paid job with leave entitlements'),[67] those at the start of their career, or in a probationary period (arguably, a time when support is most needed for career progression and development). As such, it seems very likely that many employees with invisible disability will conceal their disability and avoid requesting reasonable adjustments that can make the hybrid and shared working model, hot-desks and ABW more accessible.

The third problem is that, even in the unlikely event invisible disability is disclosed and reasonable adjustments are provided, hybrid and agile working policies as well as the use of ABW will still exclude people with disability from full workforce participation. This is because adaptive equipment can often not be easily moved between different workstations, either within the office or between the home and the office. Such equipment can include large screens, monitor arms

65 See, eg, Richardson et al (n 23) 46; Pejtersen et al (n 23) 380; Stranden (n 23); Gough (n 23).

66 See, eg, Louise Bedrossian, 'Understand Autism Meltdowns and Share Strategies to Minimize, Manage Occurrences' (2015) 20(7) *Disability Compliance for Higher Education* 6; Jill Aylott, 'Autism in Adulthood: The Concepts of Identity and Difference' (2000) 9(13) *British Journal of Nursing* 851, 854. See also *Sherbourne v N Power Ltd* [2019] UKET 1811601/2018, in which the United Kingdom Employment Tribunal found that an employer indirectly discriminated against an employee on the ground of the employee's autism; *Truffet v Workers' Compensation Regulator* [2019] QIRC 201, 47 [285]–[286] (Knight IC) in which the evidence of a psychologist was that an 'exacerbation of autistic spectrum disorder' arose due to 'prolonged and cumulative stress' related to an employee's seating position (this was a workers' compensation matter and discrimination was not alleged). See also Harpur (n 3) 9, citing Janine Booth, *Autism Equality in the Workplace: Removing Barriers and Challenging Discrimination* (Jessica Kingsley Publishers, 2016) 43.

67 Tanya Carney and Jim Stanford, 'The Dimensions of Insecure Work' (Factbook, Australia Institute Centre for Future Work, 29 May 2018) 1.

(which can be used to adjust the distance at which a screen is viewed),[68] docking stations (which allow viewing of laptop content on large screens), high visibility keyboards which have high contrast keys or keyboards which have large keys such as 'BigKeys, Jumbo, XL or KeyMonster keyboards'[69] or Dolphin large print keyboards,[70] special chairs, etc. The solution is also not as simple as installing adaptive equipment to all workstations because not only would this be costly for an employer, but it would not be suitable and perhaps even hazardous for people who do not require such equipment.

This leaves employees with invisible disabilities in an unenviable 'catch-22' position. If they *do* request reasonable adjustments then they will disrupt the hybrid and shared workplace model and thus risk being labelled or seen as problematic. If they *do not* request reasonable adjustments then they will not have the adaptive equipment which they need to be most productive. It therefore seems likely that in the post-pandemic workplace many employees with invisible disability will not only face disadvantage in being forced to 'fit' to a 'one size fits all' workplace model but they will most probably not disclose their disability or request reasonable adjustments to accommodate their disability.

Having identified that post-pandemic workplace design creates workplace inequality and potential for discrimination on the basis of invisible disability, will the law be equipped to deal with these new and emerging inequality issues? This article will now turn to assess laws in Australia which prohibit disability discrimination in employment, to determine whether the law is suited to addressing ableism, inequalities and risks of disability discrimination which can arise from modern and post-pandemic workplace design.

IV IS LABOUR LAW AND ANTI-DISCRIMINATION LAW EQUIPPED TO ADDRESS NEW AND EMERGING INEQUALITIES IN MODERN AND POST-PANDEMIC WORKPLACES?

The ongoing Disability Royal Commission, which will deliver its final report to the Australian Government by 29 September 2023, is investigating how to promote 'a more inclusive society that supports people with disability to be independent' in various settings including workplaces and its final report will recommend improvements to the law, amongst other things.[71] As Australians turn their mind to creating a more inclusive society for people with disability, it is timely to assess whether the law is equipped to address the new and emerging forms of ableism identified in this article and whether the law plays a role in

68 'Vision Impairment and Computing', *AbilityNet* (Web Page, July 2021) <https://www.abilitynet.org.uk/factsheets/vision-impairment-and-computing>.

69 Ibid.

70 Ibid; 'Dolphin Large Print Keyboard', *Dolphin* (Web Page) <https://yourdolphin.com/keyboard>.

71 'About the Royal Commission', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <https://disability.royalcommission.gov.au/about-royal-commission>.

creating workplace culture accepting of such ableism. This article will specifically critique discrimination laws.

Discrimination in employment on the basis of disability is prohibited by Commonwealth, state and territory anti-discrimination legislation.[72] It is also prohibited by the *Fair Work Act 2009* (Cth) ('*FW Act*').[73]

This article will now assess whether establishing adverse action under the *FW Act* and discrimination under anti-discrimination legislation presents any problems of application in modern and post-pandemic workplaces for claimants with invisible disability.

A Establishing Adverse Action under the *FW Act*: Problems of Application

Section 351 of the *FW Act*, which is titled 'Discrimination', prohibits an employer from taking 'adverse action' against an employee or prospective employee. Under section 351(1) of the *FW Act*, an employer must not take adverse action against an employee or prospective employee 'because of the person's … physical or mental disability', among other grounds. There are important qualifications to the legal protection conferred by section 351 of the *FW Act*, including the existence of an inherent requirements defence in section 351(2) (which is discussed in more detail below in Part IV(C)(3)).[74]

Under the statutory scheme in the *FW Act*, determining whether adverse action is taken 'because of' a prohibited reason (such as physical or mental disability) requires a court to make a factual finding that the adverse action was taken for, or motivated by, a prohibited reason or, where there are multiple reasons for that action, reasons that included a prohibited reason.[75] The reason must be an 'operative or immediate reason' for the action,[76] which requires considering the decision-maker's mental

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72 *Disability Discrimination Act 1992* (Cth) ss 15–17 ('*DDA*'); *Discrimination Act 1991* (ACT) s 7(e); *Anti-Discrimination Act 1977* (NSW) ss 49B, 49D–49F; *Anti-Discrimination Act 1992* (NT) s 19(j); *Anti-Discrimination Act 1991* (Qld) s 7(h); *Equal Opportunity Act 1984* (SA) ss 67–9; *Equal Opportunity Act 2010* (Vic) pt 4 div 1 ('*Vic EO Act 2010*'); *Equal Opportunity Act 1984* (WA) ss 66B–66D. Queensland, Western Australia and the Northern Territory prohibit discrimination on the basis of 'impairment'.

73 See *Fair Work Act 2009* (Cth) ('*FW Act*') section 351, which prohibits 'adverse action' on the basis of 'physical or mental disability', and section 772, which prohibits termination of employment on the basis of 'physical or mental disability'.

74 Section 351(2) of the *FW Act* (n 73) reads:

> (2) However, subsection (1) does not apply to action that is:
>
> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

Section 351(3) then contains a list of 'anti-discrimination law'.

75 *FW Act* (n 73) s 360. See also *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 534–5 [101] (Gummow and Hayne JJ) ('*Barclay*'); *Salama v Sydney Trains* [2021] FCA 251, 22 [86] (Burley J).

76 Explanatory Memorandum, Fair Work Bill 2008 (Cth) 234 [1458]. See also *Barclay* (n 75) 535 [104] (Gummow and Hayne JJ).

processes[77] and a finding of fact as to their 'true reason' for the action.[78] Claimants may wish to rely on the *FW Act* instead of anti-discrimination legislation because of the existence of stronger enforcement mechanisms in the *FW Act*.[79] However, for reasons that will follow, it is doubtful that the general protections in the *FW Act* will offer much protection to employees with invisible disabilities.

One difficulty is that disadvantaging employees in the manner described above in this article is not likely 'adverse action', as defined in section 342 of the *FW Act*. The courts have required that claimants prove intent or motive or deliberate less favourable treatment[80] but employers will (as explained above in Part III) not be aware of invisible disability so motive, or intent, or deliberate treatment in relation to such disabilities will often not be able to be established. Related to this, it is unclear whether the *FW Act* prohibits indirect discrimination. As Allen writes, there is some debate as to whether the *FW Act* prohibits indirect discrimination[81] and whilst 'some judges have found that "discrimination" in the [*FW Act*] includes indirect discrimination, it cannot be said that this is apparent from the statute' or extrinsic materials to the statute, 'so a subsequent or superior court could reach a different conclusion'.[82]

A second difficulty is that whilst the *FW Act* has a shifting onus of proof onto employers which is not available in anti-discrimination law,[83] this is unlikely to be of any benefit for employees with invisible disabilities. Under section 361 of the *FW Act* if an employee or prospective employee alleges that an employer took adverse action against them and they establish that they possess a prohibited attribute listed in section 351, it will be presumed that the adverse action was, or is being taken, 'for that reason or with that intent, unless … [the employer] proves otherwise'.[84] This shifting onus of proof has obvious benefits for claimants and it recognises that, if the onus was not shifted onto employers, it would be very difficult or almost impossible for complainants to prove that an employer acted unlawfully.[85] This reverse onus of proof is, however, unlikely to assist claimants with invisible disability because the jurisprudence has developed in a way that

77 *Barclay* (n 75) 544 [140] (Heydon J).

78 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, 249 [9] (French CJ and Kiefel J) ('*BHP Coal*').

79 See Dominique Allen, 'Adverse Effects: Can the *Fair Work Act* Address Workplace Discrimination for Employees with a Disability?' (2018) 41(3) *University of New South Wales Law Journal* 846 <https://doi.org/10.53637/SARS2540>.

80 Ibid 860–1.

81 See ibid 860 n 95, 860–1.

82 Ibid 867–8. Additionally, whilst in *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 Gordon J concluded that discrimination within the meaning of adverse action in section 342 of the *FW Act* includes indirect discrimination, Her Honour was referring to indirect discrimination *of a certain kind*: (1) where an 'employer's *particular reason* for choosing a "facially neutral" criterion may in fact be its adverse impact on a protected group'; or, in other words (2) where an 'employer chose a seemingly innocent or innocuous criterion … *for a prohibited reason or basis*': at 206 [102] (emphasis added). This appears to take into account that 'a central ingredient or element' of establishing adverse action is the 'state of mind of the decision-maker': at 205 [100].

83 Allen (n 79) 862–3.

84 See *FW Act* (n 73) s 361; Allen (n 79) 864.

85 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 234 [1461].

suggests the statutory presumption in section 361 of the *FW Act* ought to be rebutted where an employer is not aware of disability as, without such knowledge, decision-makers cannot take adverse action against a complainant because of disability.[86] As discussed above in this article, employers will rarely be aware of an employee's invisible disability because the disability itself is invisible and people with invisible disability are unlikely to disclose such disabilities. Claimants with invisible disability will often therefore find themselves in situations in which the statutory presumption is rebutted by employers, placing the onerous task of having to prove their case on their (often under resourced) shoulders.

