Australian Centre for
Disability Law

29 October 2013

President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear President:

Temporary exemption application:
FHCSIA Business Services Wage Assessment Tool

Introduction

1. We refer to the application made to the Australian Human Rights Commission (**AHRC**) by the Australian Department of Families, Housing, Communities and Indigenous Affairs (**FHCSIA**) pursuant to section 55 of the *Disability Discrimination Act* 1992 (Cth) for a temporary exemption which would permit the continued use of the Business Services Wage Assessment Tool (**BSWAT**) in ADEs for a period of three years (**the Application**).

2. We note that this application is made by FHCSIA on its own behalf and by FHCSIA on behalf of unspecified Australian Disability Enterprises (**ADE's**). The application seeks temporary exemption from sections 15 and 24 of the DDA for ADEs and from section 29 of the DDA for the Commonwealth.

3. We further note that this exemption is being sought following the decision of the Full Federal Court in *Nojin & Prior v Commonwealth* [2012] FCAFC 192 (**Nojin**). In that case, the Court determined that two ADEs, - Mr Nojin and Mr Prior's employers - had discriminated against them on the basis of their intellectual disability in the manner in which their wage levels had been determined. This was because the method by which these wage levels were determined – being the BSWAT – imposed a requirement or condition relating to competency with which Mr Nojin and Mr Prior could not comply due to their disability, in circumstances where this requirement or condition disadvantaged persons with intellectual disability generally and was unreasonable. The Commonwealth was liable for this unlawful discrimination as an accessory because it was responsible for the development of BSWAT and had regulated its use for wage setting in ADEs.

Summary of submissions

4. In our submission, the AHRC ought to refuse the application for one or more of the following reasons:

   (a) It has a false goal that would not lead to the elimination of discrimination against supported employees of ADEs;

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(b) In the circumstances, the Commonwealth and ADEs ought properly to remain liable for and exposed to claims of unlawful discrimination in relation to wage setting in ADEs. This is more likely to be remedial of the discrimination identified in Nojin;

(c) The Application is disingenuous and an abuse of the AHRC's process;

(d) The remedial potential of a temporary exemption is, according to the terms of this Application, very limited and uncertain;

(e) The exemption is unnecessary according to its own terms. An alternative, non-discriminatory wage setting tool already exists;

(f) An exemption would be contrary to the recommendations of the Committee on the Rights of Persons with Disabilities;

(g) The grant of an exemption in this case would undermine public confidence in the administration of the DDA with respect to persons with intellectual disability;

(h) The application is too vague and uncertain in its terms to be capable of providing the basis for a temporary exemption.

Contextual issues

5. At the outset we note that Nojin is the first significant decision under the DDA that has benefited persons with intellectual disability in its 20 years of operation. It has been widely recognised that, until Nojin, the DDA has failed to penetrate to the specific types of inequality disproportionately experienced by persons with disability in Australia. Nojin is in counterpoint to that history. It is a case of great significance not only to employment equality for supported employees of ADEs with intellectual disability, but to the intellectual disability rights movement in Australia more generally.

6. The DDA was enacted in 1992 and came into force in April 1993, some 20 years ago, as noted above. The Commonwealth commissioned the development of a wage assessment tool that was to become BSWAT in May 2001, it was first trialled in 2002, and was finally approved for use in 2005. In other words, the DDA was in force for the whole of the period that BSWAT was under development and at the time of its ultimate approval and implementation. This is not a case where a temporary exemption is being sought in relation to a state of affairs that existed prior to the enactment of the DDA and the duty bearer reasonably requires time to comply with the new obligations imposed by the DDA. At all relevant times during the development, trial and implementation of the BSWAT, FHCSIA and ADEs operated subject to the terms of the DDA.

7. In the course of the development of the BSWAT, FHCSIA received many representations from disability advocacy and representative groups to the

effect that the wage assessment method proposed discriminated against persons with intellectual disability on the basis of their disability. FHCSIA persisted with the development, trial and implementation of BSWAT in spite of these representations. FHCSIA sought advice on this issue from the AHRC, through its Disability Discrimination Commissioner, and was advised that in the opinion of the Commissioner the proposed wage assessment tool unlawfully discriminated against persons with intellectual disability on the basis of their disability. FHCSIA persisted with the development, trial and implementation of BSWAT in spite of this advice.

8. Consequently, at all material times, FHCSIA and ADEs were on notice that BSWAT was subject to challenge under the DDA on the basis that it unlawfully discriminated against persons with intellectual disability. It is not now open to FHCSIA to claim that it has been caught 'unawares' by the Court's decision.

9. This Application is being made in circumstances where the Full Federal Court has determined Mr Nojin and Mr Prior's claims, and special leave to appeal that decision to the High Court has been refused. The purpose of the Application, and its effect if granted, will be to avoid the necessary implications of the Court's decision for other supported employees of ADEs. It has the purpose, and if granted, would have the effect of frustrating a number of equivalent or similar claims to those of Mr Nojin and Mr Prior brought by or on behalf of supported employees of ADEs which are currently before the AHRC.

The applicable law

10. The AHRC must determine this Application pursuant to section 55 of the DDA having regard to the objects of that Act, which are set out in section 3:

> The objects of this Act are:
> (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
> (i) work, accommodation, education, access to premises, clubs and sport; and
> (ii) the provision of goods, facilities, services and land; and
> (iii) existing laws; and
> (iv) the administration of Commonwealth laws and programs; and
> (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
> (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

11. In short summary, a temporary exemption may only be granted if the AHRC can be satisfied that such an exemption is consistent with:
(i) the elimination of discrimination on the basis of disability as far as possible is those specified areas of life engaged by the Application;
(ii) ensuring that persons with disability have the same rights to equality before the law as the rest of the community as far as practicable; and

(iii) promoting recognition and acceptance within the community of the principle that persons with disability have the same fundamental rights as the rest of the community.

