

Response to Australian Human Rights Commission

Introduction

The primary focus of the Department of Social Services' application for temporary exemption from the *Disability Discrimination Act (1992)* (DDA) for three years is to ensure that current workers have access to ongoing stable employment opportunities.

Introducing an alternative wage setting arrangement to replace the use of the Business Services Wage Assessment Tool (BSWAT) which is used by approximately 50 per cent of ADEs to determine the pro-rata wages of supported employees, is a complex piece of work which will require the development and implementation of a number of policy and program initiatives designed to address several interrelated policy issues. These include:

- the Full Federal Court judgement of *Nojin & Prior v Commonwealth [2012] FCAFC 192*;
- the restricted employment options available in mainstream employment for people with disability, especially those with high to very high support needs;
- the changing nature of employment for people with disability; and
- the ongoing financial viability of the ADE sector.

Despite the complexity of the task, the Australian Government is committed to putting in place new wage assessment arrangements for supported employees within three years or less. The Department's application has been made to provide the necessary time for the development and implementation of tailored policy solutions for the medium to long-term, particularly measures which will support stable employment options for people with disability.

In the event that the Australian Human Rights Commission (AHRC) does not grant a temporary exemption, the Government will need to look at crisis arrangements. It is likely the impact on supported employees will be increased instability of employment, the closure of some ADEs and consequential job losses and reduced employment options leading to increased social isolation for people with disability, particularly those with high support needs. In turn, this could increase demands on many families and carers.

If a temporary exemption is granted it would allow a planned transition to new wage assessment arrangements, allow for the implementation of reforms to build the viability and capacity of the ADE sector to pay higher wages while continuing to provide employment options to people with disability, especially those with high support needs. Sustainable employment opportunities delivering improved wage outcomes will only be possible in financially robust ADE businesses. There is a very high risk that an inability to deliver strong business outcomes to pay improved wages will result in widespread business closure and resulting unemployment for this group of workers.

It should also be noted that the ADE sector employs around 4000 additional workers to deliver support to people with disability; and administration and business functions.

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

Arguments for the use of the Supported Wage System (SWS) as an alternative to the BSWAT:

- SWS is owned by the Australian Government and is an authorised tool under the *Supported Employment Services Award 2010*. It is used to determine pro-rata wages for people with disability in open employment and it is also currently used by a small number of Australian Disability Enterprises (ADEs) to determine wages for supported employees. Adoption of the SWS as an alternative to the BSWAT would bring supported employment in line with the mainstream labour market in terms of how pro-rata wages are assessed and would entitle supported employees to the same industrial rights as other employees.
- The use of SWS would likely result in higher wages for the majority of supported employees, although there would be a small group who would be disadvantaged. This is explained under the BSWAT section.
- SWS measures productivity only and therefore its use is less likely to be open to future claims of discrimination. The use of SWS is the preferred option for most advocacy services.

Arguments against the use of SWS as an alternative to the BSWAT:

- It has been suggested that those supported employees with the highest support needs would fall out of employment because it would no longer be economically viable to employ this group. A key factor in this likely outcome is that many jobs in the ADE sector are significantly pared back beyond the definition of Grade 1 or Grade 2 contained in the relevant Industrial Award. The simplification of jobs is not reflected in the SWS wage assessment process. For example, a worker in open employment may perform several duties with several subcomponent tasks. Employment for a worker in an ADE may involve just one task with one subcomponent.
- Another reason put forward why employees with the highest support needs may fall out of employment is because it is possible that the productivity only measure available through the SWS may not provide an accurate indication of true productivity of some employees. The period of time used for the SWS assessment is relatively short and a supported employee may be able to demonstrate a productivity level for a short period of time which cannot be sustained over a longer period.
- It is also worth noting the requirement of the *Supported Employment Services Modern Award 2010* to pay a minimum weekly wage of at least \$78.00 to all employees assessed by SWS regardless of hours worked. This could possibly result in some supported employees who work low part-time hours being at risk of losing their employment if the minimum weekly wage was more than the wage they would otherwise have been assessed as being entitled to.
- Initial data indicates that there would be a significant increase in the wages of supported employees for ADEs transitioning to using SWS.

- The risk of ADE closures resulting unemployment is a significant concern for people with disability, their families and carers, especially in circumstances where there would be limited alternative employment options (for example, in rural and regional Australia).

