

# EXTENDING REASONABLE ADJUSTMENTS: A RENEWED TOOL FOR CREATING INCLUSIVE WORKPLACES?

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*Extending employers' duties to make reasonable adjustments to all protected grounds could be a transformative tool for advancing substantive equality, challenging workplace norms, and creating positive and proactive approaches to equality. However, despite legislative reform across jurisdictions, it appears unlikely that existing provisions are adequately framed to realise this transformative potential. This article argues that the individualised and reactive framing of duties to make reasonable adjustments will likely mean that they fall short of their full transformative potential. As well as extending these duties to all protected grounds, a more proactive approach to these duties is required to meaningfully advance substantive equality.*

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I INTRODUCTION

There is a need for proactive change to better accommodate and include all workers in Australian workplaces. While discrimination laws are in place in every Australian jurisdiction,<sup>1</sup> individual complaints of discrimination remain rare.<sup>2</sup>

<sup>1</sup> *Disability Discrimination Act 1992* (Cth) ('DDA'); *Discrimination Act 1991* (ACT) ('ACT Discrimination Act'); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT) ('NT Anti-Discrimination Act'); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas) ('Tas Anti-Discrimination Act'); *Equal Opportunity Act 2010* (Vic) ('Vic Equal Opportunity Act'); *Equal Opportunity Act 1984* (WA) ('WA Equal Opportunity Act').

<sup>2</sup> Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010) 1, 243. See also Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) 166 ('Beyond Individual Enforcement').

Scholarship has repeatedly critiqued and criticised discrimination law's reliance on individual complaints to effect workplace change,<sup>3</sup> considering instead the role of statutory agencies,<sup>4</sup> positive equality duties<sup>5</sup> or collective action<sup>6</sup> to advance equality. Still, though, discrimination laws remain largely reactive by remedying discrimination after it occurs, and have been interpreted in a way that emphasises formal (rather than substantive) equality.<sup>7</sup>

That said, a shift towards a more substantive understanding of equality may be occurring in some jurisdictions. Discrimination laws in the Northern Territory ('NT') and the Australian Capital Territory ('ACT') have extended the duty to provide reasonable adjustments or accommodations to all protected characteristics under discrimination law.<sup>8</sup> Reasonable adjustments recognise that equality is not simply about treating everyone alike; rather, there is a need to

<sup>3</sup> See, eg, Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws To Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689, 725, 730; Belinda Smith, 'It's About Time: For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 117–18; Dominique Allen and Adriana Orifici, 'The Barriers To Pursuing Workplace Equality for Women' (2023) 48(4) *Alternative Law Journal* 293, 294; Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83, 86–7; Dominique Allen, 'Removing Barriers to Substantive Equality: A Case Study of Remedying Disability Discrimination Complaints' (2011) 17(2) *Australian Journal of Human Rights* 159, 171–2; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 580–6 ('Reducing the Burden').

<sup>4</sup> See, eg, Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 330–4.

<sup>5</sup> See, eg, Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98, 99 ('Positive Equality Duties'); Belinda Smith, 'Respect@Work Amendments: A Positive Reframing of Australia's Sexual Harassment Laws' (2023) 36(2) *Australian Journal of Labour Law* 145, 161–2.

<sup>6</sup> See, eg, Blackham, *Beyond Individual Enforcement* (n 2) 313; Alysia Blackham, 'Collective Action, Voice and Equality: Equality Bargaining To Achieve More Equal Futures?' (2024) 45(3) *Adelaide Law Review* 554, 554–5, 557–8, 583–8 ('Collective Action').

<sup>7</sup> Dominique Allen, 'An Evaluation of the Mechanisms Designed To Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 471–2, 476–7, 479–81 ('Promote Substantive Equality'). See also Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 197–9; Alice Taylor, 'Substantive Equality and the Possibilities of the *Queensland Human Rights Act 2019*' (2024) 43(1) *University of Queensland Law Journal* 41, 41.

<sup>8</sup> *ACT Discrimination Act* (n 1) ss 7, 74; *NT Anti-Discrimination Act* (n 1) ss 19, 24.

recognise and accommodate difference in the workplace.<sup>9</sup> Expanding reasonable accommodations to all protected grounds may therefore reflect a shift towards substantive equality in the legal framework.<sup>10</sup>

This article considers what the expansion of reasonable adjustments might mean for the advancement of equality at work. It considers existing criticisms of reasonable adjustment provisions, including their individualised nature and potential to reinforce dominant norms and structures, and whether these critiques might be addressed by these provisions. This article argues that while the extension of reasonable adjustments to include adjustments relating to other grounds is a positive development, it still represents a highly individualised and reactive approach to shifting the nature of the labour market and organisations. It argues that systemic and proactive measures are required to achieve meaningful change and that provisions relating to reasonable adjustments should be reframed in this way to better achieve their transformative potential.

In Part II, I critically examine scholarship on reasonable adjustments to examine the benefits and limitations of existing legal provisions. My focus is particularly on the Australian context, though I consider literature from other jurisdictions where relevant. Further, my focus is primarily on the workplace, though duties to make reasonable adjustments often apply in other contexts as well.<sup>11</sup> In Part III, I map out existing laws and legal provisions that provide for reasonable accommodations and adjustments, focusing on the United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD'),<sup>12</sup> discrimination laws (at the federal level and in Victoria, the NT and ACT) and industrial law.<sup>13</sup> I also consider regulation emerging from collective agreements and enterprise

<sup>9</sup> Sandra Fredman, *Discrimination Law* (Oxford University Press, 3<sup>rd</sup> ed, 2022) 42, 360–2 ('*Discrimination Law*').

<sup>10</sup> See below Part II(A) for further discussion.

<sup>11</sup> Education, in particular, has been considered in detail elsewhere: see, eg, Elizabeth Dickson et al, 'Reasonable Adjustment to Assessment: What Do Australian Teachers Need To Know and Consider?' (2021) 24 *International Journal of Law and Education* 62, 64, 69–70; Joy Cumming, Elizabeth Dickson and Amanda Webster, 'Reasonable Adjustments in Assessment: Putting Law and Policy into Practice in Australia' (2013) 60(4) *International Journal of Disability, Development and Education* 295, 295–300; Joan Squelch and Jacques Duvenhage, 'Supporting University Students with Disabilities: Making Reasonable Adjustments while Meeting Education Program and Course Requirements' (2021) 40(2) *University of Tasmania Law Review* 140, 153–63.

<sup>12</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

<sup>13</sup> Specifically, my focus is on the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

bargaining. In Part IV, I consider whether these provisions and reforms are adequate to shift workplace norms, and argue for the need for more proactive, preventative approaches that do not hinge on individual disclosures or requests. Part V concludes.

First, though, a word about language. In Australia and the United Kingdom ('UK'), the duty is generally described as one of making 'adjustments'; in the United States ('US') and Canada, it is described as one of making 'accommodations'.<sup>14</sup> Alice Taylor sees this as simply a jurisdictional difference,<sup>15</sup> though, in Australia, Victoria uses the language of both 'accommodation' and 'adjustment', and 'accommodation' is the language used in the NT.<sup>16</sup> It is likely, though, that language matters: an 'adjustment' might be seen as invoking ideas of a small tinkering with workplace structures,<sup>17</sup> whereas an 'accommodation' focuses more on inclusion and participation.<sup>18</sup> Equally, though, an 'adjustment' is something that must be done actively, whereas an 'accommodation' might be more passive.<sup>19</sup> When seeking to change the culture of workplaces, there is a need to be clear about the language chosen, as this will likely impact on how those who are regulated (like employers) respond to the provisions. The *CRPD*, for example, uses the language of 'reasonable accommodation', which it defines by reference to the equal enjoyment or exercise of all human rights and fundamental freedoms.<sup>20</sup> This is a substantive, rights-based notion of accommodation<sup>21</sup> that may have more impact in practice than provisions focusing on 'adjustments'.

<sup>14</sup> Alice Taylor, 'Disability Discrimination, the Duty To Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* 461, 464 ('Disability Discrimination').

<sup>15</sup> *Ibid.*

<sup>16</sup> See below Parts III(C)–(D) for further discussion of ss 17(1) and 19(1) of the *Vic Equal Opportunity Act* (n 1) and s 24(1) of the *NT Anti-Discrimination Act* (n 1).

<sup>17</sup> See, eg, the definition adopted in *Watts v Australian Postal Corporation* (2014) 222 FCR 220 ('*Watts*'). "The word "adjustment" is left undefined by the statute and is to be given its ordinary meaning as "an alteration or modification": at 228 [22] (Mortimer J), quoting the *Oxford English Dictionary* (online) 'adjustment' (def 1.a).

<sup>18</sup> See *Macquarie Dictionary* (online at 27 March 2026) 'accommodation' (def 10); *Oxford English Dictionary* (online) 'accommodation' (def 1.a).

<sup>19</sup> See *Macquarie Dictionary* (online at 27 March 2026) 'accommodation' (def 2).

<sup>20</sup> *CRPD* (n 12) art 2.

<sup>21</sup> See below Part III(A) for discussion.

## II REASONABLE ACCOMMODATIONS

Requiring employers to make reasonable accommodations or adjustments in the workplace potentially offers a critical tool for advancing inclusion and participation at work. Reasonable accommodations or adjustments recognise that equality is not simply about treating everyone alike; rather, there is a need to recognise and accommodate difference.<sup>22</sup> As Sandra Fredman argues, ‘treating two people alike, where one comes to the situation already burdened with disadvantage, will do no more than perpetuate the disadvantage’.<sup>23</sup> Instead, equality should accommodate and ‘even celebrate’ difference,<sup>24</sup> including by making changes to structures to facilitate inclusion and participation. For Rosemary Kayess and Phillip French, then, reasonable accommodations have ‘the potential to result in fundamental structural transformations of the norm’.<sup>25</sup> Duties to make reasonable adjustments or accommodations have three related potential strengths. First, they might advance substantive equality at work. Second, they might challenge and shift workplace ‘norms’. Third, they might require proactive and positive measures to advance participation and inclusion at work. These potential strengths are considered in the parts that follow, alongside questions of enforcing these measures.

### A *Advancing Substantive Equality*

Duties to make reasonable accommodations could be important tools for advancing substantive equality at work.<sup>26</sup> Fredman puts forward a ‘multidimensional principle’ of substantive equality, which encompasses four dimensions: redressing disadvantage (the redistributive dimension);

<sup>22</sup> Sandra Fredman, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’ in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005) 199, 203 (‘Disability Equality’); Fredman, *Discrimination Law* (n 9) 42, 360.

<sup>23</sup> Fredman, ‘Disability Equality’ (n 22) 203.

<sup>24</sup> Fredman, *Discrimination Law* (n 9) 3.

<sup>25</sup> Rosemary Kayess and Phillip French, ‘Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1, 9. This might be undermined, though, if the obligation to make change is avoided too easily: at 9. See below Part II(D) for further discussion.

<sup>26</sup> See Dominique Allen, ‘Thou Shalt Not Discriminate: Moving from a Negative Prohibition to a Positive Obligation on Business To Tackle Discrimination’ (2020) 26(1) *Australian Journal of Human Rights* 110, 115–16, 120–1 (‘Shalt Not Discriminate’).

addressing stigma, stereotyping, prejudice and violence (the recognition dimension); facilitating participation, inclusion and voice (the participative dimension); and accommodating difference and structural change (the transformative dimension).<sup>27</sup>

For Fredman, duties to provide reasonable accommodations advance substantive equality in important ways. First, they are asymmetric (that is, they only apply to those with a disability or protected ground) and seek to redress disadvantage, including through more favourable treatment.<sup>28</sup> They therefore advance the redistributive dimension by redressing disadvantage.<sup>29</sup> Second, they seek to modify the environment to accommodate individual needs and enable participation.<sup>30</sup> Substantive equality requires structures to be changed to accommodate difference,<sup>31</sup> rather than seeking to ‘exact conformity as the price of inclusion’.<sup>32</sup> In the context of disability, this reflects a social model of disability,<sup>33</sup> which positions and understands disability in its social environment, bringing with it a focus on dismantling social barriers to full participation.<sup>34</sup> By accommodating difference and structural change, reasonable accommodations advance the transformative dimension of substantive equality. Third, and relatedly, the duties impose a positive responsibility to make changes to enable participation.<sup>35</sup> Again, this reflects the transformative dimension of substantive equality. Fourth, duties to make reasonable adjustments might prompt a dialogue between individuals and employers about what adjustments are required.<sup>36</sup> This can enable voice and participation at work, advancing the participative dimension of substantive equality.<sup>37</sup> However, as Anna Chapman

<sup>27</sup> Fredman, *Discrimination Law* (n 9) 29. See also at 31–44.

<sup>28</sup> *Ibid* 360.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* 361.

<sup>31</sup> *Ibid* 42.

<sup>32</sup> *Ibid* 29.

<sup>33</sup> *Ibid* 361.

<sup>34</sup> Kayess and French (n 25) 6.

<sup>35</sup> Fredman, *Discrimination Law* (n 9) 362. This can be contrasted with a negative duty to avoid discrimination, a point discussed further below at Part II(C).

<sup>36</sup> Fredman, *Discrimination Law* (n 9) 465–7. See also Allen, ‘Promote Substantive Equality’ (n 7) 487–8; Allen, ‘Shalt Not Discriminate’ (n 26) 121, discussing Sandra Fredman, *Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 299.

