Australian Federation of Disability Organisations

National Council on Intellectual Disability

AED Legal Centre

Disability Advocacy Network Australia

People with Disabilities Australia

Down Syndrome Australia

Family Advocacy

Physical Disability Australia

Side by Side Advocacy

A joint supplementary response from national peak consumer and advocacy organisations in response to questions from the Australian Human Rights Commission regarding the application by the Department of Social Services for an exemption from the Disability Discrimination Act 1992 to use the Business Services Wage Assessment Tool

For consideration of the

Australian Human Rights Commission

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Legal Section

Australian Human Rights Commission

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Introduction

The national peak disability and advocacy organisations would like to thank the Commission for the opportunity to provide an additional submission to the Commission's request for further information. This submission is supplementary to our response provided on 31 January 2014.

We have already presented the Commission with available temporary and long-term solutions that can be implemented with appropriate time, planning and commitment to redress discrimination in the wage setting of employees in ADEs.

These solutions have been presented on the contingency that the Commonwealth will provide financial support to ADEs to ensure a timely redress of discrimination and simultaneously prevent business closure and job losses. This involves a modest cost to the Commonwealth.

We wish to pursue an agenda of real solutions to stop the discrimination, and ensure that people with disability receive *just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value.*[1]

The response to the Commission's questions by the Commonwealth presents little in the way of new information about plans to continue discrimination and develop a new wage assessment.

The Commonwealth's response is a threatening ultimatum. Our interpretation is that it is saying, "grant the exemption or a crisis of business closure and job losses will ensue."

We fear the recently announced BSWAT Payment Scheme is occurring without transparency or consideration of the vulnerability of a workforce to comprehend, negotiate and protect their interests against the interests of their employer and the Commonwealth.

We believe the Commonwealth's response to date is designed to create fear in the hearts and minds of employees, families, and support staff.

There is no apology or acknowledgement of the Court's decision that the BSWAT discriminates against people with intellectual disability as a group; no plan to ameliorate the current discrimination; and there is no detail of what standard, principle or right a future new wage assessment will uphold.

Unfortunately, we are familiar with this strategy of fear. It is a strategy to continue the status quo while promising change. As stated in our earlier submission, 'Wait' almost always means 'Never'.

We continue to recommend a rejection of the application.

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[1] UN Convention on the Rights of Persons with Disabilities, Article 27.

1. What are the arguments for and against the use of the Supported Wage System (SWS) as an alternative to the BSWAT?

We agree with the Commonwealth that use of the SWS is unlikely to be open for future claims of discrimination. This achieves the objective of the Commonwealth's application of a *DDA compliant wage assessment.*

We agree with the Commonwealth that the use of the SWS in ADEs would bring ADE employers in line with mainstream labour market expectations.

We agree with the Commonwealth that the use of the SWS in ADEs provides employees with disability the same entitlement to the same industrial rights as other employees.

It is this standard of equal rights and protection we are seeking.

Given these admissions from the Commonwealth there is no justification to spend time and resources developing a new wage assessment system.

The Commonwealth response incorrectly identifies the "pared back" nature or "simplification" of jobs in supported employment as something outside the capacity of the SWS.

We have already provided the AHRC with a detailed explanation on how jobs can be *customised* to match the ability of the jobseeker with the needs of an employer.

The argument by the Commonwealth that the SWS is unable to assess jobs which have been *customised* is incorrect, as many *customised* jobs have been the subject of SWS assessment.