Even if claimants with invisible disability make their employer aware of their disability through disclosure and subsequently bring a complaint of adverse action under section 351 of the *FW Act*, many invisible disabilities would likely fall outside the meaning which the courts have given the term 'disability' within the *FW Act*. A third difficulty, therefore, is that 'disability' or 'physical or mental disability' (which is not defined in the *FW Act*)[87] has been interpreted narrowly by the courts. In *Hodkinson v Commonwealth* ('*Hodkinson*')[88] Cameron FM stated that 'disability' in section 351 of the *FW Act* should be understood 'according to its ordinary meaning'[89] and 'the word "disability" should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person's movements, activities or senses'.[90] In *Stephens v Australian Postal Corporation* ('*Stephens*')[91] Smith FM agreed that where there is no definition the ordinary meaning should be used,[92] but the context of section 351 of the *FW Act* (specifically, the existence of the inherent requirements defence in section 351(2)) suggests a 'statutory intention to include some functional and other practical consequences of an underlying condition within the concept of "disability"'.[93] Smith FM then said of 'disability' in the *FW Act*:

> In my opinion, in this context it is possible to conclude only that the word 'disability' appears to encompass both the medical or scientific diagnosis of an underlying condition capable of resulting in 'disability', and also its inherent and perceived functional impairments or consequences in relation to presentation or work in a workplace, which are the manifestation of the underlying condition.[94]

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86 *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424, 430 [9] (Perry J) ('*RailPro*'). In this case, Perry J found that the primary judge erred in finding a breach of s 351(1) in circumstances where it was 'glaringly improbable' that three decision-makers were 'aware' of a complainant's physical or psychological disability before dismissing him. According to Perry J, the 'primary judge ought to have found that the statutory presumption in [section] 361 of the *FW Act* had been rebutted as, in the absence of such knowledge, the decision-makers could not be found to have dismissed [the complainant] Mr Flavel because of his disability'.

87 *Shizas v Commissioner of Police* (2017) 268 IR 71, 76 [6] (Katzmann J) ('*Shizas*').

88 (2011) 248 FLR 409 ('*Hodkinson*').

89 Ibid 443 [145] (Cameron FM).

90 Ibid 444 [146].

91 (2011) 207 IR 405 ('*Stephens*').

92 Ibid 440 [86] (Smith FM).

93 Ibid 441 [88].

94 Ibid 441 [90].

This view that disability includes its manifestations was also reached by Katzmann J in *Shizas v Commissioner of Police* ('*Shizas*')[95] (in which Katzmann J rejected an argument that adverse action on the basis of spinal infirmity was not on the basis of the underlying disability being ankylosing spondylitis),[96] but manifestations of disability can only be linked to a decision where those manifestations are visible and obvious.[97] In *Western Union Business Solutions (Australia) Pty Ltd v Robinson* ('*Western Union*')[98] the applicant's illness was not known by a decision-maker so the link between the decision and whether it was made because of disability could not be drawn.[99] Invisible disability will rarely manifest with obvious or noticeable signs or symptoms, and in the rare cases in which they do people with such disabilities tend to conceal these signs and symptoms for the various reasons discussed above. The causal nexus between invisible disability and an employment decision is, therefore, extremely difficult and sometimes even impossible to establish when relying on an employer's awareness of the manifestations of such disability.

Even if an employer is aware of manifestations of an employee's disability, that awareness alone will not be enough to satisfy a court that the employer took action 'because of' disability. That would require, at the very least, an employer having direct knowledge of the employee's disability[100] so that it can be said the attribute is part of the decision-maker's mental process.[101] This means that in effect the courts treat 'disability', for the purposes of the *FW Act*, as something that is directly observable or known by an employer. In *Batista v Wells Fargo International Finance (Australia) Pty Ltd [No 2]* ('*Batista*')[102] the applicant asserted that forgetfulness or fatigue were manifestations of his mental disability but Kendall J held that a decision-maker's observation, or an applicant's claims to have symptoms consistent with a disability, was not enough[103] because observing symptoms and behaviours does not amount to knowledge of disability.[104] Without such knowledge, it is not possible for an act to be 'because of' the disability. This suggests that directly observable and visible disabilities – such as paraplegia or total blindness – would usually be covered by the general protections in the *FW Act* whilst undisclosed invisible disabilities which are serious enough to have indirectly observable symptoms or behaviours or functional impairments or consequences would not.

This demonstrates that the courts have developed a definition of 'disability' in the *FW Act* which does not adequately cover many claimants with invisible

95 See *Shizas* (n 87) 95–6 [119]–[122] (Katzmann J).
96 See *Western Union Business Solutions (Australia) Pty Ltd v Robinson* (2019) 272 FCR 547, 563 [60] (Kerr J) ('*Western Union*').
97 See, eg, ibid.
98 (2019) 272 FCR 547.
99 See, eg, ibid 563–4 [61]–[64] (Kerr J), 581 [141], 584 [152]–[154] (O'Callaghan and Thawley JJ).
100 See, eg, *DPP (Vic) v Grant* (2014) 246 IR 441, 455 [73] (White J).
101 See, eg, *BHP Coal* (n 78) 267 [85] (Gageler J), citing *Barclay* (n 75) 517 [44]–[45] (French CJ and Crennan J), 542 [127] (Gummow and Hayne JJ), 544 [140] (Heydon J).
102 [2020] FCCA 829 ('*Batista*').
103 Ibid 64 [194], citing *RailPro* (n 86) 460 [128] (Perry J).
104 *Batista* (n 102) 64 [194].

disability, and which is obsolete in its emphasis on visible and observable criteria. Firstly, on the test in *Hodkinson*, 'disability' for the purposes of section 351 of the *FW Act* is a condition which limits a person's movement, activity or senses,[105] but many invisible disabilities (such as properly managed HIV,[106] post-traumatic stress disorder, or cystic fibrosis) will not likely be captured by this test because they do not limit movement, activity or senses. Secondly, on the elaborated test in *Stephens* and *Shizas* 'disability' can also include manifestations of an underlying condition, but invisible disabilities will usually not have manifestations identifiable by an onlooker so, as held in *Western Union*, it is not possible to draw a link between the (invisible) manifestation and any adverse action. Even if they do have manifestations (such as slowness, etc), based on the reasoning in *Batista* and *RailPro Services Pty Ltd v Flavel*,[107] the existence of these manifestations alone will be insufficient to establish that an employer had knowledge of disability sufficient to satisfy a breach of section 351 of the *FW Act*. It is therefore no surprise that conditions which have been deemed by the courts to fit within the meaning of 'disability' in the *FW Act* have had visible or noticeable manifestations – such as morbid obesity[108] and ankylosing spondylitis[109] (symptoms of the latter include reduced spine mobility).[110]

1 Proposed Law Reform

In view of the above analysis, the *FW Act* is not equipped to adequately protect employees with invisible disability from inequalities that can arise in modern and post-pandemic workplaces. To better equip the *FW Act* to provide improved coverage for claimants with invisible disability, lawmakers might consider a number of changes to the *FW Act*.

Allen has proposed a number of reforms to the *FW Act* which borrow from the wording in the *Disability Discrimination Act 1992* (Cth) ('*DDA*').[111] To this end, Allen recommends:

1. Adding a definition of 'physical or mental disability' to section 12 of the *FW Act* (Allen suggests that the broad definition of 'disability' in the *DDA* could be used);[112]

105 See, eg, *Findley v MSS Security Pty Ltd* [2017] FCCA 2898, 23 [63] (McNab J) ('*Findley*'), in which McNab J accepted that morbid obesity 'may constitute a disability for the purposes of [section] 351 of the [*FW Act*] as that condition may limit a person's movements, activities or senses'.

106 A claim of adverse action on the basis of disability has been brought before the Federal Court by an HIV-positive person, but the court did not make a determination on whether HIV is a 'disability' for the purposes of the *FW Act* (n 73). See *C v Commonwealth* (2015) 234 FCR 81, in which the applicant, who was a member of the Defence Force, was held to not be covered by section 351 of the *FW Act* because members of the Defence Force are not 'employees' within the meaning of the *FW Act*.

107 *RailPro* (n 86).

108 See *Findley* (n 105) 23 [63] (McNab J).

109 *Shizas* (n 87) 76 [6] (Katzmann J).

110 'Ankylosing Spondylitis', *Victoria State Government Better Health Channel* (Web Page, 9 July 2018) <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/ankylosing-spondylitis>.

111 See Allen (n 79) 865–70.

112 See ibid 865–6.

2. Amending the *FW Act* so that it includes positive duties (such as allowing employers to take special measures (in line with section 45 of the *DDA*)[113] or, placing a positive obligation on employers to provide reasonable adjustments to accommodate the disabilities of employees (in line with the requirements of section 5(2) of the *DDA*);[114] and
3. Reforming the *FW Act* so that it prohibits indirect discrimination in similar ways to the *DDA*.[115]

The first two of these reforms to the *FW Act* proposed by Allen would likely improve the legislation's coverage of employees with invisible disability. This is because, firstly, the expansive definition of 'disability' in the *DDA* captures many invisible disabilities, and, secondly, proactive efforts to address discrimination may benefit such employees.

The third reform proposed by Allen, however, requires further refinement. Allen proposes defining indirect discrimination in the *FW Act* in similar terms to the definition of indirect discrimination in section 6 of the *DDA*[116] (that is, prohibiting 'employers from requiring an employee with a disability to comply with a requirement, condition or practice which has (or is likely to have) a disadvantageous effect on them because of their disability and which is not reasonable in the circumstances',[117] and imposing the burden of proving reasonableness on the employer).[118] This, in theory, would be an important addition to the *FW Act* because in most cases employees with invisible disabilities would not be able to rely on the current adverse action protections in section 351, as argued above. For reasons which are explained in detail below,[119] however, this definition of indirect discrimination in the *DDA* has been prone to judicial distortions which require that employers must have knowledge of an employee's disability to indirectly discriminate against that employee (with the result that claims by employees with invisible disability are in most cases automatically defeated). To avoid such judicial distortions, the definition could be refined (as proposed below in this article) to clarify that motive for, and knowledge of, discrimination is irrelevant to finding indirect discrimination. As discussed below, a similar approach in Victorian anti-discrimination legislation has allowed Victorian judges to find that an employer indirectly discriminated against an employee with invisible disability, even though the employer had no knowledge of the disability.[120]

113 Ibid 868–9.
114 Ibid 869.
115 Ibid 868. Allen also proposes expanding the window for making claims under the *FW Act* (n 73) for employees with disability.
116 See Allen (n 79) 868.
117 See ibid. It is important to note here that the definition of 'indirect discrimination' imposes an implicit obligation to provide reasonable adjustments because it permits only 'reasonable' requirements or conditions. See Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 105–6 [4], 126 <https://doi.org/10.1017/9781139923811>.
118 See Allen (n 79) 868.
119 See Part IV(B)(2)(a) of this article.
120 See Part IV(B)(2)(b) of this article.