<sup>37</sup> Fredman, *Discrimination Law* (n 9) 39–42, 361.

points out, discrimination law lacks a framework for making requests for adjustments and for considering those requests.<sup>38</sup> This might limit the potential for voice and dialogue, particularly given the significant power disparities between employers and employees.<sup>39</sup>

Thus, in the context of Fredman's multidimensional model of substantive equality, duties to provide reasonable accommodations advance the dimensions of redressing disadvantage, accommodating difference and facilitating participation.<sup>40</sup> For Taylor, what distinguishes the duty to make reasonable adjustments from other negative prohibitions of discrimination is its focus on the social model of disability and its asymmetrical nature.<sup>41</sup> However, the transformative potential of reasonable accommodations only goes so far: for Fredman, '[w]hile duties of accommodation create exceptions or modify existing structures, a more thoroughgoing alternative to the conformist tendency of like treatment is to create a different norm'.<sup>42</sup>

### B Challenging the 'Norm'

The question, then, is the extent to which reasonable accommodations might challenge or shift workplace norms. For Mark Bell, the value of a duty to make reasonable adjustments lies in its ability to challenge workplace norms, including those of the able-bodied worker.<sup>43</sup> The 'ideal worker' norm reflects an idealised worker who is unencumbered by domestic or caring responsibilities, is in good mental and physical health, works full-time and is available to work

<sup>38</sup> Anna Chapman, 'Reasonable Accommodation in Australia: Displacing the Normative Worker?' in Roger Blanpain and Frank Hendrickx (eds), *Reasonable Accommodation in the Modern Workplace: Potential and Limits of the Integrative Logics of Labour Law* (Wolters Kluwer, 2016) 47, 57 ('Reasonable Accommodation'). There is, however, a clear framework in labour law, discussed below at Part III(F).

<sup>39</sup> See below Part II(D).

<sup>40</sup> Fredman, *Discrimination Law* (n 9) 362.

<sup>41</sup> Taylor, 'Disability Discrimination' (n 14) 464.

<sup>42</sup> Fredman, *Discrimination Law* (n 9) 43.

<sup>43</sup> Mark Bell, 'Mental Health at Work and the Duty To Make Reasonable Adjustments' (2015) 44(2) *Industrial Law Journal* 194, 200–1.

long hours.<sup>44</sup> The ideal worker norm — while unrepresentative of actual workers — pervades the way ‘good’ work and jobs are structured.<sup>45</sup> Rather than seeking conformity with the ‘dominant norm’, a more substantive understanding of equality serves to challenge the norm, rather than reinforce it.<sup>46</sup> For Fredman, duties to provide reasonable accommodations recognise that it is inadequate to require everyone to meet the same able-bodied ‘norm’.<sup>47</sup> Rather, the norm needs to be adapted to accommodate workplace inclusion and participation.<sup>48</sup> Equally, reasonable adjustments might challenge an individualistic focus on ‘merit’, upending the assumption that workers should fit the job, and replacing it with the idea that the job should be adjusted to fit the worker themselves, revealing ‘merit’ as simply a social construct.<sup>49</sup>

Again, this reflects a social model of disability, which emphasises the need to remove socially constructed barriers to participation, rather than requiring conformity with an able-bodied ‘norm’.<sup>50</sup> Equally, as Anna Lawson argues, the social model is key to reasonable accommodations being effective; if our understanding of disability is grounded in a medical model, this will limit the effectiveness of reasonable accommodation provisions.<sup>51</sup> As Lawson elegantly articulates: ‘Reasonable accommodation regimes ... need the oxygen of a social model understanding to survive and flourish.’<sup>52</sup>

There is an open question, though, as to whether reasonable adjustments can promote structural change and challenge the norm, or whether they will simply be seen as individualistic exceptions to the norm.<sup>53</sup> There is a risk that by requiring ‘exceptions’ to the ‘norm’, reasonable adjustments serve to embed

<sup>44</sup> See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do about It* (Oxford University Press, 2000) 1, discussed in Sara Charlesworth, ‘Managing Work and Family in the “Shadow” of Anti-Discrimination Law’ (2005) 23(1) *Law in Context* 88, 95.

<sup>45</sup> Charlesworth (n 44) 95, quoting Williams (n 44) 1.

<sup>46</sup> See Fredman, *Discrimination Law* (n 9) 42; Fredman, ‘Disability Equality’ (n 22) 203.

<sup>47</sup> Fredman, *Discrimination Law* (n 9) 358.

<sup>48</sup> *Ibid.*

<sup>49</sup> Fredman, ‘Disability Equality’ (n 22) 204.

<sup>50</sup> Fredman, *Discrimination Law* (n 9) 358.

<sup>51</sup> Anna Lawson, ‘People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities’ (2008) 26(2) *Law in Context* 62, 68.

<sup>52</sup> *Ibid.*

<sup>53</sup> Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, 2023) 128 (‘*Interpreting Discrimination Law*’).

and entrench the norm, positioning those who need adjustments as exceptional or different.<sup>54</sup> Sara Charlesworth critiques the focus of reasonable accommodations on ‘individual “special” needs’ and “lack of fit”, arguing they serve to further entrench ‘the norm of the “ideal worker”’ and the organisation of work, rather than focusing on systemic disadvantage or change.<sup>55</sup> Shelagh Day and Gwen Brodsky similarly argue that the duty to accommodate reinforces existing power structures, as it forces people to fit existing structures and systems.<sup>56</sup> The duty implies that social norms can continue to be made by dominant groups in society, with some limited concessions being made for those who are different and cannot fit the norm.<sup>57</sup> For Day and Brodsky, then, the duty is ‘assimilationist’, rather than recognising and accommodating difference, and is grounded in ideas of formal equality.<sup>58</sup> It is not genuinely transformative in a way that would change structures and systems to ‘[abandon] the idea of “normal” and [work] for genuine inclusiveness.’<sup>59</sup> Indeed, the availability of accommodations might *discourage* transformation, leaving discriminatory rules intact and enabling ‘only minor adjustments to the status quo’.<sup>60</sup>

The potential for reasonable accommodations to challenge and disrupt the norm is therefore contested. Further, the potential of the duty may be undermined by its implementation in practice: Chapman argues that while reasonable adjustments might ‘challenge the normativity of the vision of the standard worker’,<sup>61</sup> the weaknesses in the legal framework undermine this potential.<sup>62</sup> These questions of practical implementation are considered further in Parts II(D) and III.

<sup>54</sup> See Shelagh Day and Gwen Brodsky, ‘The Duty To Accommodate: Who Will Benefit?’ (1996) 75(3) *Canadian Bar Review* 433, 462, quoted in Taylor, *Interpreting Discrimination Law* (n 53) 128–9.

<sup>55</sup> Charlesworth (n 44) 90, 112.

<sup>56</sup> Day and Brodsky (n 54) 435.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* 462.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* 462–3.

<sup>61</sup> Chapman, ‘Reasonable Accommodation’ (n 38) 48. Note, too, that Chapman was writing before the decision in *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 (*Sklavos*): see Chapman, ‘Reasonable Accommodation’ (n 38) 41 n 13. *Sklavos* (n 61) is discussed below at Part III(B). The situation in federal law following *Sklavos* (n 61) is even less optimistic today.

<sup>62</sup> Chapman, ‘Reasonable Accommodation’ (n 38) 49.

### C Positive and Proactive Change

Duties to make reasonable accommodations or adjustments might require employers to make positive and proactive changes to structure and systems, thereby advancing substantive equality. Dominique Allen sees the requirement to make reasonable adjustments as a form of proactive measure, putting the obligation on the employer to address discrimination before it occurs (and therefore akin to a positive equality duty).<sup>63</sup> The Victorian Supreme Court has described the duty to make reasonable adjustments for disability in the context of service provision as a ‘positive obligation’.<sup>64</sup> Bill Swannie also sees the Victorian duty to accommodate employees’ parenting or carer responsibilities in determining their work arrangements as positive, proactive and potentially transformative<sup>65</sup> (though this potential has arguably not yet been realised).<sup>66</sup> For Taylor, it is the positive nature of the duty to make reasonable adjustments that challenges Australian courts:

Other discrimination law obligations require a duty-bearer to refrain from acting in a certain way and the court to sanction that behavior when it is found. In contrast, the duty to make adjustments, particularly when considered in its most substantive light and in the Canadian jurisprudence, requires courts to challenge the existing standards and practices of duty-bearers, and to consider whether the standard as a whole is necessary.<sup>67</sup>

Fredman argues, too, that the duty should be proactive from a normative perspective: ‘Ideally, there should be an ongoing duty to ensure that the built environment is inclusive of the whole spectrum of abilities, without putting the burden on an individual to claim accommodation as a right.’<sup>68</sup> For Fredman, the duty to make reasonable adjustments therefore ‘foreshadowed’ the broad positive equality duty in the UK.<sup>69</sup>

<sup>63</sup> Allen, ‘Shalt Not Discriminate’ (n 26) 111, 121.

<sup>64</sup> *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1, 5 [14] (Richards J).

<sup>65</sup> Bill Swannie, ‘Reasonable Accommodation of Employees’ Parenting and Carer Responsibilities: A Human Rights Perspective’ (2022) 48(2) *Monash University Law Review* 208, 208–9.

<sup>66</sup> *Ibid* 227–9. See also at 209, discussing *Vic Equal Opportunity Act* (n 1).

<sup>67</sup> Taylor, ‘Disability Discrimination’ (n 14) 485.

<sup>68</sup> Fredman, *Discrimination Law* (n 9) 358.

<sup>69</sup> Fredman, ‘Disability Equality’ (n 22) 200.

While duties to make reasonable accommodations or adjustments arguably *should* be positive and proactive from a normative perspective to advance substantive equality, this is not always realised in existing legal provisions. A positive measure (which requires action) is arguably different to a negative measure (which requires restraint).<sup>70</sup> However, a positive measure is not necessarily *proactive*; a positive measure can be *reactive*. As currently drafted and framed, requirements to make reasonable adjustments are likely better seen as *reactive* measures, as they hinge on an individual requesting an adjustment that is reasonable.<sup>71</sup> As Allen notes, there is no requirement for employers to proactively make adjustments without a request being made;<sup>72</sup> as Swannie describes it, ‘th[e] duty is triggered by an employee’s request for accommodation’.<sup>73</sup> This differs in nature to a positive equality duty, where employers must take reasonable and proportionate measures to address discrimination and advance equality, without any individual requests or complaints being made.<sup>74</sup> Beth Gaze and Belinda Smith therefore see obligations to make reasonable adjustments as making explicit the implicit obligations to take action to address discrimination in negative prohibitions against discrimination.<sup>75</sup> As the authors summarise, ‘[t]hese are still complaints-based rules, but ones that contain a more demanding obligation to promote equality’.<sup>76</sup>

Further, it is arguable that the need for reasonable adjustments reveals that structural features of the workplace are already discriminatory, making a request reactive to the discrimination embedded in the way the workplace oper-

<sup>70</sup> But see Lawson (n 51) for a critique in the context of economic, social and cultural rights: at 65–6.

<sup>71</sup> See below Part III(C) for a discussion of the relevant case law.

<sup>72</sup> Allen, ‘Shalt Not Discriminate’ (n 26) 116. By contrast, in the UK context, Fredman argues the duty to make reasonable accommodations might be anticipatory, such as for those performing public functions: Fredman, *Discrimination Law* (n 9) 363.

<sup>73</sup> Swannie (n 65) 212 (emphasis omitted).

<sup>74</sup> See, eg, *Vic Equal Opportunity Act* (n 1) s 15; *Tas Anti-Discrimination Act* (n 1) s 104; *Equality Act 2010* (UK) s 149 (*‘UK Equality Act’*), discussed in Sandra Fredman, ‘Breaking the Mold: Equality as a Proactive Duty’ (2012) 60(1) *American Journal of Comparative Law* 265, 267–8. See also Blackham, ‘Positive Equality Duties’ (n 5) 105–13.

<sup>75</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 284–5 [36]–[39].

<sup>76</sup> *Ibid* 285 [39].

ates. As Sophia Moreau argues, privilege is accommodated by existing structures and systems; these are ‘structural accommodations’ of privilege.<sup>77</sup> Structural accommodations can perpetuate direct and indirect discrimination and often render those without privilege invisible and inferior.<sup>78</sup> While those who lack privilege can, in some cases, request reasonable accommodations, there can be significant costs in asking for change.<sup>79</sup> Perhaps, then, the duty to make reasonable adjustments sits somewhere between the negative duties that form the core of discrimination law (‘thou shalt not discriminate’) and the positive duties on organisations to take measures to address discrimination.<sup>80</sup>

### D Enforcement

While duties to make accommodations or adjustments might have the potential to advance substantive equality, challenge workplace norms and require positive and proactive action, in practice, this will hinge on how these duties are framed and enforced. First, in terms of how the provisions are drafted, much will hinge on what is regarded as ‘reasonable’: a highly fact-specific inquiry.<sup>81</sup> Chapman describes the test as ‘fuzzy’,<sup>82</sup> and Smith sees it as ‘likely to cause more confusion than clarity’.<sup>83</sup> In the workplace, it is likely to be the employer who has the power to determine whether an adjustment is ‘reasonable’,<sup>84</sup> and this will only rarely be challenged in or assessed by the courts.<sup>85</sup> This reflects the power differential in the employment relationship: an employee might

<sup>77</sup> Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) 43.

<sup>78</sup> *Ibid* 63–6, 71.

<sup>79</sup> *Ibid* 71.

<sup>80</sup> Allen, ‘Shalt Not Discriminate’ (n 26) 112–13.

<sup>81</sup> *Ibid* 117.

<sup>82</sup> Anna Chapman, ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (2012) 33(1) *Adelaide Law Review* 39, 78 (‘Adverse Action’).

<sup>83</sup> Belinda Smith, ‘Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law’ (2010) 23(3) *Australian Journal of Labour Law* 199, 207 (‘Fair and Equal’).