The Commonwealth's own research documents demonstrates this to be true. For example, the *Evaluation of the Moderate Intellectual Disability Loading* (MIDL) by the Department of Education, Employment and Workplace Relations (DEEWR, April 2013), states,

> *While the trial was instigated on the strength of empirical evidence, the evaluation searched for and found supporting evidence in the research literature. The employment support technology required for people with significant intellectual disability to succeed in open employment is well documented. One-on-one specialist instruction based on applied behaviour analysis* ***together with job customisation*** *and on-the-job support is a resource intensive model. (p. 2 & 3, Emphasis added)*

The report goes on to say,

> *The importance of job customisation is also emphasised because people with more severe intellectual disability are rarely able to fill advertised vacancies:*

> *"This approach is designed to result in employment where job tasks are carved from an existing job, or created to match the skills and accommodation needs of the job seeker so that the employer's operation is helped in a specific way. Thus, the individual has a 'customised' job description that did not exist prior to the negotiation process, along with other negotiated conditions of work, such as productivity expectations or work schedules." (Luecking 2011: 262)*

Job customisation requires a much deeper level of interaction between disability employment initiatives and employers. This is employer engagement at a local, often personal, level.

> *"Employers cited the value of competent disability employment professionals who helped identify operational improvements as a key reason for hiring and retaining employees with intellectual disability and multiple disabilities, in spite of the fact that their employment was contingent on significant customization of job duties and conditions of work...Continuing campaigns to 'raise employer awareness' will have limited effect on actual employer hiring behaviour without simultaneous improvements in connecting employers to actual applicants with intellectual disability." (Luecking 2011: 265)*

The MIDL report further identifies that *Jobsupport*, a specialist open employment service provider for people with significant intellectual disability, utilises job customisation in all of its job placements. As noted in our previous submission, 40% of *Jobsupport* clients receive a wage determined by the SWS. It follows that the SWS is clearly able to determine the wages of jobs that have been customised.

The AHRC should also note that the Commonwealth conducted comparative research of jobs in ADEs with jobs in the open market. This research was presented as evidence to the Federal Court. This study was discussed by Marshall Consulting in July 2003 in their report, *Testing of the proposed business services wage assessment tool - Further Report on Job Analyses, Competencies, and Wage Outcomes.* This report states that,

> *Firstly, employers of all categories of workers with a disability are calling into play a relatively narrow span of industry competencies – an average of 2.38 competencies for business service workers (this figure validated by the Extended Trial control, where the average was 2.49 competencies). The number of competencies differs between industry lines but the spread is not wide (1.86 in Packaging/Assembly and 3.87 in Gardening, with 4.36 in Recycling being regarded as an outlier) . . . .*
>
> *Secondly, the control group of workers in open employment does not present much of a different picture. The open employment workers are required by the actual jobs being performed to have*

2.8 industry competencies. It is notable that the employers of workers in open employment are extending full award wages, sometimes, the Report suggests, above the base wage level specified in the relevant award, even though the jobs are quite narrowly skilled . . . .

The current experimental testing shows clearly that employers are prepared to pay full award wages for open employment workers with quite narrow competency spreads.

This research identified that the number and range of industry competencies per job in ADEs was not dissimilar to comparable jobs in the open market. And that jobs with a narrow range of industry competencies in the open market still attracted full award wages.

The argument that the SWS is unable to conduct assessment of jobs that have been customised is not sustained by the evidence.

The argument that jobs in ADEs are significantly different in the number and range of industry competencies in comparable jobs in the open market is not sustained by the evidence.

The argument that employees with high support needs are not economically viable is also not sustained by the evidence.

The preponderance of evidence is that people with high support needs can work productively and that a customisation of jobs or job tasks is not outside the scope of the SWS. Indeed, it is best practice.

<u>The Commonwealth response does not recognise the innovation developed by SWS assessors in ADEs to address variability in productivity performance.</u>

We have already set out in our previous submission the strategies currently being used by SWS assessors to address variability in the productivity of workers over the long-term. SWS assessors have indicated that they are already using historical productivity data collected by ADE employers to address any atypical performance on the day of assessment.

Whereas this is not strictly part of the SWS assessment process, it is a method of performance data collection that the SWS is capable of utilising to address variability of productivity over time. This process could be easily formalised within the current SWS assessment guidelines.

This is by no means an insurmountable barrier preventing the SWS being used in ADEs.