It is worth noting here that this article proposes that the *FW Act* should be amended to prohibit indirect discrimination, but the definition of indirect discrimination to be used should not be modelled on the *DDA* but rather on the approach in Victorian anti-discrimination legislation.[121] This article does not propose any changes to adverse action. The prohibition on adverse action, as explained above, prohibits direct forms of discrimination 'because of' prohibited attributes (such as physical or mental disability). This requires a factual inquiry as to the decision-makers' true intentions,[122] reasons or motivations for a decision[123] so it engages provisions such as sections 360 and 361 of the *FW Act* which apply in circumstances where it is alleged a person took action for a particular reason. The indirect discrimination protections proposed by this article, however, would prohibit unreasonable requirements, conditions or practices which have a disadvantaging effect on employees with disability regardless of the intent or reasons of an employer. As such, adverse action on the one hand, and the proposed indirect discrimination protections on the other, would cover distinct forms of discrimination.

Having assessed the *FW Act*, this article will now turn to assess whether establishing discrimination under anti-discrimination legislation poses any problems of application for claimants with invisible disability.

B Establishing Discrimination under Anti-Discrimination Legislation: Problems of Application

Anti-discrimination legislation contains a definition of 'disability' which is wide and expansive,[124] and it can cover a range of conditions, injuries and illnesses that are 'invisible'. 'Disability' can include vision impairment, viral infections, morning sickness,[125] colour blindness,[126] HIV infection, attention disorders,[127] certain forms of brain damage,[128] type 2 diabetes and cardiomyopathy[129] for example.

Under anti-discrimination legislation disability discrimination in employment is unlawful[130] and it can be either direct[131] or indirect.[132] This article will now assess the utility of direct and indirect discrimination provisions in addressing the new and emerging inequalities identified above in this article.

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121 Ibid.
122 See *BHP Coal* (n 78) 249 [9] (French CJ and Kiefel J), 267 [85] (Gageler J).
123 *Barclay* (n 75) 534–5 [101] (Gummow and Hayne JJ); *Salama v Sydney Trains* (n 75) [86] (Burley J).
124 See, eg, *DDA* (n 72) s 4 (definition of 'disability'); *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'disability'); *Vic EO Act 2010* (n 72) s 4 (definition of 'disability').
125 Gaze and Smith (n 117), 99–100.
126 *Davies v Victoria* [2000] VCAT 819; *Loscialpo v NSW Police Service* [2000] EOC 93-042, cited in Gaze and Smith (n 117) 100.
127 Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 25.
128 *Purvis v Department of Education and Training (NSW)* (2003) 217 CLR 92, 119 [80] (McHugh and Kirby JJ) ('*Purvis*').
129 *Ferris v Victoria* [2018] VSCA 240, 5 [12] (Tate AP, Niall and Hargrave JJA) ('*Ferris Appeal*'); *Ferris v Department of Justice and Regulation (Human Rights) (Vic)* [2017] VCAT 1771, [82]–[83] (Harbison J) ('*Ferris*').
130 See, eg, *DDA* (n 72) s 15.
131 See, eg, ibid s 5.
132 See, eg, ibid s 6.

1 Direct Disability Discrimination

Under section 5(1) of the *DDA* employers directly discriminate against employees with disability where they treat the employees less favourably than a person without the disability 'in circumstances that are not materially different', and the treatment is *because of* the disability.[133] Importantly, duty holders cannot take action 'because of' disabilities of which they are unaware.[134]

Whereas section 5(1) of the *DDA* is concerned with achieving formal equality,[135] 2009 amendments to the *DDA* introduced a new section 5(2) which is concerned with achieving substantive equality because the new provision focuses on effect or outcome.[136] Under section 5(2) of the *DDA* employers will also have an explicit duty to provide reasonable adjustments to employees with disability[137] unless making the reasonable adjustment would impose an 'unjustifiable hardship' on the employer.[138]

Under section 5(2) 'the function of a comparator in the context of discrimination is to facilitate the isolation of the reason why the person was treated as he or she was'.[139] The comparison exercise requires drawing a conclusion as to whether the 'effect' of failing to make reasonable adjustments is to treat an employee with disability less favourably because of their disability.[140] Significantly, in *Watts v Australian Postal Corporation*[141] Mortimer J opined:

> Section 5(2)(b) expressly addresses, in my opinion, the finding of the plurality in *Purvis* at [230] that the comparison must identify '*all the effects and consequences of disability that are manifested to the alleged discriminator. What then is asked is: how would that person treat another in those same circumstances*?'[142]

As such, employees with invisible disability will often face a losing battle in direct disability claims – whether under section 5(1) or section 5(2) of the *DDA* – because employers will more often than not be unaware that an employee has an invisible disability, and such disabilities will usually not have observable manifestations or consequences.

Given that the parliaments specifically require direct disability discrimination to be 'because of'[143] or 'on the ground of'[144] or 'on the basis of'[145] disability, an employer would need to be aware of a claimant's disability to directly discriminate.

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133 Ibid s 5(1). See also Ronalds and Raper (n 127) 39–40.
134 See, eg, *Justice v Department of Human Services (Cth)* [2019] FCCA 2726, 24 [68] (Driver J).
135 See Gaze and Smith (n 117) 126.
136 Ibid. See also *Watts* (n 63) 278 [246] (Mortimer J).
137 *DDA* (n 72) s 5(2); Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009 (Cth) 7 [35]–[39].
138 *DDA* (n 72) ss 4, 11, 21B.
139 *Watts* (n 63) 277 [242] (Mortimer J), citing *Purvis* (n 128) 160–1 [223] (Gummow, Hayne and Heydon JJ).
140 *Watts* (n 63) 277 [242] (Mortimer J).
141 (2014) 222 FCR 220.
142 *Watts* (n 63) 277 [243] (Mortimer J), quoting *Purvis* (n 128) 162 [230] (Gummow, Hayne and Heydon JJ) in which their Honours discussed section 5(1) of the *DDA* (emphasis added).
143 See, eg, *DDA* (n 72) s 5(1); *Equal Opportunity Act 1984* (SA) s 66(a); *Vic EO Act 2010* (n 72) s 8(1).
144 See, eg, *Anti-Discrimination Act 1977* (NSW) s 49B(1)(a).
145 See, eg, *Anti-Discrimination Act 1998* (Tas) s 14(2).

As noted above in this article invisible disabilities are not readily apparent to an onlooker and people with invisible disabilities are reluctant to disclose their invisible disabilities to employers, so in most cases claimants with invisible disability will not be able to rely on direct discrimination provisions. This article will now turn to assess whether claimants with invisible disabilities can seek to rely on indirect discrimination provisions and, if so, whether they face any particular difficulties in seeking to rely on such provisions.

2 Indirect Disability Discrimination

Laws which prohibit indirect discrimination are designed to challenge requirements or conditions that seem neutral, but which disadvantage or have a disproportionate impact on people with disability. Generally speaking, indirect disability discrimination can occur when the following three criteria are satisfied:[146]

1. apparently neutral requirements, conditions or practices are imposed by an employer on all employees within a workplace;[147] but
2. the requirements, conditions or practices disadvantage, or are likely to disadvantage, people with disability (the 'disadvantage test'),[148] *or* they have a disproportionate impact on people with disability in the sense that a substantially higher proportion of persons who do not have that disability can comply with the imposed requirements, conditions or practices (the 'proportionality test') and the employee with disability cannot or would not be able to comply;[149] and
3. the requirements, conditions or practices are not 'reasonable'.[150]

Like the *DDA*, the definition of indirect discrimination in the Victorian and Australian Capital Territory ('ACT') legislation is based on a 'disadvantage test'.[151] Under section 6(1) of the *DDA* the 'disadvantage test' is combined with a 'cannot comply' test which essentially also asks whether a person with disability 'does not or would not comply, or is not able or would not be able to comply, with the requirement or condition' because of disability. In employment cases where a

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146 See further Gaze and Smith (n 117) 119.

147 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ) ('*Waters*').

148 See, eg, *DDA* (n 72) s 6(1); *Discrimination Act 1991* (ACT) s 8(3)–(4); *Vic EO Act 2010* s 9(1).

149 See, eg, *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1); *Equal Opportunity Act 1984* (SA) s 66(b); *Equal Opportunity Act 1984* (WA) s 66A(3).

150 See, eg, *DDA* (n 72) s 6(3); *Discrimination Act 1991* (ACT) s 8(4); *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(c); *Equal Opportunity Act 1984* (SA) s 66(b)(ii); *Vic EO Act 2010* (n 72) s 9(1)(b); *Equal Opportunity Act 1984* (WA) s 66A(3)(b);.

151 See, eg, *Vic EO Act 2010* s 9(1):

> [i]ndirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –
>
> (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
>
> (b) that is not reasonable.

See also *Discrimination Act 1991* (ACT): 'a person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes': at s 8(3). 'However, a condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances': at s 8(4).

person with a disability faces 'serious disadvantage' in complying with a condition or requirement then that person will not be able to comply with the condition or requirement, regardless of whether the employee can 'cope'.[152]

The definition of indirect discrimination in other jurisdictions within Australia (NSW, Queensland, Western Australia and South Australia) is based on the 'proportionality test'[153] (which was used in the *DDA* before the 2009 amendments).[154]

Whilst the definition of 'indirect discrimination' imposes an implicit obligation to provide reasonable adjustments because it permits only 'reasonable' requirements or conditions,[155] the *DDA* explicitly prohibits 'reasonable adjustments' discrimination. Under section 6(2) of the *DDA* indirect discrimination occurs where an employee with disability can comply with a condition or requirement only with

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152 *Sievwright v Victoria* [2012] FCA 118, 52 [184] (Marshall J), citing *Hurst v Queensland* (2006) 151 FCR 562, 585 [134] (Ryan, Finn and Weinberg JJ) (an education case); *Devers v Kindilan Society* (2009) 263 ALR 433, 440 [29] (Marshall J) (an employment case) ('*Devers*'); *Devers v Kindilan Society* (2010) 269 ALR 404, 427 [101] (Ryan, Mansfield and McKerracher JJ) ('*Devers Appeal*'). See also *Devers Appeal* at 410 [22], 426–7 [99]–[101].

