



Ms Michelle Lindley
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Australian Human Rights Commission
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By email: michelle.lindley@humanrights.gov.au

7 March 2016

Dear Michelle,

Re: Business Services Wage Assessment Tool - Exemption

We refer to the above and to your correspondence of 3 March 2016.

Thank you for the opportunity to make a submission to the Australian Human Rights Commission (Commission) on whether it should grant an exemption to the Commonwealth and Australian Disability Enterprises (ADEs) to render the use of the BSWAT during the period 30 April 2015 to 18 December 2015 lawful.

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI's position

QAI is very strongly of the view that the use of the BSWAT constitutes unfavourable, discriminatory treatment that disadvantages and causes significant harm to the vulnerable people with disability to whom it is applied. QAI considers makes the following submissions:

- In holding that the use of the BSWAT assessment tool to determine reduced rates of pay for persons with an intellectual or cognitive disability constituted unlawful discrimination in breach of the federal disability discrimination laws in 2012, the Full Federal Court of Australia was completely justified and correct.¹ We consider that

¹ *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

support for this view is evidenced by the High Court's refusal to grant the Commonwealth special leave to appeal the decision of the Full Federal Court.²

- Since the landmark decision of the Full Federal Court in *Nojin v Commonwealth*, the approach taken to this issue has been consistent and the message is clear: the use of the BSWAT wage assessment tool on people with disability is discriminatory and unlawful.³
- The exemption granted by the Commission on 29 April 2014 to this ruling of the Full Federal Court made it clear that the exemption was granted for pragmatic reasons, as a transitional arrangement pending implementation of a new wage setting approach. In granting the exemption for the 12 month period, the Commission rejected a request by the Commonwealth to grant an exemption for a three year period and authorised the shorter period as a means for the Commonwealth and ADEs to transition to a new tool whilst ensuring the discriminatory impacts on workers subjected to BSWAT were minimised.⁴ In the event that the Commission now retrospectively authorises a further exemption, the Commission will have, in essence, permitted the exemption to operate for a much longer period that the Commission was prepared to approve.
- When the exemption expired in April 2015, it was not appropriate for a further exemption of any length to be sought nor granted. To do so would undermine the decision by the Full Federal Court that the use of BSWAT on people with disability constitutes unlawful discrimination and have adverse practical impacts on the people with disability subjected to the BSWAT.
- The terms of the exemption granted by the Commission specifically required transition from the BSWAT 'immediately' or 'as quickly as possible'.⁵ In continuing to seek extensions to the original exemption, the Commonwealth and ADEs are flouting the intent of this temporary exemption, at the expense of the people with disability subjected to the BSWAT.
- To grant further exemptions would be contrary to the object of eliminating discrimination against people with disability in the realm of employment, which is the

² 10 May 2013, High Court of Australia.

³ See for example *Watts v Australian Postal Corp and Abela v State of Victoria*. On 5 June 2015, the Fair Work Commission made orders by consent varying the SES Award, the effect of which was to remove the BSWAT as an approved wage assessment tool from the Award. The order required the Australian Disabilities Enterprises, within one month, to inform the FWC in writing of the approved wage assessment tool the ADE's proposed to transition to: Cited in *People with Disability Australia v Australian Human Rights Commission* [2015] AATA 548, at [59]. On the 25 June 2015, the Secretary of the Department of Social Services notified the AHRC that, as at 30 April 2015, only three ADE's had not chosen an alternative approved wage assessment tool (down from 24 in the previous quarter: Cited in *People with Disability Australia v Australian Human Rights Commission* [2015] AATA 548, at [60].

⁴ See Australian Human Rights Commission *Disability Discrimination Act 1992* (Cth), s 55(1) Notice of Grant of a Temporary Exemption.

⁵ See Australian Human Rights Commission *Disability Discrimination Act 1992* (Cth), s 55(1) Notice of Grant of a Temporary Exemption.

objective of the relevant legislation, as affirmed by the Full Federal Court. It would instead actively permit further discriminatory treatment which is unconscionable.

Why QAI opposes the retrospective granting of the exemption

As an organisation concerned with protecting the rights and lives of the most vulnerable people with disability in our society, QAI has maintained an active and long-term campaign against the use of the BSWAT wage assessment tool. QAI considers that the BSWAT wage assessment is an anathema to workers with an intellectual or cognitive impairment. In essence, this tool permits the payment of slave rates of pay to a vulnerable subset of the community. These rates of pay would cause outrage if applied in any other sector of the community. It is discriminatory to apply the BSWAT to people with disability, many of whom have faced a lifetime of disadvantage and disempowerment.