<u>The SWS minimum weekly wage provision of $78 can be addressed.</u>

As set out in our previous submission, the current minimum weekly SWS wage of $78 is a feature that the disability and advocacy sector is willing to amend to permit workers in low hour jobs and/ or with low productivity be employed despite the level of the weekly wage. As stated in our

previous submission, it would be important to consider safeguards to ensure such flexibility was not abused.

Such a modification to the SWS was recommended by the SWS review in 2001, and we do not see this as an insurmountable barrier to the use of the SWS in ADEs. We must recall that the SWS is already in use in some ADEs.

The Commonwealth does not provide the "initial data" in relation to a "significant increase" in wages

The Commonwealth makes the claim that there will be a 'significant increase' in wages on the basis of 'initial data'. Yet the Commonwealth does not provide any data to substantiate its claim.

We agree that the payment of "fair" award wages will increase the wage cost of many ADEs. And we provided an estimate of such an increase in our previous submission.

What should be clear is that the payment of "fair" award-based wage is the basic level of wage that an Australian employee is entitled to under our industrial relations system. The quantum of the "increase" is due only to the current use of a discriminatory wage assessment (i.e. BSWAT) which severely and unlawfully discounts the award wages of people with intellectual disability.

Such an increase in wage cost is not an argument against the use of the SWS. The SWS is simply doing its job as a fair award wage assessment of productivity.

The issue of "increased" wage cost is a matter of business viability. It would be contrary to fair business practice to achieve viability by unfairly discounting the wages of employees with disability as noted by the Full Federal Court decision. According to the Commonwealth's standard funding agreement, ADEs must ensure that:

> *A wage must not have been reduced, or be reduced, because of award exemptions or incapacity to pay or similar reasons . . .*

Operating a business that is unable to pay its employee entitlements is not permitted under the Commonwealth's ADE contract. It is important that the issue of ADE viability is not conflated with the discussion on wage assessments. If this is permitted to be entertained, then it is likely that the Commonwealth and ADE industry will continue its historical and current propensity to design and use wage assessments as part of a strategy to address business viability rather than on the basis of employee productivity of actual work against the award standard.

If there is difficulty in implementing fair award-based wages via the SWS, due to the poor business viability of many ADEs, then it is 'business viability' that should be addressed, not the SWS.

As recommended in our earlier submissions, we consider it important that discrimination is addressed immediately, and the SWS should be implemented as the single national award wage assessment for the long-term.

The capacity of ADEs to maintain viability and jobs should be addressed on a case-by-case basis, with the Commonwealth providing temporary funding to assist ADEs adjust to business parameters based on fair award wages.

2. What steps/processes would need to be undertaken to implement the SWS immediately?

3. How long would these steps/process take?

We agree with the Commonwealth that a transition from BSWAT to SWS, and a building of SWS assessor capacity, would take time.

This is, however, a good use of time.

In our previous submission we outlined a process by which this could be achieved.

It should be noted that using 'time' to transition to SWS, and build assessor capacity, are steps towards ensuring employees are subject to a wage assessment system which is 'fair'. It is a use of time which is 'just-ifiable'.

In such a transition, *time* would *not* need to be used on developing a new wage assessment system which would be considerably *more* time than getting on with implementing an available solution.

We believe that the Commonwealth is underestimating the current (or potential) capacity of the national panel of assessors (i.e. SWS assessors) to take on more SWS assessments.

We also cannot presume that the Commonwealth will develop a wage assessment that is compliant with the DDA.

ADE viability must be viewed within the parameters of fair award wage assessment. Implementing the SWS would need to work *concurrently* with an examination of ADE viability to pay fair award-based wages, and short term financial assistance should be provided by the Commonwealth to protect jobs whilst ADEs adjust business practices.

4. What are the arguments for and against using only the productivity part of the BSWAT?

We agree with the Commonwealth that using only the productivity part of the BSWAT would be simple, as data from existing assessment is available.

We agree with the Commonwealth that the productivity element of BSWAT is similar to the SWS. This provides an immediate redress of current discrimination.