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

3. How long would these steps/process take?

- Transitioning from BSWAT to SWS would take some time. A number of significant pieces of work would need to be carried out, in consultation with all stakeholders, to ensure successful implementation of the SWS and continuing viability of the ADE sector. This work would need to include:
 - building capacity of SWS assessors, scheduling and undertaking an additional 10,000 assessments per annum. It should be noted that current resources meet 4,000 SWS assessments per annum. Capacity would need to be trebled to meet the demand of 14,000 assessments per annum.
 - developing and implementing a viability strategy for ADEs including the possible restructuring/amalgamation of ADEs to meet the costs of increased wage bills to ensure jobs are not lost.

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

Arguments for using only the productivity part of the BSWAT:

- A move to using only the productivity part of the BSWAT would be relatively straightforward as data from existing assessments could be used.
- The measurement of productivity is likely to see an increase in wages for most supported employees.
- The BSWAT allows for the assessment of productivity over a longer time-frame than the SWS, therefore potentially providing a more accurate assessment of an employee's true level of productivity.
- Using only the productivity part of the BSWAT would remove the risk of further claims of discrimination in relation to the measurement of competency.

Arguments against using only the productivity part of the BSWAT:

- The productivity component of the BSWAT is almost the same as the SWS. There is no advantage in having both in the long-term.
- As with the proposal to use SWS, the use of the productivity only component of the BSWAT would result in viability problems for many ADEs and resulting uncertainty of employment for supported employees.
- Anecdotally the Department is advised that an initial estimate of average increased wage costs for ADEs transitioning to the BSWAT productivity part only would be up to 70 per cent. This is a significant cost for marginal businesses to absorb in a short time period and is likely to result in business closure and job losses. .

- The measurement of productivity only would disadvantage some people, for example where someone has a high level of competency relative to their productivity, and would result in lower wages for these individuals. It is estimated that approximately 200 of the current cohort would be in this group.
- The Department's exemption application (the exemption application) noted that the majority of judges in the Full Federal Court decision of 21 December 2012 said that the test of competency in BSWAT (in particular, the question and answer method used to assess parts of the units of core competency) disadvantaged people with intellectual disability and that, by virtue of their intellectual disability, Mr Nojin and Mr Prior were not able to comply with the competency component of BSWAT in their particular circumstances. It does not follow from the majority judgements that all assessments under the BSWAT would constitute unlawful discrimination: the exemption application sets out (non-exhaustive) circumstances where an assessment under the BSWAT would not constitute unlawful discrimination. Further, the majority judgments do not preclude use of an alternative method of assessing competency which complies with the requirements of the DDA. Competency is not only used in the BSWAT assessment, it is also widely used in workplace training and assessment in open employment regardless of whether a person has a disability or not, for example, accredited trade certifications.

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?

A number of steps would be required before the productivity only part of BSWAT could be rolled out, including:

- Re-establishing commercial wage assessment arrangements to undertake assessments that have expired or are due.
- Revising wage assessment guide documentation, trialling to check validity, and training for assessors. Given that BSWAT assessments ceased following the 21 December 2012 Full Federal Court Decision, there will be a significant number of people who have out of date or lapsed BSWAT assessments.
- The Fair Work Commission would need to approve the change to the structure of the BSWAT for inclusion in the Supported Employment Services Award.
- Designing sector sustainability options and implementing a strategy to support ADEs to absorb increased wages

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

- Although the Department does not have specific information about each organisation's industrial agreements including which wage tool they might be using, the four main tools currently used are BSWAT, SWS, SkillsMaster and Greenacres.

- In addition to the BSWAT and SWS, being the only two wage assessment tools owned by the Australian Government, there are 28 other wage tools named in the *Supported Employment Services Modern Award 2010* (see Attachment A). Five of the approved tools listed in the Award are either for specific use by the organisation named in the tool or other organisations that were using those particular tools before mid-2005.
- The Department is also aware that some tools are either no longer in use or are in the process of being phased out.

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

Employers will have their own views about what best suits their circumstances (and the Commonwealth is generally not aware of these circumstances) however, some arguments may include:

- In contrast to the other 28 tools listed in the *Supported Employment Services Modern Award 2010*, for employers using the SWS or the BSWAT there are only minimal costs involved as the Australian Government pays for assessments using these two tools.
- SWS and the BSWAT are the only tools independently assessed. This transparency is a factor which is valued by both employers and advocates.