<sup>84</sup> Jason Olsen, ‘Employers: Influencing Disabled People’s Employment through Responses to Reasonable Adjustments’ (2024) 39(3) *Disability and Society* 791, 799.

<sup>85</sup> See Chapman, ‘Reasonable Accommodation’ (n 38) 52; Alysia Blackham and Dominique Allen, ‘Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in

ask for an accommodation, which an employer might simply refuse.<sup>86</sup> If a request is rejected and challenged in the courts, a claimant then bears the onus of establishing all the elements of a claim for reasonable adjustments, including that the adjustment is reasonable.<sup>87</sup> What is 'reasonable' is likely to be based on information held by an employer, making it complex for a claimant to prove.<sup>88</sup> Overall, the 'reasonable' test is effectively determining who will bear the cost of the adjustment (or the absence of adjustment): the employer or the individual employee?<sup>89</sup>

Second, the duty to make reasonable adjustments might be limited in practice by restrictive judicial interpretations of the legislative provisions,<sup>90</sup> and, in Australia, an overarching focus on the employment contract and the inherent requirements of the position.<sup>91</sup> In Victoria, Swannie argues that adopting a human rights lens (grounded in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)) to interpret duties to make reasonable adjustments would help to overcome these restrictive interpretations.<sup>92</sup> Similar arguments might also be made in Queensland and the ACT, which also have human rights statutes.<sup>93</sup>

Third, in practice, the duty to make reasonable adjustments generally hinges on employees requesting a specific adjustment.<sup>94</sup> However, as Jason Olsen asserts, in the UK, employees may be unwilling to disclose their disability to their employer, and making a request requires disclosure.<sup>95</sup> As Olsen argues, employees may feel that requesting an adjustment draws attention away from their

Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253, 253, 260–1.

<sup>86</sup> Charlesworth (n 44) 101.

<sup>87</sup> Chapman, 'Adverse Action' (n 82) 62.

<sup>88</sup> See *ibid*; Allen, 'Reducing the Burden' (n 3) 583.

<sup>89</sup> Fredman, *Discrimination Law* (n 9) 364.

<sup>90</sup> See, eg, Bell (n 43) for commentary on the operation of this duty in the UK: at 199, 201–3. Comparisons have been drawn between the operation of this duty in Australia and Canada: see generally Emma Purdue, 'Scoping Reasonable Adjustments in the Workplace: A Comparative Analysis of an Employer's Obligation To Accommodate a Worker's Disability under Australian and Canadian Laws' (2017) 30(2) *Australian Journal of Labour Law* 185, 191–203. See generally Swannie (n 65) for commentary on the operation of this duty in Victoria: at 215–16.

<sup>91</sup> Purdue (n 90) 196.

<sup>92</sup> Swannie (n 65) 209.

<sup>93</sup> See *Human Rights Act 2019* (Qld) ss 48(1)–(3); *Human Rights Act 2004* (ACT) ss 30–1.

<sup>94</sup> See, eg, *Richold v Victoria* [2010] VCAT 433, [40] (Deputy President Macnamara) ('*Richold*').

<sup>95</sup> Olsen (n 84) 803. See also Lawson (n 51) 78.

skills and potential, and towards their disability.<sup>96</sup> This might change how employers see them as employees, with negative consequences for career progression and advancement.<sup>97</sup> Rather than requesting an adjustment, employees ‘often hide their impairment(s) from their employer to avoid being treated less favourably than their co-workers’.<sup>98</sup> As a result, employees may not obtain the adjustments they need to fully participate in employment.<sup>99</sup> Indeed, three-quarters of the interviewees in Olsen’s study reported negative experiences with obtaining reasonable accommodations.<sup>100</sup> The reactive nature of duties to make reasonable adjustments, and their reliance on individual requests being made, might severely curtail their potential in practice.

### III EXISTING LEGAL PROVISIONS

This Part turns, then, to consider how duties to make reasonable adjustments are framed in Australian discrimination and industrial law. It commences by positioning Australian law in the context of the *CRPD*, which Australia has ratified.<sup>101</sup> It then canvasses legislative provisions under both discrimination and industrial law, as both might shape or provide for reasonable accommodations and adjustments at work.<sup>102</sup> It also considers collective bargaining, which might provide for reasonable accommodations in addition to those in legislation.<sup>103</sup>

Three key differences emerge in how duties to make reasonable adjustments are framed across these jurisdictions: (1) whether they relate to disability only, or to a broader range of protected grounds; (2) whether they create an independent right as a standalone provision or are built into the definition of discrimination; and (3) the extent to which they might challenge existing workplace norms and advance substantive equality, including by creating positive and proactive obligations on employers.

It is in relation to this first point — whether reasonable adjustments relate to disability only or to a broader range of protected grounds — that Australian

<sup>96</sup> Olsen (n 84) 803.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 805.

<sup>101</sup> See below Part III(A).

<sup>102</sup> See below Parts III(B)–(F).

<sup>103</sup> See below Part III(G).

law is evolving.<sup>104</sup> Gaze and Smith make a compelling argument for extending reasonable adjustments to grounds other than disability.<sup>105</sup> For the authors, adjustments are needed when the 'norm is too narrow.'<sup>106</sup> The 'norm', as framed above in Part II(B), is too narrow for most workers. Providing adjustments could therefore be transformative across all protected characteristics, so long as the individual requesting adjustments is not seen as 'merely different and deficient', but instead entitled to equality.<sup>107</sup> In extending reasonable accommodations to grounds other than disability, adjustments become relevant to a broader group of people. It is possible that this might help to shift norms in the workplace and to destigmatise requests for reasonable accommodations.<sup>108</sup> Other jurisdictions already extend reasonable accommodations beyond disability. For example, in the US, the duty applies to both accommodating disability and religious purposes<sup>109</sup> (and, indeed, evolved from religious accommodations).<sup>110</sup> In Canada, the duty applies to religion<sup>111</sup> and the *Canadian Human Rights Act* includes a duty to accommodate, which applies to all protected grounds.<sup>112</sup> The expansion of reasonable accommodations to a broader group of protected characteristics therefore reflects and builds on international developments. That said, the case law considered in the sections that follow often focuses on disability, as this is where most case law has emerged in Australia to date.<sup>113</sup>

<sup>104</sup> See Gaze and Smith (n 75) 128 [80].

<sup>105</sup> Ibid 126–8 [76]–[80].

<sup>106</sup> Ibid 127 [77].

<sup>107</sup> Ibid 128 [80].

<sup>108</sup> Cf Olsen (n 84) 801–2.

<sup>109</sup> Fredman, *Discrimination Law* (n 9) 360; Taylor, 'Disability Discrimination' (n 14) 466–7.

<sup>110</sup> Fredman, *Discrimination Law* (n 9) 360 n 194; Taylor, 'Disability Discrimination' (n 14) 466, citing Ravi Malhotra, 'The Legal Genealogy of the Duty To Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective' (2007) 23(1) *Washington University Journal of Law and Policy* 1, 18.

<sup>111</sup> Fredman, *Discrimination Law* (n 9) 360.

<sup>112</sup> See *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3, 15(1)(a). However, this is only engaged as part of the bona fide occupational requirement defence to discrimination: at ss 15(1)(a), (2).

<sup>113</sup> See especially below Part III(C).

A *United Nations Convention on the Rights of Persons with Disabilities*

The *CRPD* is grounded in the social model of disability.<sup>114</sup> The Preamble states:

[D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>115</sup>

The *CRPD* includes, as part of its principles, ‘respect for difference and acceptance of persons with disabilities as part of human diversity and humanity’.<sup>116</sup> ‘Reasonable accommodation’ is defined in art 2 as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>117</sup>

Article 5(3) requires States Parties to ‘take all appropriate steps to ensure that reasonable accommodation is provided’. In relation to work and employment,

States Parties shall safeguard and promote the realization of the right to work ... by taking appropriate steps, including through legislation, to ... [e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace ...<sup>118</sup>

Measures must also be taken to ensure accessibility, including by setting standards and guidelines.<sup>119</sup> Kayess and French describe the *CRPD*’s inclusion of provisions relating to reasonable accommodations as ‘perhaps the most fundamental instrumental element of the convention’.<sup>120</sup> However, they critique the use of ‘undue burden’ and ‘disproportionate’ as the limiting tests of the provision, describing the drafting as ‘very far from optimal’.<sup>121</sup> Overall, Kayess and

<sup>114</sup> Kayess and French (n 25) 6.

<sup>115</sup> *CRPD* (n 12) Preamble para 5.

<sup>116</sup> *Ibid* art 3(d).

<sup>117</sup> *Ibid* art 2 (definition of ‘reasonable accommodation’).

<sup>118</sup> *Ibid* art 27(1)(i).

<sup>119</sup> *Ibid* art 9.

<sup>120</sup> Kayess and French (n 25) 27.

<sup>121</sup> *Ibid*.

French argue that the provision is likely to lead to positive outcomes only for those who need ‘marginal changes’ to the norm.<sup>122</sup> The provisions are ‘insufficiently challenging’ of structures and systems, particularly where substantial changes might be required.<sup>123</sup>

The *CRPD* goes beyond a focus on reasonable accommodations to also consider ‘universal design’, defined in art 2 as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’.<sup>124</sup>

In relation to universal design, States Parties have obligations to:

- undertake or promote research and development of universally designed goods, services, equipment and facilities;
- promote their availability and use; and
- promote universal design in the development of standards and guidelines.<sup>125</sup>

Therefore, while recognising the importance of universal design, the *CRPD* does not mandate its adoption. Rather, States Parties are required to promote universal design.

#### B *Federal Law: Disability Discrimination Act 1992 (Cth)*

In federal discrimination law, reasonable accommodations are embedded in the definitions of direct and indirect discrimination in the *Disability Discrimination Act 1992 (Cth)* (*‘DDA’*).<sup>126</sup> As Taylor argues, though, these provisions have been interpreted using a framework of formal equality, which has limited their impact and transformative potential.<sup>127</sup> Section 5(1) of the *DDA* defines direct discrimination as follows:

[I]f, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.<sup>128</sup>

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> *CRPD* (n 12) art 2 (definition of ‘universal design’).

<sup>125</sup> Ibid art 4(1)(f).

<sup>126</sup> *DDA* (n 1) ss 5(1)–(2)(a), 6(1), 6(2)(b)–(c). See also Smith, ‘Fair and Equal’ (n 83) 205–6.

<sup>127</sup> Taylor, *Interpreting Discrimination Law* (n 53) 132.

<sup>128</sup> *DDA* (n 1) s 5(1).

Section 5(2) now extends this definition to include the failure to make reasonable adjustments. It says:

- (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
  - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.<sup>129</sup>

Section 5(3) clarifies that ‘circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments’.<sup>130</sup> Similarly, the definition of indirect discrimination in s 6 now includes a failure to make reasonable adjustments.<sup>131</sup> Section 4 defines a ‘reasonable adjustment’ as ‘an adjustment to be made by a person ... unless making the adjustment would impose an unjustifiable hardship on the person’.<sup>132</sup> Section 4 arguably creates a presumption that an adjustment is reasonable unless and until it imposes unjustifiable hardship.<sup>133</sup> As noted by Mortimer J in *Watts v Australian Postal Corporation* (‘Watts’),

although the word ‘reasonable’ is used, it has no qualitative character in its context. It is simply part of a term defined by legislative declaration of what is outside the term. All that Parliament declares to be outside the term is a modification or alteration which imposes unjustifiable hardship on a person ...<sup>134</sup>

Assessing whether hardship amounts to ‘unjustifiable hardship’ requires consideration of ‘all relevant circumstances’ including the:

<sup>129</sup> Ibid s 5(2) (emphasis in original), as inserted by *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 item 17.

<sup>130</sup> DDA (n 1) s 5(3) (emphasis omitted).

<sup>131</sup> Ibid s 6(2)(c).

<sup>132</sup> Ibid s 4 (definition of ‘reasonable adjustment’) (emphasis omitted).

<sup>133</sup> See *ibid*; *Watts* (n 17) 228 [22] (Mortimer J).

<sup>134</sup> *Watts* (n 17) 228 [22].

- nature of the benefit or detriment likely to be experienced by any person concerned;
- effect of the disability of any person concerned;
- financial circumstances and cost likely to be incurred by the respondent;
- availability of financial and other assistance to the respondent; and
- any relevant action plans.<sup>135</sup>

The burden of establishing unjustifiable hardship rests with the person claiming unjustifiable hardship.<sup>136</sup> The explicit inclusion of reasonable adjustments in the definition of discrimination in the *DDA* was effected by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), following Australia's ratification of the *CRPD*.<sup>137</sup> The amendments were seen by some to be a rushed attempt at reform following the High Court's decision in *Purvis v New South Wales*,<sup>138</sup> which adopted a focus on formal equality under the *DDA*.<sup>139</sup> Gaze and Smith argue that the *DDA* reasonable adjustment provisions focus on the effect or outcome of a failure to provide reasonable adjustments, reflecting a substantive view of equality.<sup>140</sup> This was the approach adopted by Mortimer J in *Watts*.<sup>141</sup> However, in *Sklavos v Australasian College of Dermatologists* ('*Sklavos*'), the provisions in s 5(2) were held to require a causal connection between the disability and the refusal to make reasonable adjustments: that is, the failure to make adjustments

<sup>135</sup> *DDA* (n 1) s 11(1) (emphasis omitted).

<sup>136</sup> *Ibid* s 11(2).

<sup>137</sup> Smith, 'Fair and Equal' (n 83) 204–5. See also Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008* (Report No 95, October 2008) 5 [2.1]–[2.3], 6 [2.7], archived at <<https://perma.cc/3JAT-XFTU>>.

<sup>138</sup> (2003) 217 CLR 92.