In our previous submissions, we have recommended this to be a temporary step in a transition to the SWS. It provides immediate redress of discrimination whilst time and effort is directed to build the assessment capacity of the SWS and begin a roll out of SWS assessments for all ADE employees.

The 2% of employees with high competency scores could have their wages grandfathered

The Commonwealth claim that 200 employees or about 2% of the BSWAT employee population could be disadvantaged via the use of the productivity only score of BSWAT. The claim does not indicate whether these employees are people with intellectual disability or people with other disabilities.

The wages of these employees could be 'grandfathered' until a valid SWS assessment indicates a higher wage.

The Commonwealth is defending the continued use of BSWAT, despite the ruling of our highest Courts.

What is of great concern to national peak disability and advocacy organisations is the continued position of the Commonwealth that BSWAT is still a valid wage assessment tool for employees with intellectual disability.

In our original submission to the AHRC, we addressed in detail the circumstances by which the Commonwealth believes the BSWAT to be valid. None of these circumstances are justifiable, and the Commonwealth's position is contrary to the Federal Court's decision.

What is particularly concerning is that the Commonwealth, despite the Court ruling, continues to advocate the use of competency based wage assessment. The Federal Court was clear that this theoretical and artificial basis for wage assessment lacked validity in terms of comparison and measurement of the actual job tasks performed by employees with intellectual disability.

The expert witness evidence accepted by the Full Federal Court and the High Court clearly sets out the fact that people with and without disability in the open labour market performing similar work are not subject to competency assessment as promoted by BSWAT. In fact, as stated in the decision, if BSWAT were used in the open labour market, people with and without disability currently earning full award wages performing the same work would have their award wages discounted.

We feel strongly that we must *once again* re-state some of the concluding statements of the decision made by the Full Court of the Federal Court. It was found that;

"the criticism of BSWAT is compelling"

and

"BSWAT is skewed against intellectually disabled workers"

and the

"competency elements of BSWAT have the effect of discounting even more severely, than would otherwise be the case" for workers with intellectual disability,

and BSWAT

"is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned."

The High Court of Australia agreed and said;

"The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court."

The Courts have clearly decided that BSWAT discriminates against people with intellectual disability. The Courts have clearly pointed to the discriminatory affect of competency based wage assessment on the award wages of employees with intellectual disability.

The Commonwealth response indicates that it has not accepted the Court's decision. The continued defence of the use of competency based wage assessment indicates a lack of acceptance or understanding of the discrimination that employees with intellectual disability have and continue to be subject to. The only other basis for holding such a position would be malice, which we find hard to believe our government would deliberately support.

5. What steps/processes would need to be undertaken to use only the productivity part of BSWAT immediately?

6. How long would these steps/process take?

In question 4 the Commonwealth stated that *a move to using only the productivity part of the BSWAT would be relatively simple as data from existing assessments could be used.*

We agree that this can be done simply and quickly.

The other steps listed by the Commonwealth in question 6 are relatively minor administrative steps.

We would expect that the Fair Work Commission would agree to quickly approve a temporary change to BSWAT, as part of the Supported Employment Services Award, to respect the Full Federal Court decision and address disability discrimination in employment.

This need only be a temporary change to bring about immediate redress of the discrimination caused by BSWAT, and as part of a transition to the Supported Wage System.

7. What tools are currently used to assess the 50% of employees of ADEs that are not assessed by BSWAT?

8. What are the arguments for and against the use of these other tools in place of BSWAT?

The Commonwealth response doesn't fully answer question 7 and 8.

The Commonwealth has previously funded consultants to prepare an analysis of the other 28 wage tools, other than the SWS, that are included in the Supported Employment Services Award. This analysis was presented to industrial authorities and supported by the Commonwealth.

It is not clear why the Commonwealth has chosen not to present a view on the other 28 wage tools.

As the Commission can see from our analysis in our previous submission, there are considerable concerns about disability discrimination in the design and use of the other 28 wage tools for approximately 50% of ADE employees.

We agree with the Commonwealth that the other 28 wage tools lack independence in the conduct of the wage assessment.