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?

- ADEs are mostly not-for-profit organisations with a dual focus on supporting people with disability in employment and operating a viable operation. Many ADEs do not make significant surpluses and some operate at a loss – this information is published in organisations' Annual Reports.
- Departmental analysis of 2011-12 financial statements provided by ADEs show that 92 organisations or 48 per cent of ADEs, had a medium to high risk of failure, with 28 of remaining organisations remaining at the high risk rating for two or more consecutive years. Data for 2012-13 is not yet available however there is no indication that the picture has changed significantly.
- Since December 2012, the Department has received consistent anecdotal advice from ADEs that many organisations will not remain viable if they are required to meet increased wages. This position is also strongly articulated in submissions to the AHRC in relation to this Application.

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

- The Australian Government currently provides a budget of \$230 million per annum for supported employment (approx. 20,000 supported employees) and \$3.4 billion over four years for Disability Employment Services (approx. 150,000 employees per annum) directed towards open employment options.

- The Government is committed to continuing to provide supported employment options for people with disability. Work is continuing on developing sector sustainability options.
- Any additional support to ADEs would need to be considered in the context of other Federal Budget considerations.

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 Department has established a specific taskforce and an Inter-Departmental Committee to progress the complex work involved in addressing the implications of the Full Federal Court judgment: *Nojin & Prior v Commonwealth [2012] FCAFC 192*.
- The Department completed the first stage of an extensive consultation process prior to lodging the exemption application and established a phone line to provide information for supported employees.
- On 15 January 2014, the Government announced a new scheme, the BSWAT Payments Scheme, to provide an additional payment in certain circumstances to former and current eligible employees with an intellectual disability whose wages were assessed and paid using the BSWAT. Work is currently being done on the detailed payment design. The scheme will commence from 1 July 2014.
- The Department is focused on fast tracking ADE sector sustainability strategies which support the viability of ADEs and their capacity to pay higher wages to supported employees.
- Once the outcome of the Department’s application for a temporary exemption is made available by the AHRC, the Department will be in a position to finalise the Action Plan for transitioning to a new wage assessment process. In particular:
 - it will be clear whether or not there is a need for a crisis response or an orderly transition; and
 - it will be possible to commence further consultations with people with disability, their families and carers, providers, representatives, peaks and other stakeholders.

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

14. 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).

15. 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 does not accept the use of the BSWAR is discriminatory *per se*. In *Nojin*, a majority of the Full Federal Court found that the use of the BSWAT to assess the wages of Messrs Nojin and Prior was discriminatory in the particular circumstances relevant to Messrs Nojin and Prior. Whether an assessment under the BSWAT complies with the requirements of the DDA or amounts to unlawful

discrimination will depend on the *particular circumstances of the case*. As noted above, and in the exemption application, there are circumstances where the use of the BSWAT will or may not constitute unlawful discrimination.

- Notwithstanding this, there is extensive work to be done in establishing a new wage assessment process. This work is a priority for the Department. A new wage assessment process which meets the requirements of the DDA will be implemented as quickly as possible, within the exemption period of three years or less. It should be noted that some people with disability will start moving to the new wage assessment process earlier than the three years identified, that is, as soon as the new process is identified.
- The exemption would form an important component, but only one part of, resolving the current issues and improving employment outcomes for supported employees:
 - it will ensure ongoing and stable employment for supported employees, particularly those employees with higher support needs who have extremely limited alternative employment options;
 - it will allow Government to implement a planned and orderly transition to a new wage assessment process in consultation with all stakeholders; and
 - it will provide the opportunity to build infrastructure and capacity to ensure the sector remains sustainable, while at the same time paying higher wages to supported employees.
- Another significant component of resolving issues for supported employees is the Government's recently announced BSWAT Payments Scheme. The Scheme will provide a one-off retrospective additional payment for eligible supported employees impacted by the use of the BSWAT prior to 21 December 2012.
- Work is underway to build capacity and viability of the ADE sector to ensure their ability to pay higher wages to supported employees.

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

The published submissions received by the AHRC on the Department's application for a temporary exemption demonstrate the polarised nature of the debate on the issue of wage assessment and the views held by stakeholders. Advocates are in the main opposed to the application, ADEs support the application, and people with disability and their families are divided or more often unclear about their position on the application. Families of those with high support needs however, often emphasise the important role that ADEs have in the lives of their family member with disability. In contrast, advocates generally hold a view that open employment should be the aim of any employment assistance provided by government.