<sup>139</sup> See *ibid* 158–9 [213]–[214], [217] (Gummow, Hayne and Heydon JJ, Callinan J agreeing at 175 [273]), 100–1 [11], 102 [13] (Gleeson CJ); Smith, 'Fair and Equal' (n 83) 205–6; Gaze and Smith (n 75) 125.

<sup>140</sup> Gaze and Smith (n 75) 126 [74].

<sup>141</sup> *Watts* (n 17) 277 [241], 280 [257] (Mortimer J).

must be ‘because of’ the disability.<sup>142</sup> This has significantly constrained any positive obligation in the *DDA*.<sup>143</sup> As Taylor argues in her detailed consideration of these developments:

This approach turns what was described in the extrinsic materials as a positive obligation — to make changes to existing structures and practices to accommodate difference — into a negative obligation. It becomes a negative obligation because a duty-bearer is *only* required by the *DDA* to make a reasonable adjustment where a reason for the refusal is the disability itself.<sup>144</sup>

*Sklavos*, then, has transformed what might or should have been a positive obligation into a negative obligation. There is now arguably only a requirement under the *DDA* to make reasonable accommodations where the reason for refusal is the disability.<sup>145</sup> For Taylor, this emphasis on formal equality ‘stymies the effectiveness and underlying purpose of the duty to make reasonable adjustments.’<sup>146</sup> The *DDA* also does not require consultation or create any process for achieving voice and participation in the workplace.<sup>147</sup> Taylor argues, too, that the *DDA* should be redrafted to include the duty to provide reasonable adjustments as an independent right, rather than including it as part of the definition of discrimination.<sup>148</sup> Arguably, then, the *DDA* provisions fall far short of what is required to achieve substantive equality at work or to challenge normative workplace standards.

### C Victoria: Extending Reasonable Adjustments to Caring Responsibilities

In Victoria, the *Equal Opportunity Act 2010* (Vic) (*‘Vic Equal Opportunity Act’*) creates duties for employers to make reasonable accommodations for those

<sup>142</sup> *Sklavos* (n 61) 255 [23], 256 [30]–[32], 261 [53] (Bromberg J, Griffiths J agreeing at 290 [179], Bromwich J agreeing at 303 [213]).

<sup>143</sup> Taylor, ‘Disability Discrimination’ (n 14) 475.

<sup>144</sup> *Ibid* 476 (emphasis in original).

<sup>145</sup> See *ibid*; Taylor, *Interpreting Discrimination Law* (n 53) 134.

<sup>146</sup> Taylor, ‘Disability Discrimination’ (n 14) 462 (citations omitted).

<sup>147</sup> Smith, ‘Fair and Equal’ (n 83) 206.

<sup>148</sup> Taylor, ‘Disability Discrimination’ (n 14) 486.

with caring responsibilities and disabilities.<sup>149</sup> In relation to caring responsibilities, s 17(1) says: 'An employer must not, in relation to the work arrangements of a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.'<sup>150</sup> Similarly, for employees, s 19(1) provides that '[a]n employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.'<sup>151</sup> Whether a refusal is unreasonable requires consideration of 'all relevant facts and circumstances', including:

- the person's circumstances and responsibilities as a parent or carer;
- the nature of the role;
- the nature of the arrangements;
- the employer's financial circumstances;
- the size and nature of the workplace and business;
- the effect on the workplace and the business of accommodating the caring responsibilities, including the financial impact, the impact on efficiency, productivity and customer service, and the number of persons who would benefit or be disadvantaged by the accommodation;
- the consequences of making the accommodation for the employer; and
- the consequences for the person of not making an accommodation.<sup>152</sup>

In relation to disability, s 20 applies where a person with a disability 'requires adjustments in order to perform the genuine and reasonable requirements of the employment'.<sup>153</sup> Section 20(2) provides that

<sup>149</sup> *Vic Equal Opportunity Act* (n 1) ss 17, 19, 20. The provisions relating to caring responsibilities may have been inserted in response to the decision in *Victoria v Schou* (2004) 8 VR 120: see Chapman, 'Adverse Action' (n 82) 40–1. See *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) s 11, as repealed by *Vic Equal Opportunity Act* (n 1). See also Anna Chapman, 'Care Responsibilities and Discrimination in Victoria: The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)' (2008) 21(2) *Australian Journal of Labour Law* 200, 200–1.

<sup>150</sup> *Vic Equal Opportunity Act* (n 1) s 17(1).

<sup>151</sup> *Ibid* s 19(1).

<sup>152</sup> *Ibid* ss 17(2), 19(2).

<sup>153</sup> *Ibid* s 20(1)(b).

[t]he employer must make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.<sup>154</sup>

The legislation does not require employers to make a ‘perfect working environment for every employee’: rather, adjustments need to be reasonable.<sup>155</sup> Again, determining whether an adjustment is reasonable requires consideration of ‘all relevant facts and circumstances’, including:

- the person’s circumstances and the nature of the disability;
- the nature of the role;
- the nature of the adjustment;
- the employer’s financial circumstances;
- the size and nature of the workplace and business;
- the effect on the workplace and the business of making the adjustment, including the financial impact, the impact on efficiency, productivity and customer service, and the number of persons who would benefit or be disadvantaged by the adjustment;
- the consequences of making the adjustment for the employer;
- the consequences for the person of not making an adjustment; and
- any relevant action plan under the *DDA* or *Disability Act 2006* (Vic).<sup>156</sup>

In relation to disability, it is further necessary to consider whether an employee could ‘perform the genuine and reasonable requirements of the employment’ with the adjustment.<sup>157</sup> This again involves consideration of ‘all the relevant facts and circumstances’, including the person’s training, qualifications and experience, and current performance (if relevant).<sup>158</sup> The ‘genuine and reasonable requirements of the employment’ are wider than inherent or essential requirements.<sup>159</sup>

<sup>154</sup> *Ibid* s 20(2).

<sup>155</sup> *Butterworth v Independence Australia Services* [2015] VCAT 2056, [208] (Member Wentworth) (*‘Butterworth’*).

<sup>156</sup> *Vic Equal Opportunity Act* (n 1) s 20(3).

<sup>157</sup> *Ibid* s 20(2).

<sup>158</sup> *Ibid* s 20(4).

<sup>159</sup> *Butterworth* (n 155) [179] (Member Wentworth), citing *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432, [43] (Member Dea) (*‘Dziurbas’*). Member Dea quoted *Davies v Victoria*

A contravention of ss 17, 19 or 20 is regarded as discrimination under s 7(1)(b) of the *Vic Equal Opportunity Act*.<sup>160</sup> Under s 23, an exception allows for discrimination on the basis of disability if the employee requires adjustments, the employer has complied with s 20 and either the adjustments are not reasonable or the employee could not ‘adequately perform the genuine and reasonable requirements of the employment’ with the adjustment.<sup>161</sup> In this context, ‘adequately’ does not mean ‘perfectly’; the role only needs to be *adequately* performed with adjustments.<sup>162</sup>

In Victoria, the duties to make reasonable adjustments create an independent, standalone right to the prohibitions of discrimination. They are therefore arguably superior to those in federal discrimination law.<sup>163</sup> In practice, though, Swannie argues that tribunal decisions relating to the duty for caring responsibilities in s 19 of the *Vic Equal Opportunity Act* have interpreted the provisions as requiring formal equality, rather than substantive equality, and given more weight to the needs and evidence of employers than employees.<sup>164</sup> Thus, the transformative potential of these provisions has likely not been realised in practice.

Since Swannie’s research, a further decision has been handed down on s 19: *Tham v Hertz Australia Pty Ltd* (*‘Tham’*),<sup>165</sup> which further illustrates the reactive nature of s 19 in practice. Mr Tham was employed by Hertz as a casual vehicle services attendant.<sup>166</sup> Mr Tham alleged a number of breaches of the *Vic Equal Opportunity Act*, including a failure to provide reasonable adjustments to accommodate parental responsibilities.<sup>167</sup> In that case, the Tribunal’s decision implicitly hinged on an absence of a ‘request’:<sup>168</sup> as noted in

*Police* [2000] VCAT 819, 12 (Deputy President McKenzie and Member Dudycz): *Dziurbas* (n 159) [43].

<sup>160</sup> *Vic Equal Opportunity Act* (n 1) s 7(1)(b).

<sup>161</sup> *Ibid* s 23.

<sup>162</sup> *Dziurbas* (n 159) [31] (Member Dea), discussing *Vic Equal Opportunity Act* (n 1) s 20(2). See also *Dziurbas* (n 159) [34] (Member Dea).

<sup>163</sup> See above Part III(B).

<sup>164</sup> Swannie (n 65) 227, discussing *Richold* (n 94); *Tate v Department of Human Services* (Vic) [2015] VCAT 507.

<sup>165</sup> [2020] VCAT 31, [7], [136] (Senior Member Burdon-Smith) (*‘Tham’*).

<sup>166</sup> *Ibid* [5] (Senior Member Burdon-Smith).

<sup>167</sup> *Ibid* [7] (Senior Member Burdon-Smith).

<sup>168</sup> See *ibid* [32] (Senior Member Burdon-Smith).

*Richold v Victoria*, a requirement for a request is ‘necessarily implicit’ in the provisions relating to caring.<sup>169</sup> In *Tham*, Senior Member Burdon-Smith held:

I am not satisfied on the evidence before me that the applicant had made the respondent aware of his obligations (whatever they may be) and that such accommodations were refused. As such there could be no unreasonable refusal.<sup>170</sup>

There was therefore no claim to answer in relation to s 19.<sup>171</sup> The drafting of s 19, as implicitly requiring a request, is therefore having a noticeable impact in practice.<sup>172</sup> As Swannie found, then, the transformative potential of s 19 is unlikely to have been realised in practice, and its reactive operation is likely to reinforce workplace norms.<sup>173</sup>

The duty relating to disability in s 20 might be more likely to prompt positive and proactive adjustments than the duties in ss 17 and 19 relating to caring responsibilities. The provisions for reasonable adjustments in s 20 read (at least on paper) as being potentially proactive measures, which do not depend on an individual request being made.<sup>174</sup> Section 20 appears potentially more proactive than the provisions relating to caring responsibilities in ss 17 and 19 (which focus on refusing to provide adjustments).<sup>175</sup> Section 20 also differs from ss 17 and 19 in that it refers to ‘adjustments’, rather than ‘accommodation’.<sup>176</sup>

In practice, though, the broad and proactive potential of s 20 has not yet been realised in the case law. Victorian Civil and Administrative Tribunal (‘VCAT’) decisions have repeatedly held that s 20 requires employees and potential employees to make clear requests for specific reasonable adjustments before the duty is enlivened. In *Muller v Toll Transport Pty Ltd (2)*, for example, Senior Member Megay viewed s 20 as requiring an employee to make a request for adjustments:

[A]n employee needs to articulate what he or she needs and expects from an employer by way of adjustment so as to enable him or her to perform the genuine

<sup>169</sup> *Richold* (n 94) [40] (Deputy President Macnamara).

<sup>170</sup> *Tham* (n 165) [32].

<sup>171</sup> *Ibid* [33] (Senior Member Burdon-Smith).

<sup>172</sup> See, eg, *ibid* [32]–[33] (Senior Member Burdon-Smith). See also Swannie (n 65) 209.

<sup>173</sup> Swannie (n 65) 209.

<sup>174</sup> But see the discussion of case law below at nn 177–267 and accompanying text.

<sup>175</sup> *Vic Equal Opportunity Act* (n 1) s 20. Cf at ss 17, 19.

<sup>176</sup> See especially *ibid* ss 20(1)(b), (2)–(3), (5)–(6).

and reasonable requirement of the particular job. As counsel for the respondent put it, his clients are not mind readers.<sup>177</sup>

The obligation to make reasonable adjustments therefore only arose from the point when the company became aware of the claimant's Crohn's disease.<sup>178</sup> However, Senior Member Megay did identify a need for consultation in identifying reasonable adjustments, though this again puts a responsibility on the employee to provide adequate (medical) information to the employer:

The concept of 'reasonable adjustment' does not mean an employer must simply comply with an employee's demands. It surely must be a product of proper consultation by parties armed with appropriate (in this case) medical information and advice and appropriate knowledge of the genuine and reasonable requirements of the particular job. ... It is not for the respondent to work out what is required in an information vacuum. There must be some initiative from the worker. The comprehensive requirements of s 20(3) make it clear considerable information is required in determining reasonability — 'all relevant facts and circumstances' *must* be considered. That obviously requires a proper understanding of the requirements of an employee (in this case a courier driver) having regard to the nature and specifications of his employment and having regard to the nature and difficulties of his disability. And the latter is what is missing from this case.<sup>179</sup>

On the information available about the claimant's condition, it appeared the respondent's existing provision for the claimant — allowing him to divert if required for bathroom stops and that any resulting delay would be accommodated — was a reasonable adjustment.<sup>180</sup> The claimant had not shown that a different delivery route with fewer freeways was required as a reasonable adjustment.<sup>181</sup> Overall, then, a substantial onus is placed on employees to enliven s 20, including to disclose their disability, propose reasonable adjustments and make clear how those adjustments are required by their disability. The duty, then, is largely reactive, and hinges on clear and compelling employee requests for adjustments.

<sup>177</sup> [2014] VCAT 472, [51] ('Muller').

<sup>178</sup> Ibid [48], [51] (Senior Member Megay).

<sup>179</sup> Ibid [74] (emphasis in original).

<sup>180</sup> Ibid [75] (Senior Member Megay).

<sup>181</sup> Ibid [76] (Senior Member Megay).