It is particularly concerning that the Commonwealth does not recognise the prevalent use of competency based wage assessment, and other assessment features that are <u>not</u> directly concerned with the actual jobs tasks of ADE employees, in many of the other 28 wage assessment tools.

9. What evidence or analysis is available, or has been done, to support the submission that ADEs would close as a result of the increased wages?

10. What consideration has been given to providing additional support to ADEs to assist them manage the additional costs resulting from increased wages?

Commonwealth and ADE claims about business closure and job losses in implementing the SWS are not presented on the basis of transparent or detailed evidence.

There is no detailed analysis provided on the commercial viability of each of the 194 ADEs.

We are also not informed as to the methodology on how the Commonwealth has arrived at its conclusion on levels of ADE viability.

The Commonwealth informs the Commission that ADEs are not for profit and do not make significant surpluses. Why hasn't the Commonwealth provided detailed evidence to substantiate these claims?

We decided to take a brief look at some of the ADE Annual Reports referenced by the Commonwealth. We randomly chose three ADEs that had provided written submissions to the AHRC. A limitation in gaining clarity about ADE viability via annual reports is organisations tend to produce financial statements which include consolidated financial information from across a number of different programs.

The *Endeavour Foundation* is the largest employer of people with intellectual disability in ADEs. Endeavour employs 1,855 people with intellectual disability. This is close to 20% of ADE employees being paid via BSWAT. According to its Annual Financial Report 2012-13, the Endeavour Foundation has,

- a net surplus of $3.4 million
- assets of $96 million, which includes cash of $11 million
- a net surplus by Endeavour industries of $2.3 million

Disability Services Australia employs over 550 employees with disability in ADEs. According to their Financial Report 2012-13, it has,

- assets of $23.5 million which includes cash of $8.1 million, and
- retained earnings of $15.4 million

The *Oakleigh Centre*'s annual report for 2013 available online doesn't include a financial statement. It does include a treasurer's report which states that the organisation as a whole (not just its ADE) reported an annual operating deficit of $600,000. The Executive Manager of ADEs is quoted in the report that *Oakleigh Centre Industries* had a "sensational year!" The annual report claims that fair award-based wages via the SWS would increase wage cost by $250,000 per year and this cost would be difficult for the organisation to meet. Without financial statements, and specific financial information for the ADE, we are unable to interpret this statement.

On the basis of this simple probe into the annual reports of three ADEs we can see that there is evidence that some ADE organisations are in a very healthy financial position, and that some others are more sensitive to the impact of fair award wages on their overall viability status.

We question why the Commonwealth's exemption application does not include this level of detail and transparency about the financial position of each of the 194 ADEs. Instead, the application is presented as if fair award wages is something all ADEs are unable to afford.

We also question why the Commonwealth is protecting ADEs from taking responsibility in paying compensation due to the underpayment of wages of employees assessed by the BSWAT. The rhetoric of the BSWAT Payment Scheme is to absolve ADEs from paying compensation to employees so that the viability of ADEs is not threatened. Yet it appears that there are some ADEs that could meet this employer responsibility.

We also question why the Commonwealth cannot immediately move to an available DDA compliant wage assessment tool such as the SWS, and immediately redress the current discrimination being suffered by people with intellectual disability. Some ADEs would appear able to cope financially with this change.

The quantum of Commonwealth financial assistance to assist some ADEs to meet its obligations under the DDA could be restricted to only those ADEs that are clearly at financial risk if fair award wages were implemented.

For many ADEs, wage costs have been kept low due to unfair wage assessment. A change to fair award wage assessment will clearly incur increased wage costs for ADEs. This is an increase to meet a basic entitlement, not a pay rise, as we would typically understand such a rise in pay to be.

Our submissions have proposed that the Commonwealth should provide financial assistance to ADEs on a case-by-case basis as a temporary solution to ensure redress of discrimination, and assist those employers who may need to adjust business practices to achieve viability based on fair award-based wages.