153 See, eg, *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b):

> [a] person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of disability if the perpetrator … requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply

Anti-Discrimination Act 1991 (Qld) s 11(1):

> [i]ndirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term –
>
> (a) with which a person with an attribute does not or is not able to comply; and
>
> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable

Equal Opportunity Act 1984 (SA) s 66(b):

> a person discriminates on the ground of disability – …
>
> (b) if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and –
>
> (i) the nature of the requirement is such that a substantially higher proportion of persons who do not have such a disability complies, or is able to comply, with the requirement than of those persons who have such a disability; and
>
> (ii) the requirement is not reasonable in the circumstances of the case

Equal Opportunity Act 1984 (WA) s 66A(3):

> a person … discriminates against another person … on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition –
>
> (a) with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply; and
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

154 See Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009 (Cth) 8.

155 Gaze and Smith (n 117) 126.

'reasonable adjustments' but the employer fails to provide reasonable adjustments and the failure has a disadvantaging effect on people with the disability.

(a) Problems of Application

This article will now assess whether establishing the elements of indirect discrimination poses any problems of application when applied to modern and post-pandemic workplaces. As the reasonableness test can accurately be regarded as a defence to indirect discrimination, an assessment of the reasonableness test can be found further below under the assessment of defences to discrimination.

First, for reasons that will now be explained, the element of whether an employer imposes a requirement, condition or practice seems largely unproblematic. Whilst a requirement, condition or practice must be formulated 'with some precision'[156] they should be 'construed broadly'[157] and they are imposed by a duty bearer where an aggrieved person is required (that is, 'obliged' or 'compelled') to do something.[158] Although in *New South Wales v Amery*[159] this element was interpreted 'very narrowly' by the High Court 'the precedent itself can generally be distinguished on its facts'.[160] As such, it is open to claimants to argue that agile and shared workplace design is a condition, requirement or practice and this appears to pose no real problems of application.

Second, and for reasons that will now be explained, whilst the 'disadvantage' test and the 'proportionality' test in anti-discrimination legislation throughout Australia seem to present no problems of application in modern and post-pandemic workplaces, problems of application can arise from judicial distortions of the definition of indirect discrimination which displace legislative intent.

In *Zoltaszek v Downer EDI Engineering Pty Ltd [No 2]*,[161] the applicant, Mr Zoltaszek, was a technician who claimed that the respondent's failure to give him light duties after the respondent was made aware of his tendonitis was direct and indirect discrimination.[162] In relation to the indirect discrimination claim, Barnes FM concluded that, because the respondent had not been made aware of the applicant's back pain, nothing which the respondent did 'that may be asserted to amount to indirect discrimination could be said to be *on the ground of* any disability consisting of or arising out of the claimed back pain'.[163]

In *Devers v Kindilan Society*[164] (which had not been brought under section 6(2) of the *DDA* because the provision had not commenced at the time of the

156 *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 185 (Dawson J) ('*Banovic*').
157 Ibid.
158 *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 577 [56]–[57] (Drummond J). See further *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 444–5 [159]–[166] (Driver FM).
159 (2006) 230 CLR 174 ('*Amery*').
160 Gaze and Smith (n 117) 120.
161 [2010] FMCA 938. This matter concerned the *DDA* before the 2009 amendments introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).
162 [2010] FMCA 938, 2 [4] (Barnes FM).
163 Ibid 34 [121] (emphasis added).
164 (2009) 263 ALR 433.

alleged actions)[165] the applicant, Jane Devers, was profoundly deaf but when she commenced paid work with the respondent in early September 2003 the respondent 'was not aware that Ms Devers required qualified interpreters or other equipment to perform her duties'.[166] It was not until 12 October 2006 that Ms Devers disclosed to the respondent that she required equipment including flashing lights.[167] Marshall J held that during the period the employer was unaware of Ms Devers' requirements for reasonable adjustments it did not impose a requirement on Ms Devers that she work without the adjustment:[168]

> [B]efore 12 October 2006, Focus did not impose a condition or requirement on Ms Devers that she access her employment without flashing lights as the evidence indicates that Focus was unaware that Ms Devers required the installation of flashing lights and no such request had been made by Ms Devers. No indirect discrimination occurred in respect of this period.[169]

These approaches in the above cases (that employers must have knowledge of an employee's invisible disability or reasonable adjustments request to indirectly discriminate against that employee) are problematic for two main reasons. Firstly, they create barriers and remove many employees with invisible disability from the law's coverage and protection because, as established above in this article, people with invisible disability tend to not tell employers about their disability or reasonable adjustment needs. Second, for reasons that will now be explained, they appear to be judicial distortions of the legislation.

In this author's view, for three reasons that will now follow, it is most consistent with legislative intent that employers can indirectly discriminate against employees even where they have no knowledge of the employee's disability or reasonable adjustments request.

First, extrinsic materials to the *DDA* clarify that a discriminator does not need to have knowledge of a claimant's disability or reasonable adjustments request to indirectly discriminate against that person. For example, section 6 of the *DDA* concerning indirect discrimination was intended to cover 'discrimination which occurs because a condition or requirement is imposed which unfairly impacts on people with disabilities *even if that was not its actual intention*'.[170] According to the explanatory memorandum to the Disability Discrimination Bill 1992 (Cth), where a service provider provides a service on the first floor of a building with stair access only then this may be indirect discrimination against a person with a mobility disability.[171] There is no specified requirement that the service provider have knowledge of the person's mobility impairment.

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165 Australian Human Rights Commission, 'Federal Discrimination Law' (30 June 2016) n 253.

166 *Devers* (n 152) 435 [10] (Marshall J).

167 Ibid 443 [48]–[49] (Marshall J).

168 See Australian Human Rights Commission (n 165) 204; *Devers* (n 152) 443 [51], 446 [68] (Marshall J).

169 *Devers* (n 152) 443 [51] (Marshall J). On appeal, none of the grounds of appeal were upheld. See *Devers Appeal* (n 152) 432 [138]. Special leave to appeal to the High Court of Australia was refused by Heydon and Bell JJ. See *Devers v Kindilan Society* [2011] HCASL 18.

170 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 6 (emphasis added).

171 Ibid.

Second, it is accepted that direct and indirect discrimination are 'mutually exclusive'[172] (that is, a claimant cannot win on both grounds),[173] which is consistent with the text of anti-discrimination legislation in that the indirect discrimination provisions would be left with no work to do if they require the same test as the direct discrimination provisions. By requiring a claimant to show that a respondent had knowledge of a disability or a reasonable adjustments request, a court or tribunal would essentially be asking whether discrimination is 'because of' a claimant's disability. This is the same question that is asked in establishing direct discrimination.

In view of judicial distortions of the clear text of the *DDA*, and the legislative intent underpinning it, it seems prudent for lawmakers to turn their attention to amending the *DDA* and other anti-discrimination legislation. This article will now turn to consider how the test for indirect discrimination in the *DDA*, as well as in other anti-discrimination legislation of the states and territories, can be improved to help ensure a federally consistent approach to establishing indirect discrimination which covers employees with invisible disability.

(b) Proposed Law Reform

A review of the *DDA* and other anti-discrimination legislation in the states and territories reveals that the Victorian anti-discrimination legislation – the *Equal Opportunity Act 2010* (Vic) ('*Vic EO Act 2010*') – contains a unique combination of provisions (sections 9(4) and 10)[174] which permit the courts to apply this legislation to cover employees with invisible disability in certain circumstances. First, section 9(4) of the *Vic EO Act 2010* provides that '[i]n determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination'. Second, section 10 of that Act expressly provides that motive is irrelevant to discrimination.

The below text will now analyse how these provisions were applied in the Victorian case *Ferris v Victoria* ('*Ferris*')[175] to illustrate how they operated to permit an employee with an invisible disability to successfully claim indirect discrimination in circumstances where the employer had no knowledge of the disability. It is contended that this result provides important lessons for federal,

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172 See *Banovic* (n 156) 171 (Brennan J), 184 (Dawson J), cited in *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 253 [13] (Bromberg J) ('*Sklavos*').

173 *Sklavos v Australasian College of Dermatologists* [2016] FCA 179, 65 [164] (Jagot J); *Sklavos* (n 172) 253 [13] (Bromberg J).

174 A similar provision to section 9(4) of the *Vic EO Act 2010* appears in Queensland's anti-discrimination legislation but not in other anti-discrimination legislation. See *Anti-Discrimination Act 1991* (Qld) section 11(3) which states '[i]t is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination'. The Queensland legislation, however, only expressly provides that motive is irrelevant to direct discrimination: see *Anti-Discrimination Act 1991* (Qld) s 10(3). Thus its indirect discrimination provision is missing a provision cognate to section 10 of the *Vic EO Act 2010*. Many other state laws provide that motive is irrelevant to discrimination: see Ronalds and Raper (n 127) 38. However, such a requirement is not explicitly provided in the text of the *DDA*.

175 [2018] VSCA 240.

state, and territory lawmakers (in jurisdictions other than Victoria), to inform reforms to the test for indirect discrimination in the legislation of these jurisdictions.

In *Ferris*, the applicant, Scott Ferris, worked at a low security prison as a store supervisor from May 2009 until July 2014, when he was suspended. In May 2015, his employment was terminated. Mr Ferris claimed that his suspension and termination of employment were due to discrimination based on disability, his type 2 diabetes and cardiomyopathy (conditions which he did not disclose in a pre-existing medical condition form,[176] and he did not tell anyone at work that an increased workload could adversely impact his diabetes).[177] At the Victorian Civil and Administrative Tribunal Harbison J dismissed Mr Ferris's claim for direct discrimination but upheld his claim for indirect discrimination.[178] Mr Ferris not disclosing to his employer or anyone at the prison that his diabetes was becoming 'unmanageable'[179] created difficulties for the direct discrimination claim (given the difficulty of establishing unfavourable treatment due to disability where an employer is unaware of the disability),[180] but it did not create difficulties for the indirect discrimination claim.