Similarly, in *Mulder v Victoria Police*, despite the absence of proper expert evidence to that effect, Senior Member Steele assumed that the claimant had a psychological injury and that this disability required an adjustment to his working conditions, namely not to work at a specific police station.<sup>182</sup> However, even with these assumptions, a critical issue for the Tribunal was whether the respondent knew of this disability, and whether the respondent knew what adjustments were required:

The Applicant had to prove that his employers knew he had a disability and knew (or reasonably should have known) what adjustments were required to accommodate his disability and allow him to do his job.<sup>183</sup>

In this case, the claimant did not inform the respondent that he could not work at a particular police station because of an illness or injury, or that working at a different station was required as a reasonable adjustment.<sup>184</sup> It was found that

[a]n employee who requires reasonable adjustments to his working conditions cannot assume the employer knows what adjustments are required and why. ... No evidence before me showed the Respondents had that information.<sup>185</sup>

The claim under s 20 therefore failed.<sup>186</sup> Again, this illustrates the substantial onus placed on employees to enliven any right to accommodation.

A failure to disclose the disability was also fatal to the claim in *FWQ v Gooi*.<sup>187</sup> In that case, the claimant sought additional rest breaks during a hospitality shift to accommodate her mental health condition.<sup>188</sup> Senior Member Johnson opined that, for obligations to arise under s 20,

the employer must be informed of the nature of the person's or employee's disability, and of the nature of the adjustments that are required to accommodate the person's or employee's disability.<sup>189</sup>

<sup>182</sup> [2020] VCAT 428, [48], [70] (*'Mulder'*). See also *Mulder v Victoria Police* [2019] VCAT 372, [73] (Member Johnson).

<sup>183</sup> *Mulder* (n 182) [71], [75] (Senior Member Steele).

<sup>184</sup> *Ibid* [134] (Senior Member Steele).

<sup>185</sup> *Ibid*.

<sup>186</sup> *Ibid* [135] (Senior Member Steele).

<sup>187</sup> [2024] VCAT 858, [73]–[77] (Senior Member Johnson) (*'FWQ'*).

<sup>188</sup> *Ibid* [28] (Senior Member Johnson).

<sup>189</sup> *Ibid* [65].

This notification obligation arises from the requirement under s 20(3) for the employer to consider the nature of the disability and the adjustments required.<sup>190</sup> In this case, the claimant had not adequately disclosed her disability or the adjustments required prior to her first shift.<sup>191</sup> There was therefore no breach of s 20.<sup>192</sup>

Claims under s 20 have also failed where adjustments are not shown to be 'required'. For example, in *Bevilacqua v Telco Business Solutions (Watergardens) PL*, which related to adjustments for severe morning sickness, the respondent refused Ms Bevilacqua's request to temporarily reduce her working hours.<sup>193</sup> The Tribunal held that the reduction in hours was not 'required', just a 'reasonable idea'.<sup>194</sup> This was contrary to the medical certificate that Ms Bevilacqua provided to the respondent (which stated 'that "she needs to decrease her work hours"'),<sup>195</sup> but was consistent with the doctor's later evidence.<sup>196</sup> It was therefore held that s 20 did not apply.<sup>197</sup>

Again, in *Harrison v Department of Education and Training (Vic)* the claimant (a teacher) sought adjustments of a day off in between work days and the provision of breaks during the teaching day.<sup>198</sup> However, Senior Member Burdon-Smith held that there was no medical evidence to support the request for non-consecutive days of teaching, meaning there was no evidence that the adjustment was required.<sup>199</sup> Further, Senior Member Burdon-Smith was not satisfied that the claimant had raised the issue of break times, or that she required longer break times.<sup>200</sup> The claims under s 20 were therefore dismissed.<sup>201</sup>

<sup>190</sup> Ibid.

<sup>191</sup> Ibid [73], [76] (Senior Member Johnson).

<sup>192</sup> Ibid [77] (Senior Member Johnson).

<sup>193</sup> [2015] VCAT 269, [3] (Senior Member Proctor) ('*Bevilacqua*').

<sup>194</sup> Ibid [214] (Senior Member Proctor).

<sup>195</sup> Ibid [209] (Senior Member Proctor) (emphasis omitted).

<sup>196</sup> Ibid [212] (Senior Member Proctor).

<sup>197</sup> Ibid [216] (Senior Member Proctor).

<sup>198</sup> (2017) 273 IR 267, 275–6 [47] (Senior Member Burdon-Smith) ('*Harrison*').

<sup>199</sup> Ibid 298 [227], [228].

<sup>200</sup> Ibid 299 [235].

<sup>201</sup> Ibid. However, the applicant succeeded on her other grounds of appeal: see ibid 302 [252] (Senior Member Burdon-Smith).

In *Walker v Heathcote Health*, the adjustment sought was to not work on day shifts.<sup>202</sup> The respondent argued, though, that there was insufficient medical evidence to show this adjustment was required, and the Tribunal agreed.<sup>203</sup> The claimant's evidence, though, was that she was reluctant to reveal her inability to work during the day, for fear of losing her job.<sup>204</sup> As the Tribunal recounted:

When Ms Walker herself gave evidence, she said she had not told the respondent that her depression and seizures meant she was unable to work during the day. At the hearing, Ms Walker was not asked whether she had discussed this with her doctors and she was not asked to explain this hiatus in the medical evidence. Ms Walker expressed some fears in her oral evidence that telling her employer about her condition would have resulted in losing her job. One possible explanation for the lack of medical evidence about the need to avoid day shifts is that she was afraid to mention it.<sup>205</sup>

Given the claimant had not notified the respondent of her need for adjustments, or the impact of her disability, nor suggested the adjustment, the claim under s 20 failed.<sup>206</sup> As Senior Member Steele summarised:

[I]n my view the Applicant's failure to tell her employer what was required meant that the employer was not in breach of section 20 by failing to make an adjustment to the requirement that she move to day shifts for the period of performance management.<sup>207</sup>

As mapped out above in Part II(D), requiring employees who are seeking adjustments to disclose their disability and to fully articulate the effect it has on their work reflects one of the major challenges with the legal framework. As reflected in *Walker*, this presents a significant barrier to many people seeking and obtaining accessible work arrangements for fear of the repercussions of disclosure.<sup>208</sup>

<sup>202</sup> [2017] VCAT 171, [5], [84] (Senior Member Steele) ('*Walker*').

<sup>203</sup> Ibid [6]–[10] (Senior Member Steele).

<sup>204</sup> Ibid [9] (Senior Member Steele).

<sup>205</sup> Ibid.

<sup>206</sup> Ibid [84], [86], [90] (Senior Member Steele).

<sup>207</sup> Ibid [90].

<sup>208</sup> See ibid [9] (Senior Member Steele).

Claims under s 20 have also been unsuccessful where adjustments are held not to be 'reasonable' or where the claimant would still not be able to perform the requirements of the role. In *Ostry v Viva Energy Refining Pty Ltd*, the Tribunal found that the proposed adjustments were not reasonable and that the claimant could not perform the genuine and reasonable requirements of his role even if the adjustments were made.<sup>209</sup> The adjustments required to accommodate the claimant's conditions were:

No BA with > 10kg in oxygen tank, no climbing ladders; work at heights, no confined space, no lone work, no repeated squatting, no repeated bending, and no repeated twisting of back.<sup>210</sup>

However, the claimant's role as a field operator had genuine and reasonable requirements of working alone, being able to climb ladders and working at heights.<sup>211</sup> There were no reasonable adjustments that could be made to enable the claimant to perform the requirements of the role.<sup>212</sup> The Tribunal further rejected the claimant's argument that the employer should have considered redeploying him to other roles to accommodate his conditions.<sup>213</sup> Rather, the requirement is to 'make *reasonable adjustments to the role the employee is contracted to perform*'.<sup>214</sup>

In *Kassir v Victoria (Anti-Discrimination)*, the respondents relied on s 23 of the *Vic Equal Opportunity Act* to justify discrimination in the recruitment process for Victoria Police on the basis that adjustments would not be reasonable, or the claimant could not adequately perform the role with an adjustment.<sup>215</sup> Deputy President Coghlan held that a core aspect of a police officer's role was to think clearly under pressure and to deal with challenging situations as they arose.<sup>216</sup> Given the claimant's history of post-traumatic stress disorder and depression, Deputy President Coghlan held that he could not perform the genuine and reasonable requirements of a police officer's role.<sup>217</sup> The claimant did

<sup>209</sup> [2023] VCAT 618, [6] (Vice President Judge Marks) ('*Ostry*').

<sup>210</sup> *Ibid* [5], [171] (Vice President Judge Marks).

<sup>211</sup> *Ibid* [170] (Vice President Judge Marks).

<sup>212</sup> *Ibid* [180] (Vice President Judge Marks).

<sup>213</sup> *Ibid* [151]–[152] (Vice President Judge Marks).

<sup>214</sup> *Ibid* [157] (Vice President Judge Marks) (emphasis in original).

<sup>215</sup> [2012] VCAT 1977, [16]–[17] (Deputy President Coghlan) ('*Kassir*').

<sup>216</sup> *Ibid* [29]–[30].

<sup>217</sup> *Ibid* [38]–[40].

not suggest any adjustments that would enable him to perform the requirements of the role, and the respondent gave evidence that they did not think adjustments could be made.<sup>218</sup> As a result, Deputy President Coghlan held that there were no adjustments that could be made.<sup>219</sup> The exception in s 23 therefore applied, and the discriminatory conduct was not unlawful.<sup>220</sup> Overall, these cases illustrate the practical difficulties associated with seeking reasonable adjustments in this reactive model, given the substantial onus placed on employees to disclose their disability, propose adjustments that are ‘reasonable’ and make clear how those adjustments are required by their disability.

In other cases, though, VCAT has appeared willing to place obligations on employers to meaningfully consider making adjustments that are akin to positive obligations. That said, this has only exceptionally led to claimants being successful under s 20. In *Dziurbas v Mondelez Australia Pty Ltd*, the parties agreed that the onus lay on the claimant to establish that he required reasonable adjustments to perform the genuine and reasonable requirements of the role, and that there had been a failure to provide those adjustments.<sup>221</sup> However, it was for the respondent to establish that, even if those adjustments were made, the genuine and reasonable requirements of the employment could not be adequately performed.<sup>222</sup> As noted above, ‘adequately’ does not mean ‘perfectly’; the role only needs to be *adequately* performed with adjustments.<sup>223</sup> In this case, the claimant was not given any real opportunity to identify adjustments, as the respondent dismissed him upon his return from leave, and before any meaningful discussion could occur.<sup>224</sup> Further, the respondent misunderstood the nature of the claimant’s role as a confectioner, and therefore did not adequately consider what adjustments were reasonable.<sup>225</sup> The respondent also failed to provide evidence that the proposed adjustments in a return to work

<sup>218</sup> Ibid [43]–[44] (Deputy President Coghlan).

<sup>219</sup> Ibid [45].

<sup>220</sup> Ibid [45] (Deputy President Coghlan).

<sup>221</sup> *Dziurbas* (n 159) [140] (Member Dea).

<sup>222</sup> Ibid.

<sup>223</sup> Ibid [141] (Member Dea). See also above n 162 and accompanying text.

<sup>224</sup> Ibid [151], [167] (Member Dea).

<sup>225</sup> Ibid [168], [170]–[171] (Member Dea).

report could not have been made,<sup>226</sup> or that the claimant could not have adequately performed the role with adjustments.<sup>227</sup> The respondent was therefore found to have contravened s 20.<sup>228</sup> While this arguably reflects a positive obligation on the employer to meaningfully consider proposed adjustments, the decision still reflects a focus on individualised exceptions. At the hearing, one expert made recommendations about the machines in use in the respondent's factory, which might benefit all employees.<sup>229</sup> These were mentioned only in passing in the judgment, which focused solely on individual exceptions and accommodation, rather than structural change.<sup>230</sup>

In *Weber v Deakin University*, the Tribunal also adopted a more proactive interpretation of the s 20 duty.<sup>231</sup> In terms of the burden of proof, Member Campana opined: 'Once it is established that the employee has a disability, it is up to the employer to satisfy the Tribunal on the balance of probabilities that reasonable adjustments have been made.'<sup>232</sup> However, in that case, the evidence showed that the university had made adjustments that were reasonable in the circumstances, including enabling the claimant to work from home.<sup>233</sup> Other adjustments sought (including appointing an alternative supervisor) were not reasonable in the circumstances.<sup>234</sup> The specific claim under s 20 was therefore unsuccessful, and the broader claim was summarily dismissed.<sup>235</sup> The substance of the decision was upheld on appeal.<sup>236</sup>

<sup>226</sup> Ibid [179], [194] (Member Dea).

<sup>227</sup> Ibid [181] (Member Dea). As the respondent was found to have discriminated against Mr Dziurbas, and was relying on the exception in s 23 of the *Vic Equal Opportunity Act* (n 1) to avoid liability, the onus was on the respondent in this specific case: *Dziurbas* (n 159) [211], [214]–[219] (Member Dea).

<sup>228</sup> Ibid [219] (Member Dea).

<sup>229</sup> Ibid [203] (Member Dea).

<sup>230</sup> See *ibid*.

<sup>231</sup> [2014] VCAT 1440, [183] (Member Campana) ('*Weber*').

<sup>232</sup> *Ibid*. This appears to be a different approach to the onus of proof to that adopted in other decisions: see above nn 177–191 and accompanying text.

<sup>233</sup> Ibid [194] (Member Campana).

<sup>234</sup> Ibid [194], [199] (Member Campana).

<sup>235</sup> Ibid [200], [241] (Member Campana).

<sup>236</sup> *Weber v Deakin University* (2015) 50 VR 645, 647 [5]–[6], 679–80 [112](f) (Derham AsJ); *Weber v Deakin University* [2016] VSC 640, [106] (McMillan J); *Weber v Deakin University* [2018] VSCA 53, [46] (Tate and McLeish JJA, McDonald AJA).