Despite the disparity of views there is some common ground covered in many of the submission. The submissions often emphasise the importance of employment options for people with disability, the important role supported employment has for those with high support needs in terms of participation and social inclusion, and the need to assess wages in a way which does not discriminate and also results in fair wages for people with disability which accurately recognises their productivity.

The Department acknowledges the view often expressed in submissions that the BSWAT had become out-dated and was due for review. The application for a temporary exemption will allow time to carry out the complex work required to replace the BSWAT with new wage assessment arrangements. In addition, it will enable the Government and the ADE sector time to carry out critical reforms to ensure the viability and capacity of these organisations to pay higher wages while at the same time continuing to provide employment options to people with disability, especially those with high support needs who are most at risk of unemployment and exclusion.

17. Technical amendments to the exemption application

The exemption application stated:

We seek an exemption for all existing ADEs from sections 15 and 24 of the DDA, and the Commonwealth (and officers of the Commonwealth) from section 29 for a period of three years.

The Department seeks to amend the exemption application as follows (and as underlined):

We seek an exemption for all existing ADEs from sections 15, 24 and 29 of the DDA, and the Commonwealth (and officers of the Commonwealth) from sections 15, 24, 29 and 122 of the DDA for a period of three years.

Since the filing of the representative proceeding (*Tyson Duval-Comrie v Commonwealth of Australia* (VID 1367 of 2013)), it has become apparent that the potential claims alleging unlawful discrimination that may be made against ADEs and the Commonwealth in relation to the use of the BSWAT may extend beyond those originally contemplated in the exemption application. Accordingly, the Department makes this technical amendment to the exemption application to ensure that, should the application be granted, there are no gaps in the coverage of the exemption.

Extract from the Supported Employment Services Modern Award 2010:**14.4 Wage assessment—employees with a disability**

(a) An employee with a disability will be paid such percentage of the rate of pay of the relevant grade in clause [14.2](#) as assessed under an approved wage assessment tool chosen by a supported employment service.

(b) For the purposes of this clause, an **approved wage assessment tool** means and is limited to:

- (i)** the Supported Wage System;
- (ii)** the Business Services Wage Assessment Tool;
- (iii)** the Civic Industries Supported Employees Wage Assessment Tool;
- (iv)** the Elouera Association Wage Assessment Tool;
- (v)** the FWS Wage Assessment Tool;*
- (vi)** the Greenacres Association Competency Based Wages System;
- (vii)** the Hunter Contracts Wage Assessment Tool;*
- (viii)** the Phoenix Wage Assessment Tool;*
- (ix)** the PHT Wage Assessment Tool;
- (x)** the Skillsmaster Wage Assessment Tool;
- (xi)** the Yumaro Wage Assessment Tool;
- (xii)** the Woorinyan Wage Assessment Tool;
- (xiii)** the RVIB Enterprises Wage Assessment Tool;
- (xiv)** the Koomarri Competency Based Wages System;
- (xv)** the Valmar Support Services Wage System;
- (xvi)** the Sunnyfield Association Wage Assessment Tool;
- (xvii)** the New Horizons Wage Assessment Tool;

- (xviii)** the Cumberland Industries Wage Assessment Tool;
- (xix)** the Endeavour Wage Assessment Tool;*
- (xx)** the Wangarang Industries Wage Assessment Tool;
- (xxi)** the Bedford Employee Wage Assessment Tool;
- (xxii)** the Blue Mountains Employment Services Wage Assessment Tool;*
- (xxiii)** the Ability Options Wage Assessment Tool;
- (xxiv)** the Blueline Laundry Inc Wage Assessment Tool;
- (xxv)** the Caloola Vocational Services Inc Wage Assessment Tool;
- (xxvi)** the GDP Industries Wage Assessment Tool;
- (xxvii)** the Kurri Contracting Service Wage Assessment Tool;
- (xxviii)** the Mai-Wel Group Wage Assessment Tool;
- (xxix)** the Merriwa Industries Limited Wage Assessment Tool; and
- (xxx)** the Waverley Helpmates Wage Assessment Tool.

* Wage Assessment Tools restricted to those specific organisations unless an employer was using that tool on or before 27 June 2005.