Judge Harbison's finding of indirect discrimination[181] stemmed from the fact that Mr Ferris was prevented from managing his diabetes properly due to an increased workload which resulted from an increase in prisoner numbers.[182] Judge Harbison found that the elements of indirect discrimination were made out,[183] namely: (1) that the respondent imposed a condition, requirement or practice that staff 'work unreasonably long hours', as implied from the surrounding circumstances;[184] (2) people with diabetes 'may be disadvantaged by a requirement to work unreasonably long hours in that the condition of diabetes is prone to become unstable in conditions of stress and exhaustion, where a sufferer is unable to eat appropriate foods, exercise adequately, or take appropriate medication';[185] and (3) the hours were unreasonable.[186] Importantly, Judge Harbison reasoned that, unlike direct discrimination claims, in indirect discrimination claims an applicant 'does

176 Ibid 1 [1], 7 [16] (Tate AP, Niall and Hargrave JJA).
177 Ibid 6 [14]–[15], 7 [17].
178 Ibid 1 [2].
179 *Ferris* (n 129) [53] (Harbison J).
180 Ibid [49].
181 No compensation was awarded for the indirect discrimination (on the basis that the suspension and termination were not a consequence of the indirect discrimination). See ibid [2], [104].
182 *Ferris Appeal* (n 129) 1 [2] (Tate AP, Niall and Hargrave JJA).
183 *Ferris* (n 129) [101].
184 Ibid [88].
185 Ibid [90].
186 Ibid [98]. Whilst the employer 'had procedures in place to deal with the impact of its working conditions on disabilities such as diabetes' it 'did not follow up' on the fact that Mr Ferris had left the relevant part of the declaration form blank, thus it did not have the opportunity to make use of these procedures 'to avoid the discriminatory effect': *Ferris* (n 129) [100] (Harbison J). The Victorian Parliament envisaged that the purpose of section 9 of the *Vic EO Act 2010* (which prohibits indirect discrimination) would be 'not so much' about 'discriminatory behaviour' but rather it would be concerned with the 'discriminatory effect' of policies and practices: see Explanatory Memorandum, Equal Opportunity Bill 1995 (Vic) 2; Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 13.

not have to prove that the respondent was aware of the applicant's disability'.[187] For her Honour, sections 9(4) and 10 of the *Vic EO Act 2010* 'relieve an applicant from the responsibility of being required to prove what was in the mind of the person who imposed an unlawful requirement, or whether the person knew that unlawful discrimination would result from the requirement'.[188] Mr Ferris appealed the dismissal of his direct discrimination claim and the Victorian Court of Appeal, consisting of Tate AP, Niall and Hargrave JJA, dismissed the appeal and found no legal error in Judge Harbison's reasoning.[189]

The result in *Ferris* demonstrates that the Victorian anti-discrimination legislation may be a useful model on which to inform changes to the test for indirect discrimination in other Australian jurisdictions. To address and prevent judicial distortions of indirect discrimination provisions moving forward (as has occurred with the *DDA*, discussed above), the *DDA* as well as anti-discrimination legislation in states other than Victoria could be amended to replicate the combined effect of sections 9(4) and 10 of the *Vic EO Act 2010*. This would not only help the courts to interpret the Acts more consistently, but it would also have the important practical effect of ensuring that claimants with invisible disability are at least covered by the laws' protection and not excluded from making claims simply because their disabilities are hidden or invisible.

The decision in *Ferris*, buttressed by sections 9(4) and 10 of the *Vic EO Act 2010*, signals that employees with invisible disability can be successful in claims of indirect discrimination in certain circumstances, but in *Ferris* the defences to discrimination were not tested. In *Ferris* it was uncontroversial that the condition imposed on Mr Ferris (that is, the long hours which he was required to work) was unreasonable. When the defences to discrimination are in controversy and engaged, however, various problems of application arise for reasons that will now be explained. As the analysis of the law below will show, defences to discrimination (which are found in the *DDA*, the *FW Act* and anti-discrimination legislation of states including Victoria) are perhaps the most problematic features of the legislative schemes.

This article will now provide an overview of the defences to discrimination and explain how they pose problems of application in modern and post-pandemic workplace contexts, to defeat or silence the claims of claimants with invisible disability.

C The Defences to Discrimination in the *FW Act* and Anti-Discrimination Legislation: Problems of Application

Anti-discrimination legislation provides duty holders, such as employers, with three main defences which they can rely upon if they are alleged to have engaged in unlawful indirect disability discrimination: (1) the 'reasonableness' test; (2) the 'inherent requirements' defence; and (3) the 'unjustifiable hardships' defence. The

187 *Ferris* (n 129) [86]–[87].
188 Ibid.
189 *Ferris Appeal* (n 129) 7–8 [21], 10 [26], 14 [35]–[36].

'inherent requirements' defence is also available under the *FW Act*, and employers can seek to rely on this defence in claims of adverse action based on disability. These defences (or safeguards) serve as a counterweight which balance against the requirements not to discriminate, and it is important that an appropriate balance is maintained.[190]

This article will now explain each of these defences and how they seek to balance various interests such as those of complainants (such as employees) on the one hand, and, duty holders (such as employers) on the other. It will, however, now be argued that whilst the defences to discrimination were designed to strike balance between the interests of employers and employees, changes to workplace design brought about organically by technology and forcibly by the COVID-19 pandemic significantly disrupt this balance to skew the legal tests to substantially favour employers.

1 The 'Reasonableness' Test: An Overview

Where an employer imposes a condition or requirement which is 'reasonable', under the *DDA* and the equal opportunity legislation of the states and the ACT, it will not indirectly discriminate even if the 'disadvantage test' (in the case of the *DDA*, Victorian and ACT legislation) or the 'proportionality test' (in the case of legislation of the other states) can be satisfied.[191] As such, the test can be viewed as a defence which an employer may seek to rely upon in claims of indirect discrimination. In employment contexts the burden of proving that such a condition or requirement is 'reasonable' would fall on the employer.[192]

The test of 'reasonableness' has been interpreted to be an objective test which is more demanding than 'convenience' but less demanding than 'necessity'.[193] To determine whether a condition or requirement is 'reasonable' requires consideration of the circumstances of the case.[194] The circumstances of the case appear to be considered to achieve a balance between the rights of alleged discriminators on the one hand, and complainants on the other. In *Waters v Public Transport Corporation*[195] the High Court approved the position that the reasonableness test is a 'balancing test' which involves 'a balancing between the interests of the complainant and

190 See, eg, Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report No 30, 30 April 2004) vol 1 xxxviii–xxxix ('*Review of the Disability Discrimination Act 1992*').

191 *DDA* (n 72) s 6(3); *Discrimination Act 1991* (ACT) s 8(4); *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(c); *Equal Opportunity Act* 1984 (SA) s 66(b)(ii); *Vic EO Act 2010* (n 72) s 9(1)(b), (2), (3); *Equal Opportunity Act 1984* (WA) s 66A(3)(b).

192 See *DDA* (n 72) section 6(4) which states 'the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition'.

193 See *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J) ('*Styles*'); *Waters* (n 147) 395–6 (Dawson and Toohey JJ).

194 See, eg, *DDA* (n 72) s 6(3); *Discrimination Act 1991* (ACT) s 8(4); *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(2); *Equal Opportunity Act 1984* (SA) s 66(b)(ii); *Vic EO Act 2010* (n 72) s 9(3); *Equal Opportunity Act 1984* (WA) s 66A(3)(b).

195 (1991) 173 CLR 349.

those of the respondent'.[196] Justice Brennan referred in particular to the need to strike a fair balance between an alleged discriminator's legal freedom to impose conditions or requirements and the interests of a complainant by considering all the circumstances of the case.[197] Determining whether a condition or requirement is 'reasonable' requires the courts to weigh up the discriminatory effect of the condition or requirement on the one hand against reasons in favour of the condition or requirement on the other.[198]

The *DDA* does not provide guidance as to what factors are relevant to determining whether a condition or requirement is 'reasonable', but based on case law some relevant factors in workplace contexts would include:

- *Discriminatory effect* – that is, the nature and extent of the discriminatory effect of a requirement or condition;[199]
- *Personal impact* – that is, the personal impact which a requirement or condition has on a complainant;[200]
- *Appropriateness* – that is, whether imposing the requirement or condition is appropriate to performing a job and whether the job can be performed without imposing the requirement or condition;[201]
- *Efficacy* – that is, the '[e]ffectiveness, efficiency and convenience in performing the activity or completing the transaction';[202]
- *Cost* – that is, the cost of alternative requirements or conditions or of not imposing the discriminatory requirement or condition,[203] or the cost of accommodations;[204]
- *Financial situation* – that is, the financial situation or position of an employer;[205]
- *Alternatives* – that is, whether alternative methods are available which would achieve an employer's objectives 'but in a less discriminatory way';[206]
- *Workforce stability* – that is, 'the maintenance of a stable workforce';[207]

196 Stella Tarrant, 'Reasonableness in the *Sex Discrimination Act*: No Package Deals' (2000) 19(1) *University of Tasmania Law Review* 38, 42.

197 *Waters* (n 147) 379.

198 *Catholic Education Office v Clarke* (2004) 138 FCR 121, 145 [115] (Sackville and Stone JJ), citing *Styles* (n 193) 263 (Bowen CJ and Gummow J) and *Waters* (n 147) 395–6 (Dawson and Toohey JJ) 383 (Deane J); *Nojin v Commonwealth* (2012) 208 FCR 1, 72 [247] (Katzmann J).

199 See *Styles* (n 193) 263 (Bowen CJ and Gummow J), in which the court considered a claim of discrimination under the *Sex Discrimination Act 1984* (Cth).

200 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J).

201 *Waters* (n 147) 378 (Brennan J), in which the court considered a complaint of disability discrimination under the *Equal Opportunity Act 1984* (Vic) and determined whether a requirement or condition is 'not reasonable' for the purposes of section 17(5)(c) of the Act.

202 *Waters* (n 147) 378 (Brennan J).

203 Ibid.

204 Ibid 395 (Dawson and Toohey JJ); Gaze and Smith (n 117) 124.

205 *Waters* (n 147) 395, 396, 398 (Dawson and Toohey JJ), 410 (McHugh J); Gaze and Smith (n 117) 124.

206 *Waters* (n 147) 395 (Dawson and Toohey JJ).

207 *Banovic* (n 156) 181 (Deane and Gaudron JJ).

- *Industrial context* – that is, the 'provisions of an award'[208] or enterprise agreement, maintaining 'good industrial relations' and observing 'health and safety requirements'.[209]

Unlike the *DDA*, anti-discrimination legislation in Victoria, Queensland and the ACT conveniently contains a list of some similar factors that may be taken into account in determining 'reasonableness'. These factors include:

- the *disadvantaging effect* of the condition, requirement or practice[210] such as the nature and extent of the disadvantage resulting from their imposition[211] or the consequences of failing to comply with them;[212]
- whether the disadvantage is *proportionate* to achieving the result which an employer seeks from imposing the condition, requirement or practice;[213]
- the *cost* of alternative requirements, conditions or practices[214] or working arrangements,[215] or 'the feasibility of overcoming or mitigating the disadvantage';[216]
- the *financial circumstances* of the employer;[217]
- whether *reasonable adjustments* can be made to the condition, requirement or practice to reduce disadvantage but still achieve the result sought by the employer.[218]

As such, the courts can take into account a multitude of competing factors to help determine whether a condition, requirement or practice is 'reasonable'.