The Commonwealth predicts a 70% increase in wage costs for ADEs, on average, due to introduction of productivity-based wages.

Our own wage cost increase estimate, based on BSWAT average data provided to the Senate in 2008, is an average increase of 64% for all employees with disability, and an average increase of 72.3% for employees with intellectual disability.

Percentages can, however, mask the quantum of change. A significant percentage increase of a low wage does not necessarily mean a substantial wage increase, (e.g. a 70% increase of $1.00 per hour changes to $1.70 per hour - and this is not a windfall).

Based on the data provided to the Senate, the average BSWAT wage score was 21% for employees with intellectual disability. This included an average productivity score of 36.2%, and an average competency score of 5.7%.

If ADEs use only the BSWAT productivity score, the award percentage would increase by 15.2% to an average of 36.2% for people with intellectual disability.

In 2008 terms, this would increase the average hourly rate from $2.89 to $4.98 for an increase of $2.09 or 72.3%.

In 2008 terms, the average hours worked was 26.6 hours, resulting in an average weekly wage of $76.87. Using productivity only scores, the average weekly wage would increase to $132.47 for employees with intellectual disability.

Disability	Average Productivity Score	Average Competency Score	Average Wage Score	Average Hours Worked	Average Hourly Wage	Average Weekly Wage
Intellectual Disability	36.2%	5.7%	21.0%	26.6	$2.89	$76.87
Intellectual Disability Productivity Only	36.2%			26.6	$4.98	$132.47
% Increase					72.3%	72.3%
All	38.1%	8.3%	23.2%	25.6	$3.20	$81.92
All Productivity Only	38.1%			25.6	$5.25	$134.40
% Increase					64.1%	64.1%

In our previous submission, we estimated that moving to productivity-based wages, taking into account changes in the federal minimum wage since 2008, and applied to all ADE employees, would result in an estimated annual increase in ADE wage cost of $78.7 million. We also estimated that due to increased wages, the Commonwealth would gain an estimated annual benefit of $34.9 million in pension savings.

According to the Commonwealth's submission, 92 or 48% of ADEs had a medium to high risk of failure. Twenty-eight of this group of ADEs have remained at high risk for 2 or more years. No detail on the viability of each of the 194 ADEs is provided, and views are reliant on anecdotal evidence.

Based on the Commonwealth data we can presume that:

- 102 (53%) ADEs are in a position of business viability.
- 64 (33%) are currently at some level of viability risk, and 28 (14%) have been at a high level of viability risk for 2 or more years.

On this basis, 53% of ADEs could move to fair award-based wages via temporary use of the BSWAT productivity score and move to the SWS as a permanent solution over time. This group of ADEs would not require financial assistance.

This 53% of ADEs will provide the Commonwealth with a financial benefit through pension savings due to the payment of fair productivity-based wages. In average terms, we estimate this to be $18.5 million in annual pension savings. This contributes to Minister Andrew's welfare reform agenda to increase earnings from work and decrease reliance on the welfare budget. Employees with disability also gain a greater total disposable income when part pension with productivity-based wages are combined.

In contrast, 47% of ADEs will require some financial assistance to meet fair productivity-based wages due to poor business viability. If we presume that this group need assistance for the total wage cost increase, this would require an estimated annual Commonwealth financial assistance of $37 million. This cost outlay is offset by annual pension savings of $16.4 million.

For an annual spending of $37 million to prevent business closure and job loss, the Commonwealth gains a return of $34.9 million through pension savings due to the payment of fair award wages.

The actual annual net cost to the Commonwealth is just $2.1 million.

	Viable	Not Viable / At Risk	Total
ADEs	102	92	194
Financial Support (Wage increase of 64%) *(millions)*	$0.0	$37.0	$37.0
Pension Savings *(millions)*	$18.5	$16.4	$34.9
Total Cost *(millions)*			$2.1

The Commonwealth is in a position where it could use its resources to support the immediate transfer of all ADE employees to a single system of wage assessment conducted by the SWS. If all ADEs become commercially viable, then the Commonwealth will receive pension savings of approximately $34.9 million annually without requiring to fund any financial assistance due to poor viability.