Similarly, in *Arhontissas v Star Track Express Pty Ltd*, s 20 was described as a ‘positive obligation on employers to make “reasonable adjustments” for employees in particular circumstances.’<sup>237</sup> However, Vice President Judge Marks was not satisfied that the claimant had a relevant disability at the relevant time.<sup>238</sup> Even if the Tribunal had been satisfied that the claimant had a relevant disability, it was not satisfied that the respondent had failed to make reasonable adjustments.<sup>239</sup> In this case, the claimant framed the reasonable adjustments as having minimal contact with Paul, her supervisor,<sup>240</sup> and the respondent had made adjustments to reduce the claimant’s contact with Paul.<sup>241</sup> The claim was therefore dismissed.<sup>242</sup>

Overall, then, claims under s 20 are only rarely successful, and often frame employers’ obligations as a reactive duty that places a significant onus on claimants to articulate their need for accommodations. Generally, successful claims under s 20 involve respondents refusing to consider making specific adjustments. In *Stuart-Teles v Department of Education and Training (Vic)*, for example, the claimant had a spinal stroke and sought to return to work after a period of unpaid leave.<sup>243</sup> The school at which he worked refused to accommodate a proposed return to work plan, instructing him to take another period of unpaid leave instead.<sup>244</sup> Two years later, the claimant proposed a subsequent return to work plan.<sup>245</sup> The school argued it could not accommodate the first return to work plan, but it did accommodate the second return to work plan, and the first plan was similar to the second.<sup>246</sup> In this context, then, the ‘respondent ha[d] not shown that it was unable to accommodate the requested adjustments in the plan, or that they were not reasonable adjustments’ as they could be accommodated two years later.<sup>247</sup> As Senior Member Steele noted:

<sup>237</sup> [2023] VCAT 1203, [464] (Vice President Judge Marks) (*‘Arhontissas’*).

<sup>238</sup> *Ibid* [473], [478], [482].

<sup>239</sup> *Ibid* [483] (Vice President Judge Marks).

<sup>240</sup> *Ibid* [484] (Vice President Judge Marks).

<sup>241</sup> *Ibid* [488] (Vice President Judge Marks).

<sup>242</sup> *Ibid* [490] (Vice President Judge Marks).

<sup>243</sup> [2023] VCAT 1226, [1]–[2] (Senior Member Steele) (*‘Stuart-Teles’*).

<sup>244</sup> *Ibid*.

<sup>245</sup> *Ibid* [2] (Senior Member Steele).

<sup>246</sup> *Ibid* [72]–[75], [77] (Senior Member Steele).

<sup>247</sup> *Ibid* [79] (Senior Member Steele).

The adjustments proposed in the failed 2020 plan are similar to those to which the respondent agreed to in 2022 eventually. If the respondent was unable to accommodate any of them, it should have identified what was unable to be accommodated and offered alternatives.<sup>248</sup>

Senior Member Steele therefore saw the obligation as lying on the respondent to propose alternative adjustments if required:

[I]t was the respondent's responsibility under section 20(2) of the [*Vic Equal Opportunity Act*] to provide reasonable adjustments. If those adjustments proposed by the applicant's rehabilitation provider were not reasonable, the respondent could have suggested others.<sup>249</sup>

Rejecting the first return to work plan was therefore a contravention of s 20.<sup>250</sup> The claimant was awarded \$45,000.00 for pain and suffering<sup>251</sup> and \$190,846.24 for economic loss for the two years he was not enabled to return to work.<sup>252</sup>

A claim under s 20 was also successful in *Butterworth v Independence Australia Services*.<sup>253</sup> In that case, the claimant, who had suffered a workplace injury, was dismissed after the respondent's obligations to provide suitable alternative employment under accident compensation legislation came to an end.<sup>254</sup> The claimant was unable to return to her previous call centre role on a full-time basis, but argued that reasonable adjustments included deploying her to other duties in contract management, accounts or enquiries.<sup>255</sup> Member Wentworth was not satisfied that the respondent had adequately turned their mind to what adjustments could be made,<sup>256</sup> though it was suggested to them that they could

<sup>248</sup> Ibid [87].

<sup>249</sup> Ibid [80].

<sup>250</sup> Ibid [88] (Senior Member Steele). However, the respondent was found to have subsequently made reasonable adjustments in 2022 under the second return to work plan: at [236] (Senior Member Steele).

<sup>251</sup> Ibid [258] (Senior Member Steele).

<sup>252</sup> Ibid [297] (Senior Member Steele). Cf at [264] (Senior Member Steele). This amount was not reduced to reflect the insurance payments received by the claimant: at [288] (Senior Member Steele).

<sup>253</sup> *Butterworth* (n 155) [286] (Member Wentworth).

<sup>254</sup> Ibid [29]–[30] (Member Wentworth).

<sup>255</sup> Ibid [29], [31] (Member Wentworth).

<sup>256</sup> Ibid [218].

redeploy the claimant.<sup>257</sup> Rather, they were focused on accident compensation legislation, not their duties under discrimination law.<sup>258</sup> While an employer is not required to create a new position as a reasonable adjustment, a reasonable adjustment may entail moving staff around within a position or the reallocation of certain tasks.<sup>259</sup> It is necessary to consider the employment as a whole.<sup>260</sup> Indeed, given the respondent had redeployed the claimant previously for operational reasons, it could do so again as a reasonable adjustment.<sup>261</sup> The respondent was therefore found to have breached s 20 for a failure to make reasonable adjustments, and terminating the claimant's employment in these circumstances was found to be discriminatory.<sup>262</sup> The claimant was awarded \$3,325.25 for economic loss and \$10,000.00 for non-economic loss including hurt and distress.<sup>263</sup> While the claimant's workplace injury was caused by the repetitive nature of call centre work,<sup>264</sup> there was no consideration in the decision of whether call centre roles should be adapted or changed to avoid further injuries in a way that would benefit both the claimant and other workers.<sup>265</sup>

Overall, these cases demonstrate that what adjustments are 'reasonable' is highly fact-specific and often hinges on evidence of the claimant's particular role and disability.<sup>266</sup> The case law to date also appears to have limited the transformative potential of the positive framing of s 20 by requiring the claimant to

<sup>257</sup> Ibid [266].

<sup>258</sup> Ibid [217] (Member Wentworth).

<sup>259</sup> Ibid [221] (Member Wentworth).

<sup>260</sup> Ibid [202], [231] (Member Wentworth).

<sup>261</sup> Ibid [222], [270]–[271] (Member Wentworth).

<sup>262</sup> Ibid [288] (Member Wentworth).

<sup>263</sup> Ibid [339], [349] (Member Wentworth).

<sup>264</sup> Ibid [259], [264] (Member Wentworth).

<sup>265</sup> See *ibid* [266], [274] (Member Wentworth).

<sup>266</sup> *Muller* (n 177) [51], [74]–[75] (Senior Member Megay); *Mulder* (n 182) [65], [71], [73]–[76], [135] (Senior Member Steele); *FWQ* (n 187) [65]–[66], [68], [73], [76] (Senior Member Johnson); *Bevilacqua* (n 193) [202]–[214], [216] (Senior Member Proctor); *Harrison* (n 198) 299 [229]–[230], [235] (Senior Member Burdon-Smith); *Walker* (n 202) [84]–[90] (Senior Member Steele); *Ostry* (n 209) [147], [172]–[180] (Vice President Judge Marks); *Kassir* (n 215) [3], [43]–[45] (Deputy President Coghlan); *Dziurbas* (n 159) [15], [140], [146]–[147], [151], [170]–[171], [179], [181], [194] (Member Dea); *Weber* (n 231) [168], [187]–[188], [191]–[200] (Member Campana); *Arhontissas* (n 237) [468]–[473], [476]–[484] (Vice President Judge Marks); *Stuart-Teles* (n 243) [178]–[179], [182]–[183], [231]–[234] (Senior Member Steele); *Butterworth* (n 155) [5], [208]–[211], [271]–[272], [274], [285]–[286] (Member Wentworth).

make specific requests for adjustments; creating an obligation only once the disability has been explicitly disclosed; and focusing on the specific individual concerned and individualised exceptions rather than changing structures and systems. It is rare, then, for a claim under s 20 to succeed at VCAT (though associated claims of discrimination were often successful in these cases), and the potential for s 20 to challenge the norm of the able-bodied worker appears significantly constrained. That said, if an employee discloses their disability and makes specific requests for adjustments, employers are required to engage meaningfully with those adjustments.<sup>267</sup> The duty therefore appears to be a positive obligation, but not a proactive, transformative obligation.

Consideration of reasonable adjustments is also embedded as part of the definition of indirect discrimination in Victoria.<sup>268</sup> This applies across all grounds. In Victoria, indirect discrimination occurs ‘if a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute; and that is not reasonable’.<sup>269</sup> The person seeking to impose the requirement, condition or practice has the burden of showing that it is reasonable.<sup>270</sup> Whether the requirement, condition or practice is reasonable will depend on all the circumstances, including

whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.<sup>271</sup>

Thus, in Victoria, reasonable adjustments are embedded in the justification of indirect discrimination, as well as being framed as a standalone right.

<sup>267</sup> See, eg, *Stuart-Teles* (n 243) [80], [87]–[88] (Senior Member Steele).

<sup>268</sup> *Vic Equal Opportunity Act* (n 1) ss 9(2)–(3).

<sup>269</sup> *Ibid* s 9(1).

<sup>270</sup> *Ibid* s 9(2).

<sup>271</sup> *Ibid* s 9(3)(e).

### D Northern Territory: Encompassing All Grounds

In the NT, the duty to accommodate applies to all protected attributes or grounds. Following the passage of the *Anti-Discrimination Amendment Act 2022* (NT) (*NT Anti-Discrimination Amendment Act*), the duty was amended to become a positive obligation, rather than a negatively framed penalty for a failure to accommodate.<sup>272</sup> As the Explanatory Statement clarified:

This clause amends section 24 so that it is expressed in positive terms, as a clear obligation to accommodate a special need, rather than as a failure to accommodate a special need. The intention behind this change is to clarify the effect of section 24, and assist the Anti-Discrimination Commissioner to educate the community about this obligation.<sup>273</sup>

The Anti-Discrimination Act 1992 (NT) s 24 now reads:

- (1) A person must reasonably accommodate a special need that another person has because of an attribute.
- (2) For subsection (1):
  - (a) reasonable accommodation of a special need of another person means making adequate or appropriate provision to accommodate the special need; and
  - (b) reasonable accommodation of a special need takes place when a person acts in a way that reasonably provides for the special need of another person who has the special need because of an attribute.
- (3) Whether a person reasonably provided for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:
  - (a) the nature of the special need; and
  - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and
  - (c) the financial circumstances of the person; and

<sup>272</sup> *NT Anti-Discrimination Act* (n 1) s 24, as amended by *Anti-Discrimination Amendment Act 2022* (NT) s 13.

<sup>273</sup> Explanatory Statement, *Anti-Discrimination Amendment Bill 2022* (NT) cl 13.

- (d) the disruption that accommodating the special need may cause; and
- (e) the nature of any benefit or detriment to all persons concerned.

While this section now reframes the duty as a positive obligation, which does not hinge on a request being made, it still frames accommodations as reflecting a ‘special need’ of an individual, rather than a need for structural or systemic change.

In its previous form, s 24 was considered by a court or tribunal in the context of employment only once, in *Marchesi v Northern Territory of Australia*.<sup>274</sup> In that case, the claimant made bullying allegations against her supervisor, JP, which were upheld in part.<sup>275</sup> The claimant experienced a deterioration in her mental health as a result of the bullying.<sup>276</sup> The claimant argued that, contrary to her special need to work at an alternate location away from JP — which arose from her mental health condition — the respondent pressured her to work in the regional office where JP was located.<sup>277</sup> However, Tribunal Member McCrimmon found there was insufficient evidence that the claimant was pressured to work in the regional office.<sup>278</sup> Rather, the claimant continued to work at a different location to JP until she resigned.<sup>279</sup> While the respondent ultimately aimed to have the whole team working at the one location at the regional office, this did not result in a breach of s 24:

Facilitation of the Applicant working from a separate location from JP was an adequate and appropriate provision to accommodate the Applicant’s special need. That the ultimate goal was to reunite the team was reasonable, provided a work environment conducive to the Applicant’s return to the regional office could be attained. This did not occur, and the reasonable accommodation of the Applicant’s special need remained in place until her resignation.<sup>280</sup>

The claim under s 24 therefore failed.<sup>281</sup> It is unlikely a different outcome would have resulted under the new framing of s 24.

<sup>274</sup> [2021] NTCAT 39, [9] (Member McCrimmon).

<sup>275</sup> Ibid [4], [7] (Member McCrimmon).

<sup>276</sup> Ibid [7] (Member McCrimmon).

<sup>277</sup> Ibid [11] (Member McCrimmon).

<sup>278</sup> Ibid [88].

<sup>279</sup> Ibid (Member McCrimmon).

<sup>280</sup> Ibid [90] (Member McCrimmon).

<sup>281</sup> Ibid.