(a) A Critique of the 'Reasonableness' Defence

As explained above, the courts can take into account a multitude of competing factors in determining whether a condition, requirement or practice, although disadvantaging people with disability, is 'reasonable' and thus not unlawful. Whilst determining 'reasonableness' requires consideration of the circumstances of the case, thus suggesting flexibility of application, the courts would still refer to and apply these competing factors in assessing the circumstances of the case. The difficulty is that, as workplaces shift and evolve to adopt hybrid and shared working models, these factors apply to favour employers and, for reasons that will be explained, they have little to no independent value as criteria.

Modern and post-pandemic workplace design directly manipulates the factors that go to 'reasonableness' in ways that were not possible in more traditional workplaces, which dominated workplaces when the factors were crafted in the early and mid-1990s by justices of the High Court and Federal Court. Firstly,

208 *Amery* (n 159) 184–5 [22] (Gleeson CJ).
209 *Waters* (n 147) 395 (Dawson and Toohey JJ); Gaze and Smith (n 117) 124.
210 See *Discrimination Act 1991* (ACT) s 8(5)(a).
211 *Vic EO Act 2010* (n 72) s 9(3)(a).
212 See *Anti-Discrimination Act 1991* (Qld) s 11(2)(a).
213 *Discrimination Act 1991* (ACT) s 8(5)(c); *Vic EO Act 2010* (n 72) s 9(3)(b).
214 *Vic EO Act 2010* (n 72) s 9(3)(c).
215 *Anti-Discrimination Act 1991* (Qld) s 11(2)(b).
216 See *Discrimination Act 1991* (ACT) s 8(5)(b).
217 *Anti-Discrimination Act 1991* (Qld) s 11(2)(c); *Vic EO Act 2010* (n 72) s 9(3)(d).
218 *Vic EO Act 2010* (n 72) s 9(3)(e).

modern and post-pandemic workplace design by its very nature increases the cost and burden of accommodating employees with disability. This increase in cost arises because, in hybrid and shared workplace settings, reasonable adjustments will often need to be fitted to a fixed desk which imposes more costs on employers than would otherwise be imposed in traditional fixed-desk environments. Secondly, hybrid and shared working arrangements create efficiencies, reduce an employer's real estate footprint and premises costs, and thus have potential to create substantial cost savings. Thirdly, the economic fallout from dealing with COVID-19 creates financial justifications or incentives for employers to use hybrid and shared working, and seek these cost savings. It follows that in 2021 and beyond, due to the ongoing impact of business closures and reduced revenues in 2020 and 2021, the financial situation of many employers will call for cost savings which hybrid working and shared working arrangements provide. Fourthly, modern and post-pandemic workplace design which makes use of hybrid and shared working is now on the verge of normalisation and it is also influencing the terminology of enterprise agreements which, as explained above, provide for mobility payments to reward employees for new ways of working.

The factors which the courts take into account in determining 'reasonableness' were mostly developed by judges of the High Court and the Federal Court in the 1990s. Some three decades later, workplace design has changed significantly and, as just explained, this design can manipulate the way these factors apply in ways that may not have been envisioned. Factors which point to hybrid and fluid working being 'reasonable' – such as efficacy, their cost savings, the financial situation of employers during and post-pandemic, and industrial context which normalises this type of work (which is evident in the way enterprise agreements are now being drafted, for example) – invariably tilt to favour employers. They no longer serve much purpose as independent criteria which might go either way depending on the facts of a case. Additionally, the other factors which point to such design being 'unreasonable' – such as the discriminatory effect of a condition or requirement, or its disadvantaging or personal impact on claimants with invisible disability – have never been easily measurable given the hidden nature of invisible disability and the tendency for such disability to be concealed from employers. As a result, in modern and post-pandemic workplace contexts, where it is relied upon the defence will usually apply to protect employers regardless of the factual matrix or what happens in a case.

This also particularly disproportionately impacts employees with invisible disability who are not only in precarious employment but also in stable contracts or ongoing positions. Whilst shared workplaces (including hot-desks) allow employers to casualise or create fluid workforces on a scale that cannot otherwise be achieved, the cost of creating accommodations for casuals or part-time workers, or full-time workers who float in and out of the office under hybrid arrangements, may not be justified when weighing up costs of the accommodation with time the employees spend at work.[219] Therefore, whilst shared working arrangements permit

219 See, eg, *Devers Appeal* (n 152) 411 [30]–[31] (Ryan, Mansfield and McKerracher JJ), citing *Devers* (n 152) 453 [105] (Marshall J). In *Devers*, the Federal Court of Australia held that because a deaf casual

greater casualisation, part-time work, and worker fluidity they also make it more difficult for workers with disability to justify adjustments because of the limited time they will spend at work as a result of these arrangements. This reinforces that the reasonableness defence overwhelmingly favours employers, because the way workplaces will be, and are being, designed creates this result.

2 The 'Unjustifiable Hardship' Defence: An Overview

Under the *DDA*, where creating adjustments would impose on an employer an unjustifiable hardship, discrimination will *not* be unlawful.[220] Determining the availability of the 'unjustifiable hardship' defence, like the reasonableness test, requires consideration of *all* the relevant circumstances of the case. For example, pursuant to section 11 of the *DDA*, relevant circumstances include:

> (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
>
> (b) the effect of the disability of any person concerned;
>
> (c) the financial circumstances, and the estimated amount of expenditure required …
>
> (d) the availability of financial and other assistance …

As McHugh and Kirby JJ explained in *Purvis v New South Wales* ('*Purvis*'),[221] the *DDA* therefore 'provides for a balance to be struck' between the rights of different stakeholders (as *Purvis* was an education case, these stakeholders were the child with disability, other students and teachers).[222] In employment cases, balancing the interests of employers and employees has required consideration of relevant factors such as the costs of adjustments on an employer, their impact on business practice and clients, and the resources and size of the employer.[223]

(a) A Critique of the 'Unjustifiable Hardship' Defence

The unjustifiable hardship defence seeks to balance the interests of stakeholders, but in new workplace settings this balancing act also overwhelmingly favours employers, for reasons that will now be explained.

Modern and post-pandemic workplace design directly increases the cost, burden and disruptiveness of accommodating employees with disability for various

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employee worked few hours, and minutes as well as colleagues could convey information, the cost of having a qualified Auslan interpreter was not justified so the condition to not have an interpreter was reasonable: at 453 [105]. One issue in *Devers Appeal* was the difficulty faced by the worker in proving that the employer's failure to provide an interpreter was 'unreasonable' (which she had the onus of proving), and, perhaps unsurprisingly, she 'produced no evidence of the respondent's financial position, budget or otherwise, at the hearing': at 410 [26]. Since *Devers Appeal*, the onus of proof to show that a condition is reasonable has shifted away from people with disability (such as employees) to people who require compliance with a requirement or condition (such as employers), so a claimant would not face the same difficulties as the claimant did in *Devers Appeal*: *DDA* (n 72) s 6(4).

220 See, eg, *DDA* (n 72) ss 4 (definition of 'unjustifiable hardship'), 11, 21B.

221 (2003) 217 CLR 92.

222 *Purvis* (n 128) 123 [93]–[94] (McHugh and Kirby JJ).

223 See, eg, *Tropoulos v Journey Lawyers Pty Ltd* (2019) 287 IR 363, 432–7 [171]–[190] (Collier J) ('*Tropoulos*').

reasons. Given that in shared workplace settings adaptive equipment would need to be installed to a fixed desk, making accommodations has added costs that would not be incurred in traditional workplace settings and because it involves putting shared desks out of commission, it has capacity to reduce cost saving goals of using these types of desks.

Making accommodations would also be disruptive to overall shared workplace design and have potential to adversely impact other employees, who may rely on the availability of shared desks. In relation to the 'unjustifiable hardships' defence it might specifically be asked whether the detriments of an adjustment outweighs its benefits to *anyone* concerned. In light of the COVID-19 pandemic, there are a host of benefits associated with hybrid and fluid working such as work flexibility and mental health benefits (because employees may feel less isolated than if they exclusively work from home), so in this context the collective benefits of these requirements may outweigh their discriminatory effect on a percentage of the workforce with invisible disability.

Making hybrid and fluid workplaces more accessible for people with invisible disability also, as just noted, requires some disruption to the status quo of workplace design. That is, a person with vision impairment may require a fixed-desk on which to install adaptive equipment but this will cause detriment to other employees who may have otherwise shared that desk or used it as part of ABW. Due to hybrid and shared workplace design, for reasons just explained, requests for adjustments now have heightened disruptiveness not only to employers but also to colleagues, which may engage the 'unjustifiable hardships' defence in ways that were not possible in traditional workplaces.

3 The 'Inherent Requirements' Defence: An Overview

Under the *DDA*, where a person with a disability cannot perform the 'inherent requirements' of 'particular work'[224] discrimination against that person will *not* be unlawful. Under the *DDA* the 'inherent requirements' defence is only available in relation to determining 'who should be offered promotion or transfer', terms or conditions of employment, or the dismissal of an employee.[225] State and territory anti-discrimination legislation also contains inherent (or essential) requirements defences and unjustifiable hardship defences.[226]

The *FW Act* contains an inherent requirements defence but it is a little different to the defence in the *DDA*, because under the *FW Act* it is a defence if the employer can establish that the 'adverse action' is 'taken because of the inherent requirements of the particular position concerned'.[227]

A requirement is an 'inherent requirement' where it is essential to a position[228] and '[a] practical method of determining whether or not a requirement is an

224 See, eg, *DDA* (n 72) s 21A.
225 Ibid s 21A(4).
226 See, eg, *Discrimination Act 1991* (ACT) s 49(1); *Anti-Discrimination Act 1977* (NSW) s 49D(4).
227 *FW Act* (n 73) s 351(2)(b).
228 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 294–5 [34] (Gaudron J), 305 [74] (McHugh J), 318 [114] (Gummow J), 340 [164] (Kirby J) ('*Christie*').

inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with'.[229] This requires consideration of not only the skills or tasks of a position, but also its context and how it fits into organisational needs.[230] For example, as noted by Gaudron J in *Qantas Airways Ltd v Christie* ('*Christie*'),[231] identifying the inherent requirements of an international airline pilot's position purely as the characteristic tasks or skills of being a pilot overlooks the position's international character.[232] In *X v Commonwealth*[233] McHugh J said that:

> What is an inherent requirement of a particular employment will usually depend upon the way in which the employer has arranged its business. In *Christie*, Brennan CJ said:
>
> > The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.
>
> Unless the employer's undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment.[234]

Whilst the fact that a requirement is stipulated in an employment contract does not 'of itself, direct an answer one way or another as to the question whether it is an inherent requirement of the particular position in question',[235] the terms of such contracts, the nature of a business and the manner of the business organisation can be relevant factors in determining whether a requirement is inherent to a position. Where a person with disability cannot do a particular job, the 'inherent requirements' defence operates to stop the person alleging that an employer discriminated against them by not giving them that job.[236] The defence, in shielding employers from such claims, balances the interests of employers and employees by ensuring that employers can legitimately discriminate against a person with a disability who cannot perform the job in question.[237]