11. Please provide full details of the 'steps to move towards a new wage setting approach' identified on page 4 of the exemption application, including proposed dates and timeframes?

12. What steps have already been taken and what were the outcomes of those steps?

The Commonwealth response to questions 11 & 12 does not provide any further details of the principles, processes or structures of the future new wage assessment they wish to devise.

The Commonwealth application remains a request to grant a DDA exemption to continue known discrimination to provide time to devise a future new wage assessment system which is completely unknown.

This is being requested when there is a valid and available wage assessment system currently available (i.e. SWS), and of which there are no valid arguments against the implementation of such a system in ADEs.

Concerns about business viability are <u>not</u> relevant to the design or analysis of an award wage assessment. It appears that a strategic aim of the Commonwealth is to devise a new wage assessment tool to ensure the commercial viability of ADE businesses. It is this very thinking that drove the development and decision making of the BSWAT in the first place.

11. If the exemption were granted, what steps would be taken to ameliorate the discriminatory effects on employees?

12. Provide any comments in response to the submissions referring to the concluding observations of the CRPD Committee relating to the BSWAT on the initial report of Australia, adopted at its tenth session (2-13 September 2013).

13. Provide submissions as to the reasonableness of the exemption, given the discrimination that will occur if the use of the BSWAT is continued.

The Commonwealth is still contending that the BSWAT is lawful.

In our original submission, we addressed the particular circumstances by which the Commonwealth claims that the BSWAT is still valid.

Unfortunately, the Commonwealth is not accepting the decision of our highest courts, despite the fact that the Court explicitly found that BSWAT discriminates against employees with intellectual disability as a group.

The discrimination of BSWAT continues for employees with intellectual disability and the Commonwealth appears comfortable continuing to support this discrimination. Further, the Quality Assurance authority - JAS-ANZ - continues to permit certification of ADEs that use BSWAT as meeting the law. This is a blight on our systems to protect the human rights of people with intellectual disability in employment.

The Commonwealth does not offer any amelioration of the continued discrimination of BSWAT.

The Commonwealth has chosen not to respond to the concluding observations of the UN CRPD Committee which seek Australia to stop using BSWAT and implement the SWS for ADE employees.

The BSWAT Payment Scheme remains largely unknown as to whether it will compensate employees for past, current and future underpayment of wages ,and how exactly this will be calculated. It also unclear whether ADE employees with intellectual disability will be provided with independent industrial support to ensure the protection of their rights and ensure informed and valid decision in response to the Scheme.

16. Provide any additional submission responding to the submissions provided to the Commission, or that you feel appropriate.

We are concerned by the Commonwealth's reference to statements that the BSWAT had become *outdated and due for review*. This gives the impression that the BSWAT just requires a few minor tweaks and that the Commonwealth had been lapse in undertaking ongoing review.

The BSWAT was found to be discriminatory against people with intellectual disability. A decision made by the Full Federal Court and agreed by the High Court of Australia.

This decision wasn't made because of the BSWAT's 'age' or lack of 'review'.

This is not some minor problem that can be dealt with by amendment or update. This is a significant disadvantage against a vulnerable group of employees.

The Commonwealth is incorrectly conflating people with "High Support Needs" with segregated employment options, and with those who will be negatively impacted by fair award wages.

The Commonwealth refers many times to the negative impact fair award wages will have on *people high support needs.*

We must make two salient points.

- A fair productivity-based wage assessment is based on the volume of work an individual can do compared to the volume of work by a worker paid the full award wage for the same job. A person with high support needs is not treated any differently - and the assessment is based on performance without support.
- The Commonwealth provides additional support funding to ADEs for people with high support needs. There are four different funding levels based on support need. Differences in support need are already addressed via Commonwealth support funding.

The issue is not higher wages, but fair award wages for the actual work performed. Differences in productivity and support need are already taken into account.