### E Australian Capital Territory: Encompassing All Grounds

Following reform by the *Discrimination Amendment Act 2023* (ACT) ('ACT *Discrimination Amendment Act*'), the duty to make reasonable adjustments in the ACT now also encompasses all protected grounds or attributes.<sup>282</sup> Further, the amendments have reframed the duty as a positive duty to make reasonable adjustments.<sup>283</sup> In the second reading speech for the *ACT Discrimination Amendment Act*, Ms Cheyne framed the duty to make reasonable adjustments as one of two new positive duties introduced by the Act.<sup>284</sup> According to that speech, the new duties both 'encourage duty holders to think proactively about their obligations under the [A]ct' and 'shift[] the responsibility away from individual complainants and helps tackle systemic discrimination before it happens'.<sup>285</sup>

The amended provision in s 74 of the *Discrimination Act 1991* (ACT) ('ACT *Discrimination Act*') now reads:

A person must make reasonable adjustments to accommodate another person's particular needs arising from a protected attribute if discrimination on the ground of the attribute is unlawful under this Act.<sup>286</sup>

An adjustment is not reasonable if it would cause unjustifiable hardship.<sup>287</sup> Unjustifiable hardship is assessed taking into account all relevant circumstances, including: the benefits and detriments likely to be experienced by each person; the protected attributes; and the estimated cost to, and financial position of, the person claiming unjustifiable hardship.<sup>288</sup> A failure to make a reasonable ad-

<sup>282</sup> *ACT Discrimination Act* (n 1) s 74, as inserted by *Discrimination Amendment Act 2023* (ACT) s 30 ('ACT *Discrimination Amendment Act*').

<sup>283</sup> *ACT Discrimination Act* (n 1) s 74. This is akin to the new positive duty to eliminate discrimination, sexual harassment and unlawful vilification: at s 75, as inserted by *ACT Discrimination Amendment Act* (n 282) s 30.

<sup>284</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 30 November 2022, 4023 (Ms Cheyne).

<sup>285</sup> *Ibid.*

<sup>286</sup> *ACT Discrimination Act* (n 1) s 74(1), as inserted by *ACT Discrimination Amendment Act* (n 282) s 30.

<sup>287</sup> *ACT Discrimination Act* (n 1) s 74(2).

<sup>288</sup> *Ibid* s 5B.

justment is unlawful under the *ACT Discrimination Act*, creating an independent cause of action.<sup>289</sup> The amended provision (s 74(1)) appears to embed many of the positive aspects of provisions in other jurisdictions into ACT law:<sup>290</sup> it creates a positive duty, as a standalone right, which relates to all protected attributes, and it creates a presumption that an adjustment is reasonable unless it creates unjustifiable hardship.<sup>291</sup> It remains to be seen how the provision is applied in practice.

#### F *Federal Law: Fair Work Act 2009 (Cth)*

The *Fair Work Act*, as the federal industrial law, also creates rights to request flexible working arrangements for those who:

- are pregnant;
- have parental or caring responsibilities for young children;
- are carers;
- have a disability;
- are aged 55 or older;
- are experiencing family and domestic violence; or
- are providing support to someone who is experiencing family and domestic violence.<sup>292</sup>

The right only extends to those with 12 months of continuous service with that employer.<sup>293</sup> Unlike under discrimination law, the *Fair Work Act* provides a procedural framework for requests, which has been strengthened by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)*.<sup>294</sup> Requests must be in writing, set out the details of the change requested and the reasons for the change,<sup>295</sup> and employers must respond in writing within 21

<sup>289</sup> Ibid s 74(3).

<sup>290</sup> See especially, eg, *NT Anti-Discrimination Act* (n 1) s 24(1); *Vic Equal Opportunity Act* (n 1) s 20(2).

<sup>291</sup> See *ACT Discrimination Act* (n 1) s 74(1).

<sup>292</sup> *Fair Work Act* (n 13) ss 65(1)–(1A).

<sup>293</sup> Ibid s 65(2).

<sup>294</sup> Ibid s 65. See also at s 65A, as inserted by *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)* sch 1 item 459 ('*Fair Work Amendment Act*').

<sup>295</sup> *Fair Work Act* (n 13) s 65(3).

days.<sup>296</sup> A request can only be refused if the employer has discussed the request with the employee and ‘genuinely tried to reach an agreement.’<sup>297</sup> If an agreement cannot be reached, a request can be refused on ‘reasonable business grounds.’<sup>298</sup> Reasonable business grounds include cost, practicability and impact on efficiency, productivity and/or customer service.<sup>299</sup> If refusing a request, the employer must explain the reasons for refusal.<sup>300</sup> An attempt should first be made to resolve a dispute about the right to request at the workplace level, and, if that fails, the dispute can then be referred to the Fair Work Commission (‘FWC’) to resolve the dispute, including by arbitration.<sup>301</sup>

Analysing the first FWC decision relating to the amended right to request flexible working arrangements,<sup>302</sup> Amanda Selvarajah argues that the FWC has unduly limited and narrowed the right by imposing unwarranted evidentiary requirements on requests.<sup>303</sup> In particular, in *Quirke v BSR Australia*, the FWC required an employee to prove both their eligibility criteria (that is, that they are pregnant, have parental or caring responsibility for young children, are carers, have a disability, are aged 55 or older, are experiencing family and domestic violence or providing support to someone who is experiencing family and domestic violence); and the ‘nexus’ between their characteristic and the request for flexible working arrangements.<sup>304</sup> This is perhaps akin to the approach taken under discrimination law in Victoria.<sup>305</sup> Selvarajah posits that, instead, a broader, more inclusive approach should be taken to the right to request, to

<sup>296</sup> Ibid s 65A(1), as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 459.

<sup>297</sup> *Fair Work Act* (n 13) s 65A(3)(a), as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 459.

<sup>298</sup> *Fair Work Act* (n 13) ss 65A(3)(b), (d), as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 459.

<sup>299</sup> *Fair Work Act* (n 13) s 65A(5), as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 459.

<sup>300</sup> *Fair Work Act* (n 13) s 65A(6), as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 459.

<sup>301</sup> Ibid ss 65B(2)–(4), 65C, as inserted by *Fair Work Amendment Act* (n 294) sch 1 item 463.

<sup>302</sup> See *Quirke v BSR Australia Ltd* (2023) 327 IR 373, 378–85 [14]–[28] (‘*Quirke*’); Amanda Darshini Selvarajah, ‘Proving the Right To Request Flexible Work: The Concerning Consequences of Comments in *Quirke v BSR*’ (2024) 37(3) *Australian Journal of Labour Law* 295, 297.

<sup>303</sup> Selvarajah (n 302) 297.

<sup>304</sup> Ibid; *Quirke* (n 302) 384 [22]–[23] (President Hatcher J, Asbury V-P and Durham C).

<sup>305</sup> See discussion above at Part III(C).

better enable conversations about flexible work.<sup>306</sup> As in discrimination law, FWC decisions relating to flexible work arrangements under industrial law appear to be embedding a reactive framework, which places a significant evidentiary onus on employees.

### G Collective Bargaining

All awards and enterprise agreements must include a term that allows an employer and employee to make an individual flexibility arrangement ('IFA').<sup>307</sup> An IFA varies the effect of terms of the award or enterprise agreement to meet the 'genuine needs of the employer and the employee', and might relate to working time.<sup>308</sup> Enterprise agreements might provide for reasonable accommodations. As Chapman notes, little is known about how widespread provisions for reasonable accommodations are in collective agreements.<sup>309</sup> However, the FWC now publishes enterprise agreements online, offering new research possibilities.<sup>310</sup> It is possible, then, to consider how widespread provisions relating to reasonable accommodations or adjustments are in enterprise agreements. Of the enterprise agreements approved on or before 25 October 2024, 143,916 agreements were returned in a search on the FWC Document Search database.<sup>311</sup> Of these, 940 (0.65 per cent) mentioned 'reasonable adjustment' and 4,866 (3.38 per cent) mentioned 'reasonable accommodation'.<sup>312</sup> Thus, additional provision for reasonable adjustments or accommodations in enterprise

<sup>306</sup> Selvarajah (n 302) 305–6.

<sup>307</sup> *Fair Work Act* (n 13) ss 144, 202.

<sup>308</sup> *Ibid* ss 144(1), 202(1)(a). The *Fair Work Regulations 2009* (Cth) include a model term: at reg 2.08, sch 2.2 cl 1.

<sup>309</sup> Chapman, 'Reasonable Accommodation' (n 38) 60.

<sup>310</sup> 'Find an Enterprise Agreement', *Fair Work Commission (Cth)* (Web Page) <<https://www.fwc.gov.au/work-conditions/enterprise-agreements/find-enterprise-agreement>>, archived at <<https://perma.cc/E69N-XJEZ>>. I have discussed the potential application of this method elsewhere: see especially, eg, Blackham, 'Collective Action' (n 6) 574–6.

<sup>311</sup> This figure appeared on the FWC Document Search database on 25 October 2024 after the relevant search filters were applied: see 'Document Search', *Fair Work Commission (Cth)* (Web Page) <[https://www.fwc.gov.au/document-search?search-ui=agreements&date\\_from=&date\\_to=2024-10-25](https://www.fwc.gov.au/document-search?search-ui=agreements&date_from=&date_to=2024-10-25)>.

<sup>312</sup> These findings are derived from the search results that appeared on the FWC Document Search database on 25 October 2024: see above n 311.

agreements is rare, though many agreements (34,951 or 24.29 per cent) referenced 'flexible work'.<sup>313</sup>

When examining the agreement provisions in more detail, many agreements mentioned 'reasonable adjustments' in other contexts, such as in relation to working time and the end of a shift,<sup>314</sup> to adjust appraisal standards<sup>315</sup> or in relation to job adjustments as part of a return to work process.<sup>316</sup> 'Reasonable accommodation' was nearly universally mentioned in the context of actual accommodation (such as for work-related travel, relocation or working away from home).<sup>317</sup> In some cases, the provisions essentially replicated legislative rights.<sup>318</sup> However, some agreements contained substantive additional rights. The VIQ Australia Services Enterprise Agreement, for example, contains provision for reasonable adjustments for reproductive needs:

Reasonable adjustments to accommodate Employees undergoing reproductive processes, menstruating or experiencing perimenopause, including working from home where possible, will not be unreasonably refused. VIQ acknowledges and supports the unique needs and challenges of Employees undergoing reproductive processes including reproductive processes, menstruating, or

<sup>313</sup> This finding is derived from the search results that appeared on the FWC Document Search database on 25 October 2024; see above n 311.

<sup>314</sup> See, eg, *Precision Fire Protection Services Pty Ltd: Electrical Enterprise Agreement 2024* (Agreement, 17 October 2024) cl 12(c), archived at <<https://perma.cc/9JEJ-LKFM>>; *Bradney Fire Pty Ltd & CEPU NSW/NFLA Sprinkler Fitting Fire Protection Union Enterprise Agreement NSW & ACT 2024/2028* (Agreement, 23 August 2024) cl 40.1, archived at <<https://perma.cc/A2B6-HKWZ>>. The clause in these agreements mentioning reasonable adjustments ('Daily Rest Break may not be taken and a reasonable adjustment will be made to the finishing time') was repeated across 307 agreements on 25 October 2024.

<sup>315</sup> See, eg, *IAG, IAG Enterprise Agreement 2024* (Agreement, 22 October 2024) cl 37, archived at <<https://perma.cc/2GLZ-WBEM>>.

<sup>316</sup> See, eg, *Civil 5000 Pty Ltd & The Australian Workers' Union Agreement 2024* (Enterprise Agreement, 6 September 2024) cl 40, archived at <<https://perma.cc/7TR2-BUJC>>; *CCS Commercial Construction Specialists Pty Ltd & The Australian Workers' Union Agreement 2024* (Enterprise Agreement, 26 August 2024) cl 40, archived at <<https://perma.cc/RJ2K-9CAS>>.

<sup>317</sup> See above n 312 and accompanying text. However, some agreements mentioned 'reasonable accommodation' in relation to legal rights: see, eg, *Monash University: Enterprise Agreement (Academic and Professional Staff) 2024* (Agreement, 18 July 2024) cl 60.1(c), archived at <<https://perma.cc/PL4P-R346>>.

<sup>318</sup> See, eg, *Edgarley Home Inc: Enterprise Agreement 2023–2026* (Agreement, 2 October 2024) cls 62.16–62.18, archived at <<https://perma.cc/9XVA-XJ AQ>>, which echo the wording adopted in *Vic Equal Opportunity Act* (n 1) s 20.

experiencing perimenopause and encourages a supportive work environment.<sup>319</sup>

This may go beyond existing legislative provisions, under which reproductive processes are not necessarily regarded as a ‘disability’.<sup>320</sup> Other agreements provide for reasonable adjustments for those experiencing domestic or family violence<sup>321</sup> (though this is now likely also captured by the *Fair Work Act* provisions discussed above).<sup>322</sup> Overall, then, it is rare for enterprise agreements to create additional rights to reasonable adjustments or accommodations, and most employees will rely on legislative rights only. It is critical, then, that legislative provisions are framed in a way that will prove meaningful in practice.

#### IV DISCUSSION: CHANGING THE NORM?

This discussion reveals significant legislative differences emerging across the jurisdictions, including in relation to whether the duty to make adjustments is framed as a standalone right (as in Victoria, ACT and NT) or built into the definition of discrimination (in the federal jurisdiction and Victoria); and whether the duty is framed as a positive obligation (as in the NT, ACT and in Victoria in relation to disability) or arising after a failure to respond to a request (in Victoria in relation to caring responsibilities).<sup>323</sup> In practice, though, even where the duty is framed and described as a positive duty, it is often interpreted as a reactive obligation that depends on individual requests for adjustments. This is most clearly illustrated by the discussion of VCAT decisions in Victoria above in Part III(C), where the Tribunal has repeatedly held that the duty is only enlivened by claimants explicitly disclosing their disability, making spe-

<sup>319</sup> *VIQ Australia Services Pty Ltd: Enterprise Agreement 2024* (Agreement, 7 October 2023) cl 6.2(f), archived at <<https://perma.cc/AEH5-MJK4>>.

<sup>320</sup> Cf *Vic Equal Opportunity Act* (n 1) s 4(1) (definition of ‘disability’).