(a) A Critique of the 'Inherent Requirements' Defence

Workplace design can now shape and mold the functions of a job in ways that were not possible before hybrid and agile working. That is, the functions of

229 Ibid 295 [36] (Gaudron J).
230 See, eg, *Tropoulos* (n 223) 465–9 [286]–[306] (Collier J).
231 *Christie* (n 228).
232 *Christie* (n 228) 294 [33] (Gaudron J).
233 (1999) 200 CLR 177.
234 Ibid 189–90 [36]–[37] (McHugh J) (citation omitted).
235 *Christie* (n 228) 295 [37] (Gaudron J).
236 See, eg, Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 10.
237 For example, the inherent requirements defence is a safeguard which balances the requirements under the *DDA*. See, eg, *Review of the Disability Discrimination Act 1992* (n 190) 203.

a job may become so intertwined with or reliant on the setting in which the job is performed that the ability to work fluidly or use hot-desks and ABW environments may be associated with the ability to perform that job. For example, agile working experience and ability appears to be an essential requirement in some job advertisements,[238] some consulting jobs may require an employee to sit in hot-desks or spare desks[239] and employees of the Australian Taxation Office ('ATO') who regularly engage in field work may be required to use a hot-desk[240] (though hot-desking arrangements may also be imposed on other employees of the ATO).[241] The fact that job advertisements now promote 'agile working' and that buildings are now designed for 'agile working'[242] lends support for the view that the physical ability to work fluidly is viewed to be essential to certain roles. Disability may therefore now be perceived as a barrier to performing certain roles in shared, fluid or hybrid workplaces that could have previously been performed in traditional fixed-office environments without issue by people with disability.

This has implications for the application of the 'inherent requirements' defence. As noted above, factors determinative of whether something is 'inherent' to a job include not only the skills and tasks required by the position itself but also the context of the position and the way a business is organised. Therefore, what is 'inherent' to a job can be informed not only by the job itself but also by the setting in which the job is performed. Traditionally, workplace design had little to no impact on the functions of a position because such design was largely fixed and uniform. For example, a person's work functions were not shaped by their seating arrangements. In modern workplaces, however, and as just explained, agile or shared workplace design shapes the functions of various jobs. Due to changes in workplace design, employers now shape what is essential to a job not from the job itself but from the setting in which it is performed, which opens up the possibility for the 'inherent requirements' defence to be used to legitimise ableism against job candidates or employees who do not have the ability to work fluidly. This may lead to situations where employers vehemently rely on the defence during negotiations and litigation because they believe or argue it applies and that it justifies their

238 See, eg, 'Project Manager/Scrum Master', *Seek.com.au* (Job Advertisement) <https://web.archive.org/web/20220317234911/https://www.seek.com.au/job/56282983?type=promoted>; 'Business Analyst', *Indeed* (Job Advertisement) <https://web.archive.org/web/20220318002516/https://au.indeed.com/viewjob?jk=65276d4311c7856c&tk=1fud65kd7mar4801&from=serp&vjs=3>; 'Business Analyst: Associate', *Indeed* (Job Advertisement) <https://web.archive.org/web/20220318003547/https://au.indeed.com/viewjob?jk=42b799bf40d3b9d0&tk=1fud727kbmapq801&from=serp&vjs=3>.

239 See, eg, *Truffet v Workers' Compensation Regulator* (n 66) 20 [111] (Knight IC).

240 See, eg, 'ATO Enterprise Agreement 2017' (Enterprise Agreement, 2017) cl 87.4.

241 See *Australian Municipal, Administrative, Clerical and Services Union v Commonwealth* (n 16) (2018) 252–3 [3], 259 [31], 262 [41] (Ross P, Beaumont DP and Saunders C).

242 See, eg, 'Director Management Development', *Adzuna* (Job Advertisement) <https://web.archive.org/web/20220318005856/https://webcache.googleusercontent.com/search?q=cache%3ANrcC7k6F4vAJ%3Ahttps%3A%2F%2Fwww.adzuna.com.au%2Fdetails%2F2941168970+&cd=13&hl=en&ct=clnk&gl=au>. The job advertisement relevantly states: 'The role is based at … a brand new, purpose-built campus that is well serviced by public transport. The building offers activity-based working with agile and flexible workspaces and the latest in technology, modern end-of-trip facilities, secure bicycle storage.'

practices. Unfortunately, employers have gone so far as to drag out what seems to be unjustified reliance on the inherent requirements defence all the way to trial – in one recent case an employer maintained the strong position that an employee could not perform the inherent requirements of employment to justify an employment decision (termination of employment) despite 'the preponderance of medical advice' suggesting the contrary.[243]

4 The Defences to Discrimination: Proposed Law Reform and Future Research

Whilst the available defences to discrimination in both anti-discrimination legislation and the *FW Act* (explained above) were intended to balance the interests of employers and employees, for reasons discussed above that balance is significantly disrupted by modern and post-pandemic workplace design. As a result, the defences to discrimination now heavily favour employers.

This has capacity for various ills. Quite paradoxically, the defences can be used to legitimise ableism against employees with invisible disability because requirements which disadvantage such employees can be easily justified under the guise of the available defences to discrimination. As such, despite their disadvantaging effects on employees with invisible disability, employers may rely on the defences to discrimination to conclude that there are genuine reasons for maintaining certain workplace requirements, such as hybrid or shared workplace design. This has compounding effects. Because the defences to discrimination can be used to legitimise ableism they can also deter meritorious claims of discrimination, mount even more pressure on employees to conceal their invisible disability and dissuade them from requesting reasonable adjustments for such disabilities.

The defences to discrimination therefore require revision and modernisation to prevent these ills and ensure the rights of employees with invisible disability are not trampled on simply because lawmakers are not yet aware of ways to properly address the inequalities which they face. The question of reform will, however, be very complicated. Given that the defences seek to balance the interests of employees and employers, any reform will disturb the balancing act which the courts and the legislatures sought to achieve. Determining how best to reform the law will require more than conceptual analysis or the use of doctrinal methodology. Rather, it will require empirical research that is beyond the scope of this article. This may involve surveys of, and consultation with, stakeholders (such as employers, unions, employees, etc) to obtain sufficient data to inform what reforms to the defences to discrimination could result in re-alignment of the interests of employers and employees. In this author's view, the courts cannot, and should not, be relied upon to develop the jurisprudence because it will require upsetting High Court authority and re-writing legislation, which is a task for a parliament.

243 See *Daccache v BOC Limited* [2020] FCA 485, 2 [9], 8 [32] (McKerracher J).

5 Proactive Measures: Practicalities of Hybrid Workplace Design and Updating the Legislative Framework

This article will now contend, however, that certain proactive measures may not only address the disadvantaging effect of hybrid workplace design on employees with invisible disability, but also help reduce reliance on the complaints-based system and circumvent many of the problems posed by the defences to discrimination. In relation to disability discrimination, the current legislative framework contains vaguely worded and generic proactive measures, examples of which include positive duties imposed by the *Vic EO Act 2010*[244] or the *DDA* allowing employers to take ad hoc special measures[245] or develop 'entirely voluntary'[246] disability action plans which have generic criteria.[247] For reasons that will now be explained, the legislative framework could be updated to introduce more specific, targeted and measurable proactive measures to help achieve the aims of disability discrimination law.[248]

Governments have focused attention on establishing agencies to improve gender equality in workplaces, such as the Commonwealth's Workplace Gender Equality Agency ('WGEA') established by the *Workplace Gender Equality Act 2012* (Cth) ('*WGE Act*'),[249] and, the Victorian Public Sector Gender Equality Commissioner ('VPSGE Commissioner') established under the *Gender Equality Act 2020* (Vic) ('*GE Act*')[250] which commenced on 31 March 2021.[251] The WGEA's key function is to improve gender equality in workplaces[252] whilst the VPSGE Commissioner's function is to promote gender equality in defined entities (the public sector, as well as in universities and local councils with 50 or more employees).[253]

Under the *WGE Act*, large employers with 500 or more employees are required to meet minimum standards by having a policy or strategy in place to support one or more gender equality indicators,[254] the objective of one of which is flexible working arrangements for employees with caring responsibilities.[255] Employers have

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244 See, eg, *Vic EO Act 2010* (n 72) s 15. These duties are, in theory, designed to get duty holders (such as employers) to think proactively about compliance obligations. See Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 17.

245 *DDA* (n 72) s 45.

246 Ibid pt 3; Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 20.

247 *DDA* (n 72) ss 61, 62.

248 In *Purvis* (n 128) McHugh and Kirby JJ noted that removing barriers or 'handicaps' which people with disabilities face in their 'social environment' is an aim of disability discrimination legislation. See *Purvis* (n 128) 119 [78]–[79] (McHugh and Kirby JJ).

249 *Workplace Gender Equality Act 2012* (Cth) s 8A ('*WGE Act*').

250 *Gender Equality Act 2020* (Vic) s 28, pt 7 ('*GE Act*').

251 Ibid s 2.

252 *WGE Act* (n 249) s 10.

253 *GE Act* (n 250) ss 4, 5, 36.

254 On gender equality indicators, see *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2013 (No 1)* (Cth).

255 *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth), made under subsection 19(1) of the *WGE Act* (n 249). Non-public sector employers with 100 or more employees also have reporting requirements under the *WGE Act*. See *WGE Act* (n 249) ss 3(1) (definition of 'relevant employer'), 13;

incentives to comply[256] and there are penalties for non-compliance[257] with the *WGE Act*. Under the *GE Act*, defined entities must promote gender equality in various ways.[258] This includes undertaking gender impact assessments when developing or reviewing policy that has a 'direct and significant impact' on the public, which involves assessing the policy's effects on people of different genders and stating how it will be developed or changed to meet the needs of people of different genders, address gender inequality and promote gender equality.[259] Defined entities must submit a progress report every two years after submitting an initial Gender Equality Action Plan,[260] and failure to do so may result in certain action.[261]

Government could introduce a new disability focused agency modelled on the WGEA and the VPSGE Commissioner, but which has the goal of addressing barriers faced by employees with disability.[262] This could include requiring large employers to report on the results of disability impact assessments of workplace policy and the extent to which policy supports specific disability equality indicators. Such disability impact assessments would likely reveal the disadvantaging effect of hybrid and agile working policy on employees with invisible disability,[263] thus engaging the need to reassess and redesign this policy to support disability equality indicators. One such disability equality indicator could include promoting 'person-environment fit' in workplaces. This reflects the World Health Organization's International Classification of Functioning, Disability and Health ('ICF'),[264] which is a new conceptual framework for understanding disability as the dynamic

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'Reporting', *Workplace Gender Equality Agency* (Web Page) <https://www.wgea.gov.au/what-we-do/reporting>.