The Commonwealth response infers that *people with high support needs* can only work in restricted or segregated employment options. We are meant to imagine some highly dependent person with disability who is incapable of productive work in the open labour market.

Low expectations have traditionally created substantial barriers for people with intellectual disability from participating in regular settings, be this a regular home, a regular classroom, or a regular workplace.

It is somewhat disturbing that the Commonwealth is promoting such old beliefs and assumptions that are not based on evidence, but sit more neatly in the space of prejudice and stereotyping.

Arguably, the most respected authority in the world on employment and people with intellectual disability is Dr Paul Wehman from the Virginia Commonwealth University. Dr Paul Wehman is the chief editor of the international *Journal of Vocational Rehabilitation* and was one of the pioneers of service models to support people with intellectual disability to work in the open labour market in the late 1970s and early 1980s - more than 30 years ago.

In 1981, Dr Wehman wrote that

> *"A significant barrier to employment opportunities for the severely developmentally disabled individual has been "What we think we know." In the not too distant past, we knew that the severely developmentally disabled individual could not function in competitive employment. As a*

result, training programs focused on preparing the individual for sheltered employment and work activities. The expectation that severely developmentally disabled persons could not function in competitive employment became a self-fulfilling prophecy. Limited expectations limited what individuals were taught, thus fulfilling the expectations."

Dr Wehman's comment underscores the evidence that people with significant disability who have high ongoing support needs can work in the open labour market when provided with evidence-based support. Restricting people with intellectual disability to sheltered employment is a restriction placed by others on people with intellectual disability. It is not a limitation due to intellectual disability or the degree of support need.

Dr Wehman's recommendation in 1981, and echoed by other professionals since, is that there is a critical need to develop support services that can deliver employment opportunities to achieve successful open employment careers.

This isn't an *ideology* in the derogative sense being used in this debate. This is hard science. The technical know-how to support and include people with intellectual disability in the regular labour market is well developed and demonstrated.

The evaluation of the *moderate intellectual disability loading* by the Commonwealth indicates that Australia has a 27 year demonstration of placing, training, and providing ongoing support of people with significant intellectual disability - who have high ongoing support needs - in open employment.

It is due to such demonstration that the Supported Wage System was introduced so people with significant intellectual disability could enjoy the dignity of paid work in the employment market. This is the notion of inclusive employment envisioned by the UN CRPD.

Unfortunately such quality employment support is not available to all people with intellectual disability in all locations. A major concern for national disability and advocacy groups is that the employment options for people with significant disability are limited, not due to the individual's disability or level of support need, but due to the severe lack of specialist service support in all areas in Australia.

For example, there is dearth of specialist open employment support for people with significant intellectual disability, which was identified by the Commonwealth in its report on the *Evaluation of the Moderate Intellectual Disability Loading*.

What we are witnessing is an inadequate vision and plan to provide evidence-based employment support for people with significant disability so they may choose to move into paid work in the regular market.

This is not an *ideology* of restricting people with intellectual disability to one choice or the other. What we are actually confronted with is Commonwealth policy that restricts people with significant disability to ADEs and non-work day options. Many people with significant intellectual disability simply cannot choose the specialist employment support they need to participate in the open market.

For many individuals and their families, ADEs and non-work programs become programs of choice as there are no other options. Sadly, due to a limitation of choice and competency, many come to believe that people with high support needs can only work in segregated options.

Even within this limited employment service choice, the Commonwealth promised people with disability that ADE employers would be required to ensure fair award wages. This is an unfulfilled promise.

Having restricted people with significant disability to sheltered employment, and promising fair award-based wages, the Commonwealth is now saying to employees and families that your choice is either continued discrimination in ADEs or unemployment. And the prospect of a new DDA compliant wage assessment is hopeful at best.

The notion of "high support needs" is not something that precludes people with disability from participation in the open labour market or from enjoying the dignity or right to a fair award-based wages. A choice to work in an ADE should indeed be a choice, not a restricted choice. A choice to work in an ADE should not be commensurate with trading off one's individual human rights to a fair award wage.