<sup>321</sup> See, eg, *Keolis Downer, KDR Gold Coast Pty Ltd Controller: Enterprise Agreement 2024* (Agreement, 23 September 2024) cl 6.5, archived at <<https://perma.cc/8W28-PTZ4>>; *Masonic Care WA, Howard Solomon Residential Care Lifestyle Care Worker: Enterprise Agreement 2023* (Agreement, 15 August 2024) cl 28.7, archived at <<https://perma.cc/PW6D-2TR5>>; *ACT Government, ACT Public Sector Nursing and Midwifery: Enterprise Agreement 2023–2026* (Agreement, 17 July 2024) cl 120.22, archived at <<https://perma.cc/8UD2-CDKE>>.

<sup>322</sup> See above n 292 and accompanying text.

<sup>323</sup> See generally Allen, ‘Shalt Not Discriminate’ (n 26) 116–17.

cific requests for adjustments and providing clear evidence of why these adjustments are required.<sup>324</sup> This places a significant obligation on individuals to effect change. It requires individuals to know what adjustments are needed, to disclose their disability or other protected ground and to explicitly request change. For people who can ‘mask’ or camouflage their disability (though often at great personal cost),<sup>325</sup> disclosure may present a significant barrier to obtaining adjustments. This reactive framing of the duty to make adjustments is inadequate for addressing systemic issues and barriers to participation, and is unlikely to lead to transformative change.

A further problem emerges in the individualised framing and focus of the provisions. In the NT, for example, the provision (despite amendment) still hinges on a ‘special need’ of the person, framing their needs and the adjustments as exceptional.<sup>326</sup> This is unlikely to challenge the norm; instead, it might reinforce the norm, which is not ‘special’.<sup>327</sup> Indeed, in Allen’s study of reasonable adjustments under the Victorian legislation, she found that some employers focused solely on the individual in making adjustments and that

lawyers also expressed the concern that reasonable adjustments, when implemented, do not move the focus beyond the individual. One said that a business will focus on the individual who seeks the adjustment and develop a solution for them without thinking about the broader context of the workplace, school, or service and any other adjustments they could make.<sup>328</sup>

<sup>324</sup> *Muller* (n 177) [51], [74]–[75] (Senior Member Megay); *Mulder* (n 182) [65], [71], [73]–[76] (Senior Member Steele); *FWQ* (n 187) [65]–[66], [68], [73], [76] (Senior Member Johnson); *Bevilacqua* (n 193) [202]–[203], [209]–[216] (Senior Member Proctor); *Harrison* (n 198) 271 [15], 299 [229]–[235] (Senior Member Burdon-Smith); *Walker* (n 202) [84]–[90] (Senior Member Steele); *Ostry* (n 209) [147], [172]–[180] (Vice President Judge Marks); *Kassir* (n 215) [12]–[15], [39], [43]–[46] (Deputy President Coghlan); *Dziurbas* (n 159) [15], [140], [149]–[151], [168]–[170], [194]–[195] (Member Dea); *Weber* (n 231) [7], [184]–[188], [194]–[200] (Member Campana); *Arhontissas* (n 237) [468]–[473], [476]–[487] (Vice President Judge Marks); *Stuart-Teles* (n 243) [182]–[183], [231]–[234] (Senior Member Steele); *Butterworth* (n 155) [271]–[272], [274] (Member Wentworth).

<sup>325</sup> Elizabeth Radulski has discussed this concept in the context of autism: see generally Elizabeth M Radulski, ‘Conceptualising Autistic Masking, Camouflaging, and Neurotypical Privilege: Towards a Minority Group Model of Neurodiversity’ (2022) 66(2) *Human Development* 113, 114.

<sup>326</sup> *NT Anti-Discrimination Act* (n 1) s 24.

<sup>327</sup> See the discussion above at Part II(B).

<sup>328</sup> Allen, ‘Shalt Not Discriminate’ (n 26) 118.

This is evident, too, in the VCAT decisions above, even where occupational injuries have created the very need for adjustments, and other workers are still being put at risk by the same machines or job design.<sup>329</sup> It is unclear whether these individualised legislative provisions are enough to challenge existing structures and systems; it is likely that they are not enough to challenge the norm.

The question remains, then: might extending the grounds on which reasonable adjustments can be obtained do more to challenge prevailing worker norms? Or does challenging the norm require a complete rethink of reasonable adjustments? Day and Brodsky are reluctant to extend the duty to make reasonable adjustments to a broader range of protected attributes as it risks entrenching existing discriminatory practices and reinforcing the status quo, and may be incompatible with the prohibition of discrimination.<sup>330</sup> Extending the duty to make reasonable adjustments to all grounds is therefore only desirable if the duty advances substantive equality and embeds a positive and proactive approach to advancing equality. These two reforms — to extend the relevant grounds and to reframe the duty as a positive means of advancing substantive equality — should go hand in hand.

A more proactive approach to the duty is required to meaningfully advance substantive equality. For example, in the UK, the duty to make reasonable adjustments can be either anticipatory or reactive, depending on the context.<sup>331</sup> The duty might be reactive in employment, for example, where there is generally no need to make an adjustment unless notified by an employee or potential employee that an adjustment is required.<sup>332</sup> In providing services or exercising public functions, though, the duty is anticipatory and requires proactive measures; there is a need to anticipate the needs of disabled service users, for example.<sup>333</sup> A more proactive approach to the duty reflects a universalist approach to equality, which recognises the infinite variety of human conditions

<sup>329</sup> See, eg, *Butterworth* (n 155) [259], [264] (Member Wentworth); *Dziurbas* (n 159) [202]–[203] (Member Dea).

<sup>330</sup> Day and Brodsky (n 54) 467.

<sup>331</sup> Fredman, *Discrimination Law* (n 9) 363, discussing *UK Equality Act* (n 74). This reflects the specific drafting of the provisions in the UK: see below n 332.

<sup>332</sup> *UK Equality Act* (n 74) sch 8 pt 2 para 5, pt 3 s 20, sch 9 pt 1 para 1.

<sup>333</sup> Fredman, *Discrimination Law* (n 9) 363.

and experiences.<sup>334</sup> In this approach, as Kayess and French articulate, '[e]quality provisions are not activated by direct knowledge of personal characteristics but on the assumption that all characteristics will be encountered'.<sup>335</sup> Structures and systems therefore need to be changed proactively, without a disclosure or request, to pre-emptively ensure full participation is possible: 'a universalist approach is about expecting difference'.<sup>336</sup> Duties to make reasonable accommodations should therefore not hinge on disclosure or specific requests for adjustments being made; such needs should be anticipated and proactively accommodated. Unlike in the UK, this expectation should also extend to the context of employment.

A tension arises, though, in seeking to move to a more proactive model of accommodations: employers cannot be expected to anticipate or pre-empt every possible individual need arising from every protected characteristic or attribute. Equally, making anticipatory change — without disclosure — might redirect finite funds to adjustments that are not actually required by existing or potential workers and reduce the funds that are available for actual workers' needs.<sup>337</sup> Some sort of balance or limit is required to create proactive obligations that pre-emptively enable full participation without overburdening employers.

This limit might arise, in part, by requiring only what adjustments are 'reasonable'<sup>338</sup> in the specific workplace context (or, in other jurisdictions, by what would not impose 'unjustifiable hardship').<sup>339</sup> What is 'reasonable' generally takes into account the size and nature of the workplace, as well as the employer's financial circumstances.<sup>340</sup> Equally, what adjustments should be made proactively, and what structures and systems need to be changed pre-emptively, would be confined to what is 'reasonable'. Further, what it is 'reasonable' to anticipate will depend on the nature of the workplace and the workforce. It might be reasonable, for example, to anticipate that stairs at the entrance to a work-

<sup>334</sup> Kayess and French (n 25) 10.

<sup>335</sup> Ibid 11.

<sup>336</sup> Ibid.

<sup>337</sup> See also Fredman, *Discrimination Law* (n 9) 44, 473.

<sup>338</sup> See, eg, *Vic Equal Opportunity Act* (n 1) s 20.

<sup>339</sup> See, eg, *ACT Discrimination Act* (n 1) s 5B.

<sup>340</sup> See, eg, *Vic Equal Opportunity Act* (n 1) ss 20(3)(d)–(e). See also above Part III for a discussion of existing provisions.

place would limit access for those with mobility difficulties, as well as for parents with prams. Accommodations (like a ramp or lift) should therefore be made proactively.<sup>341</sup> Similarly, where work systems or processes have caused injuries in the past, it is likely reasonable to anticipate a need to change them, both to accommodate employees with disabilities and to prevent further injuries or hazards.<sup>342</sup>

In some cases, it might be reasonable for employers to make a proactive shift to structures and systems, to pre-emptively ensure full participation and recognise difference, while also making provision for individual adjustments on request. A proactive approach might therefore go hand in hand with, and be complemented by, individual adjustments and requests. The difference compared to the status quo, though, is that structures or systems might be adjusted to more readily accommodate individual adjustments, by pre-emptively challenging normative workplace standards. The proactive nature of these changes also distinguishes the duty from prohibitions of indirect discrimination, which tend to operate reactively.

For example, flexible work arrangements or hybrid working might be particularly beneficial to people with a number of different protected characteristics: those with caring responsibilities, including community care obligations, which may be heightened for Aboriginal and Torres Strait Islander peoples<sup>343</sup> and those from other ethnicities;<sup>344</sup> older workers;<sup>345</sup> people with disabilities;<sup>346</sup>

<sup>341</sup> This might be captured by building standards in some cases: see, eg, *Disability (Access to Premises — Buildings) Standards 2010* (Cth) sch 1 pt D3.

<sup>342</sup> See, eg, the discussion of *Dziurbas* (n 159) and *Butterworth* (n 155) at Part III(C) above. This might also be addressed through workplace health and safety laws: see, eg, *Work Health and Safety Act 2011* (Cth) ss 17–19; *Occupational Health and Safety Act 2004* (Vic) ss 20–2.

<sup>343</sup> See, eg, ‘First Nations People’, *Fair Work Ombudsman (Cth)* (Web Page) <<https://www.fairwork.gov.au/find-help-for/first-nations-people#the-importance-of-cultural-family-and-kinship-obligations>>, archived at <<https://perma.cc/S8RE-R549>>.

<sup>344</sup> See, eg, ‘Cultural and Religious Holidays’, *Fair Work Ombudsman (Cth)* (Web Page) <<https://www.fairwork.gov.au/employment-conditions/public-holidays/cultural-religious-holidays>>, archived at <<https://perma.cc/WU4H-KUWP>> (‘Cultural Holidays’).

<sup>345</sup> Alysia Blackham, ‘Rethinking Working Time To Support Older Workers’ (2015) 31(2) *International Journal of Comparative Labour Law and Industrial Relations* 119, 120; Therese MacDermott, ‘Older Workers and Requests for Flexibility: A Weak Right in the Face of Entrenched Age Discrimination’ (2016) 44(3) *Federal Law Review* 451, 452.

<sup>346</sup> See, eg, ‘Flexible Working Arrangements for Employees with Disability’, *Fair Work Ombudsman (Cth)* (Web Page, 25 October 2023) <<https://www.fairwork.gov.au/newsroom/news/>

and those with religious beliefs.<sup>347</sup> While individual needs are likely to vary, a broad structural shift in favour of accommodating flexible and hybrid work, where reasonable, might better enable individual accommodations to be made. Similarly, additional rest breaks from work might be beneficial and necessary for people with disabilities, who are pregnant or breastfeeding, who pray regularly and older workers. Again, the specific timing of rest breaks will likely vary from person to person, but shifting structures and systems to accommodate additional rest breaks would be a proactive measure that would better support individual adjustments.

A proactive approach to reasonable accommodations is therefore unlikely to completely exclude or eliminate the need for individual requests, especially where individuals have specific needs that are difficult to anticipate. Equally, though, some needs can and should be anticipated (as in the case of workplace access or the need to change hazardous systems), and changing structures or systems proactively (to enable hybrid or flexible work and additional rest breaks, where reasonable) can better support provision for individual needs within a proactive framework that shifts workplace norms.

## V CONCLUSION

There are critical economic, social and human rights imperatives to create inclusive workplaces that accommodate workers with all protected characteristics. Extending the duty to make reasonable accommodations to all protected grounds could be a transformative tool for advancing substantive equality, challenging workplace norms, and creating positive and proactive approaches to equality. However, despite legislative reform across jurisdictions, it appears unlikely that existing provisions are adequately framed to realise this transformative potential. In reforming duties to make reasonable adjustments, there is a need to embed a universalist approach to equality, which anticipates that all workers will have different needs and proactively identifies what reasonable changes need to be made to workplace structures and systems to accommodate that diversity. If framed in this way, duties to make reasonable adjustments could become critical complements to other positive equality duties, which require reasonable and proportionate measures to advance equality. Until then,

flexible-working-arrangements-employees-disability>, archived at <<https://perma.cc/LM7P-GYQR>>.

<sup>347</sup> See, eg, 'Cultural Holidays' (n 344).

though, the individualised and reactive framing of duties to make reasonable adjustments will likely mean they fall short of their full potential. While legislative reform (as in the NT and ACT)<sup>348</sup> could be a critical enabler of change, there is also a need for a more creative and sympathetic interpretation of existing legislative provisions by courts and tribunals to fully realise the transformative and proactive potential of duties to make reasonable adjustments across all protected grounds.<sup>349</sup> A creative and purposive interpretation of these legislative provisions will likely prove critical for building inclusive workplaces.

<sup>348</sup> See above Parts III(D)–(E).

<sup>349</sup> See, eg, Taylor, *Interpreting Discrimination Law* (n 53) 149; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 353–4.