256 For example, compliant employers could be listed as an employer of choice. See 'EOCGE Citation Holders', *Workplace Gender Equality Agency* (Web Page) <https://www.wgea.gov.au/what-we-do/employer-of-choice-for-gender-equality/current-eocge-citation-holders>.

257 For example, non-compliant employers could be ineligible for government contracts and other financial assistance, and they may also be named on the agency website or in a newspaper. See, eg, *WGE Act* (n 249) ss 18, 19D; 'Non-Compliant Organisations List', *Workplace Gender Equality Agency* (Web Page, 7 October 2021) <https://www.wgea.gov.au/what-we-do/compliance-reporting/non-compliant-list>.

258 See 'What You Need to Do to Comply with the *Gender Equality Act*', *Commission for Gender Equality in the Public Sector* (Web Page, 13 January 2022) <https://www.genderequalitycommission.vic.gov.au/what-you-need-to-do-to-comply>.

259 *GE Act* (n 250) s 9. Under section 9(c) defined entities must also take into account the intersectional nature of gender inequality, if practicable.

260 Ibid s 19. On Gender Equality Action Plans, see also ibid pt 4 div 1. The first Gender Equality Action Plans were due by 31 March 2022. See 'What You Need to Do to Comply with the *Gender Equality Act*' (n 58).

261 See *GE Act* (n 250) s 26. This action can include the entity being named on the VPSGE Commissioner's website if the entity does not comply with a compliance notice: at s 26(c).

262 The Commonwealth could rely on the same constitutional powers which it relied upon to create the Workplace Gender Equality Agency, specifically those powers in section 51(xi) of the *Commonwealth Constitution* relating to census and statistics. See *WGE Act* (n 249) s 5; Explanatory Memorandum, Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth) 17.

263 See Part III of this article.

264 See 'International Classification of Functioning, Disability and Health', *World Health Organisation* (Web Page) <https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health>; *International Classification of Functioning, Disability and Health*, WHA Res 54.21, 54th sess, 9th plen mtg, Agenda Item 13.9, WHO Doc A54/VR/9 (22 May 2001).

interaction between health conditions and contextual factors.[265] The ICF emphasises that employees are only impaired or disadvantaged from medical conditions where they are required to work in environments which do not 'fit' with their conditions.[266]

'Person-environment fit' can be enhanced in two ways. One option is for employers to universally design workplaces so that workstations are made accessible for a range of disabilities.[267] A second option involves the development of workplace policy which gives employees the choice to work either fluidly (for example, 60% at the office and 40% at home), 100% in the office, or 100% at home. For reasons which will now be explained, the second of these options is likely to be the most viable and effective option moving forward into a post-pandemic world.

In March 2021, policy which allows employees to choose whether they wish to work fluidly or 100% at the office was announced by the Victorian Public Service ('VPS')[268] and Australia and New Zealand Banking Group ('ANZ').[269] Later in 2021, large employers also announced 'work from anywhere' policies, under which employees can choose the place and hours of their work (subject to business needs or client demands). 'Work from anywhere' policies have recently been announced by Deloitte[270] and KPMG.[271] The adoption of these policies by the VPS, ANZ, Deloitte and KPMG demonstrates that they may be a viable option for many other large employers as well. Allowing employees to choose where they work, thus giving them a choice between hybrid working or a fixed desk, can

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265 See World Health Organization, *World Report on Disability* (Report, 2011) 3–4.

266 See Katharina Vornholt et al, 'Disability and Employment: Overview and Highlights' (2018) 27(1) *European Journal of Work and Organizational Psychology* 40, 42 <https://doi.org/10.1080/1359432X.2017.1387536>. See also Andrew Martel et al, 'Beyond the Pandemic: The Role of the Built Environment in Supporting People with Disabilities Work Life' (2021) 15(1) *International Journal of Architectural Research* 98, 104.

267 See, eg, IncludeAbility, 'Creating an Accessible and Inclusive Workplace' (Guide, Australian Human Rights Commission, 2021) 2, 9.

268 Under a new flexible working policy launched in March 2021, the Victorian Public Service has the default position that employees are expected to attend the office at least three days per week. See Victorian Secretaries' Board, 'Supporting Victoria's Recovery: Default Remote Working Position for Office-Based Employees' (Guidance Note 1, Victorian Public Sector Commission, 23 March 2021); 'Flexible Work Policy and Resources', *Victorian Public Sector Commission* (Web Page, 21 April 2021) <https://vpsc.vic.gov.au/resources/flexible-work-policy-and-resources/>. See also Ashleigh McMillan, 'Public Servants to Head Back to the Office as Victoria Sheds Active Cases of COVID-19', *The Age* (online, 23 March 2021) <https://www.theage.com.au/national/victoria/no-active-cases-of-covid-19-left-in-victoria-after-another-zero-day-20210323-p57d4i.html>.

269 In a media article published in March 2021, Australia and New Zealand Banking Group ('ANZ') deputy chief executive Alexis George was quoted as saying that 'the bank would allow employees to work from home for several days a week in perpetuity, but some employees would choose to work full-time in the office': see Michael Fowler and Paul Sakkal, 'Home versus the Office: Clashes Loom between Staff and Bosses as Rules Ease', *The Age* (online, 23 March 2021) <https://www.theage.com.au/politics/victoria/home-versus-the-office-clashes-loom-between-staff-and-bosses-as-rules-eased-20210323-p57dei.html>.

270 See Australian Productivity Commission, 'Working from Home' (Research Paper, September 2021) 28; Tess Bennett, 'Deloitte to Allow All Staff to Decide Where and When They Work', *Australian Financial Review* (online, 30 June 2021) <https://www.afr.com/work-and-careers/careers/deloitte-to-allow-all-staff-to-decide-where-and-when-they-work-20210629-p5859t>.

271 Edmund Tadros and Hannah Wootton, 'Deloitte to Offer Remote Working: From Overseas', *Australian Financial Review* (online, 23 November 2021) <https://www.afr.com/companies/professional-services/deloitte-to-offer-remote-working-from-overseas-20211123-p59bfg>.

enhance 'person-environment fit' for not only the majority of workers who prefer hybrid working,[272] but also the rest of the workforce for whom hybrid working may be unsuitable, such as many employees with invisible disability. Whilst various initiatives have been shown to enhance disability confidence to encourage such employees to identify with and disclose disability,[273] hybrid workplace design erects barriers to using disability confidence. This is because, as explained above in this article, many adjustments to hybrid workplaces to accommodate disability are more costly, burdensome and disruptive for employers than if they are made to fixed desks. Fear of being labelled disruptive may therefore deter these employees from using disability confidence. Allowing these employees to choose where they work and use a fixed desk, however, lowers or removes these barriers to give these initiatives much better chances of success. Additionally, a person who chooses to work from home from an already accessible setting may require little to no support from an employer.

To address the various inequalities that arise from hybrid working (as identified above in this article), employers should consider adopting flexible and 'work from anywhere' policies and, to support this, develop their 'anywhere operations' model to decentralise business to ensure systems, teams, clients, etc are set up for remote working.[274] This would allow employees, including those with invisible disability, to choose where they work, tailor workspaces to suit their individual needs, and/or use already accessible spaces (such as those in their home). It also addresses a major drawback of universal design, which is that no single design can accommodate all medical conditions and some *seemingly* 'accessible' designs can actually disadvantage people with certain conditions (for example, whilst some people with eye conditions may benefit from a well-lit area or natural light this would disadvantage people with conditions that cause photophobia or light sensitivity).

V CONCLUSION

The COVID-19 pandemic has brought about unprecedented change in the way we work, which presents significant regulatory challenges for lawmakers and policy makers. Among these challenges is modernising the law to suit this shifting dynamic. The recent research and survey data referred to in this article suggests that

272 Survey data referred to above in this article supports that the majority of employees prefer hybrid working. See Part II of this article.

273 Such as creating a disability-friendly culture which includes training programs for employees who disclose disability as well as celebrating diversity and successful leaders with disability. See, eg, Sarah von Schrader, Valerie Malzer and Susanne Bruyère, 'Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate' (2014) 26 *Employee Responsibilities and Rights Journal* 237, 246, 248 <https://doi.org/10.1007/s10672-013-9227-9>. This could be modelled on existing programs for women and members of the LGBTI+ community. See, eg, 'Inspiring Women', *Deloitte* (Web Page) <https://www2.deloitte.com/au/en/pages/about-deloitte/articles/inspiring-women.html>; Deloitte, Energy Australia and Google, *2020 Outstanding 50 LGBTI+ Leaders* (Report, 2020).

274 See, eg, Business View, 'Work from Anywhere: What It Means for Professional Services', *National Australia Bank* (Web Page, 17 November 2021) <https://business.nab.com.au/work-from-anywhere-what-it-means-for-professional-services-49993/>.

modern and post-pandemic workplaces will be predominately hybrid and shared. This article argued that this shift in workplace design presents quite specific risks of inequality and indirect discrimination based on invisible disability. The problem with this new way of working is that, as argued in this article, it disadvantages and disproportionately affects employees with invisible disability, therefore creating new forms of workplace inequality.

Whilst employees with invisible disability are disadvantaged by this new and emerging post-pandemic workplace design, the assessment of Australian labour law and anti-discrimination law in this article reveals that the law is not equipped to deal with these workplace inequalities. That is, existing law does not adequately address the kind of inequalities which employees with invisible disability can face in modern and post-pandemic workplaces.

First, this article argued that when employees with invisible disability seek to establish adverse action under the *FW Act* or indirect discrimination under anti-discrimination legislation their claims are prone to being unfairly defeated, not because the claims lack merit, but because deficiencies in the law can lead the courts to this result. This article proposed reforms to the *FW Act* and to the test for indirect discrimination in the *DDA* and anti-discrimination legislation in various states and territories, to add clarity for the courts so that claimants with invisible disability can enjoy the same coverage as claimants with visible disabilities.

Second, the analysis in this article revealed that the defences to disability discrimination are the most problematic features of the legislative framework because they no longer strike their intended balance when they are applied in new and emerging workplace contexts. Whilst the defences to discrimination were designed to strike balance between the interests of employers and employees, changes to workplace design, brought about organically by technology and forcibly by the COVID-19 pandemic, significantly disrupts this balance to skew the legal tests to substantially favour employers.

Modernising the defences to discrimination to regain greater equilibrium is a very complicated question which will need to be informed by empirical research, for reasons explained above. This article does, however, propose that the legislative framework can be updated by introducing proactive measures designed to enhance 'person-environment fit' in workplaces. This may not only mitigate the disadvantaging effect of hybrid workplace design on employees with invisible disability, but also reduce reliance on the complaints-based system and help circumvent problems posed by the defences to discrimination.