Australian Disability Enterprises (ADEs), which are the worksites in which the BSWAT tool has been predominantly used, have not been beneficial for people with disability – they have sanctioned their oppression, exploited their vulnerability and eroded their dignity. They have helped to create a perspective that people with disability are not capable, valued contributors to the workforce and should not be employed in open employment but rather require special, separate employment for which they are need only be paid a small fraction of the minimum wage. ADEs are not a bridge to open employment for most people with disability who work in them, but rather a dead end. The only parties that truly benefit from ADEs are the owners, who profit from the slave labour performed by the workers at ADEs. QAI acknowledges that some people with disability need very high levels of support and have used sheltered workshops as a pseudo day service in the absence of appropriate support packages to pursue other options or activities. Yet we disagree with the practice of labelling such services as ‘supported employment’ – if they are necessary to the wellbeing of the service users, they should be funded as a day service only. The people who have been engaged in these services for extended periods should have individualised funding that is targeting their goals articulated in their NDIS plans, be recognised for their long service to the workplace and receive entitlements that reflect their contribution.

We consider that the supported wage system, and ADEs, functions as a significant disincentive to employment for people with disability and can have the effect of demeaning and undervaluing the contribution made by people with disability to the labour market, in terms of the grossly insufficient remuneration provided and the concentration and confinement of workers to a small and undervalued sector of the labour market.

The experience of ADEs has been that people are indirectly compelled into sheltered workshops because that is their only choice. If they want to work they must work under the circumstances that are available for them. This does not amount to choice and is an exploitative and debasing model. It contravenes Art 27 of the *Convention on the Rights of Persons with Disabilities*, which recognises the right of people with disabilities to work on an equal basis with others and to enjoy just and favourable working conditions, as it is essentially servitude. It also breaches Article 16, which assures freedom from exploitation, violence and abuse, and Article 17, which protects the mental integrity of the person.

While some employers have demonstrated that they are more likely respond to incentives to employ a person with a disability and will not independently do this, reduced wages are not the answer.

Alternatives to the BSWAT

All people with disability, including those currently working in ADEs and/or subjected to the BSWAT, have the right to be paid at a rate that is equal to or greater than minimum award rates. When people with disability work their set hours of work to the best of their ability, they should receive the same pay as anyone else. Any shortfalls that employers cannot meet should be met by government support.

We recommend that workers be given the opportunity to be assessed for rates of pay under whatever measure produces the best result. We also commend those workplaces that prefer to pay reasonable rates of pay in accordance with the effort and work performed by workers with disability. It is not unreasonable to assert that people who work a certain number of hours and who do their best efforts be paid accordingly. Workers in Australia who do not have a disability doing the same jobs have differing levels of productivity in the workplace. They are not paid according to their productivity but by the prevailing award rate. It is only those workers who are paid 'piecemeal' who are paid for higher productivity – for example, highly productive fruit pickers will earn more than slower workers but they are all paid at the same rate.

The 2015 budget introduced some long-overdue reform in this area, amending the Disability Employment Services funding rules whereby people employed in ADEs or sheltered workshops are able to access support to achieve employment in the open labour market. This amendment means that people with disability who are employed by an ADE will be permitted to job-seek in the general labour market, without their access to DES funding being blocked. However, while welcome, this improvement only touches on the surface of the significant changes needed in this area. A decision not to grant a further exemption to the Commonwealth and ADEs for the use of the BSWAT, while another small step, would be an important one and would send an important message to employers about the value of workers with disability.

Conclusion

QAI submits that the Commission should not grant the exemption sought by the Commonwealth and ADEs so that the use of the BSWAT during the period 30 April 2015 to 18 December 2015, or indeed for any period subsequent to 30 April 2015, was lawful. The use of the BSWAT subsequent to expiry of the exemption is unlawful and the Commonwealth and ADEs should be required to remunerate all workers paid pursuant to the BSWAT at award rates for all work performed subsequent to 30 April 2015.

If you would like further information or clarification on any matters raised in this submission, please do not hesitate to contact Michelle O'Flynn.

Thank you for your consideration of this submission.

Yours Faithfully,

A handwritten signature in black ink, appearing to read "Michelle O'Flynn". The signature is written in a cursive, flowing style.

Michelle O'Flynn, Director