12. The DDA is beneficial and remedial legislation that is to be given "a fair, large and liberal" interpretation: *IW v City of Perth* (1997) 191 CLR 1 per Brennan CJ and McHugh J at 12. The words "as far as possible" in subsection 3(a)(i), and "as far as practicable" in subsection 3(b) of the DDA are words of limitation. To give effect to the remedial nature of the DDA, these words of limitation are to be construed narrowly and those provisions which confer or amplify rights should be construed generously: *X v Commonwealth* (1999) 200 CLR 177 per Kirby J at 223; *Qantas Airways Limited v Christie* (1998) 193 CLR 280 per Kirby J at 333.

13. The limited application provisions of the DDA, which include sections 15 and 24, have effect, inter alia, to the extent that they give effect to the Convention on the Rights of Persons with Disabilities (**CRPD**) (subsection 12(8)(ba) of the DDA). The CRPD is thus a source of Commonwealth power supporting the validity of the DDA. However, for present purposes it also establishes the normative standard against which DDA recognised rights to equality and non-discrimination are to be interpreted and applied. It gives scope and content to those rights.

14. Article 27 of the CRPD recognises or declares the rights of persons with disability with respect to work and employment. It provides (relevantly):

> 1. States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. State Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability in the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>   (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
>   (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.
>   (c) ...
> 2. ...

15. Article 27 is an economic, social and cultural right to be achieved progressively. However, the progressive realisation of the right must be achieved to the maximum extent of available resources. Regressive measures are impermissible. The most intensive efforts to realise the right must be directed to those who are most disadvantaged. Perhaps most significantly for present purposes, leaving aside special measures,

progressive realisation cannot be undertaken in a manner which discriminates against a person on the basis of a particular status, including disability. In other words, in the progressive realisation of, for example, just and favourable conditions of work including with respect to remuneration there can be no unfavourable differential treatment of persons of a particular status, including disability.

16. Apart from the effect of sub-section 12(8)(ba) of the DDA, the AHRC is to have regard to Australia's international obligations under the CRPD in interpreting and applying the words of section 3 of the DDA in the context of an application for temporary exemption under section 55 of the DDA: cf *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Mason CJ and Gaudron J at 359.

A false goal

17 In our submission, the AHRC must refuse the Application because even if a non-discriminatory wage assessment tool were to be developed and implemented during the period of the proposed temporary exemption, persons with intellectual disability would still be subject to discrimination in ADEs. ADEs are segregated environments in which (primarily) persons with intellectual and other cognitive impairments are congregated together. Segregation on the basis of disability is inherently unequal treatment and an affront to human dignity: cf *Brown v Board of Education* 347 US Rep 483 (154) and *Penn. Assn for Mental Retarded Children v Penn* 334 F Supp. 1257 (1971); followed in Australia in *Dalla Costa v the ACT Department of Health* (1994) EOC 92-633 and *Alex Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education),* Human Rights and Equal Opportunity Commission, Matter 98/127, 13 November 2000 (later overturned on appeal, but not on this point).

18. In a very substantial and operative way, the purpose of this Application, and its effect if granted, is the maintenance of the ADE sector. It is claimed by FHCSIA, National Disability Services and many ADEs that the impact of assessing and paying wages to supported employees based on their productivity at work will be the closure of many ADEs. Consequently, it is claimed that ADEs must be exempted from this responsibility while a new wage setting method that does not threaten the financial viability of the ADE sector is devised and implemented.

19. Inherent in this proposition is the idea that ADEs must be protected from closure and must continue into the future. The perpetuation of segregated work environments which congregate persons with intellectual and other cognitive disability together would not be consistent with the elimination of discrimination against persons with intellectual disability in employment. It would not ensure that persons with intellectual disability have the same rights to equality before the law as the rest of the community, as far as practicable. It would perpetuate social and employment inequality for persons with intellectual disability. This is an outcome that the DDA was enacted to prevent, not facilitate. It is an outcome which would violate article 27 of the

CRPD which recognises and declares a right to inclusive employment in the open labour market with equal remuneration to others.

Continued liability and exposure more likely to be remedial

20. In our submission, FHCSIA and ADE's continued liability and exposure to disability discrimination claims related to wage setting in ADEs is more likely to be remedial of the discrimination identified by the Court in Nojin than any action taken pursuant to a temporary exemption would be. Continuing liability and exposure to claims is much more likely to stimulate focused, concerted change than any exemption from such liability and exposure could produce.

21. As noted above, FHCSIA initiated the development of BSWAT, and trialled and implemented it, during the period in which the DDA was in force. At all material times in this process, FHCSIA was in receipt of many representations from disability advocacy and representative groups, and had formal advice from the AHRC to the effect that BSWAT resulted in unlawful discrimination in employment against persons with intellectual disability. FHCSIA chose to proceed with the implementation of BSWAT despite being on notice as to its potential liability – and the potential liability of individual ADEs - to a DDA claim in relation to the use of BSWAT to determine supported employee wage levels.

22. In these circumstances, in our submission, FHCSIA and ADEs ought to remain liable for and exposed to claims under the DDA in relation to discriminatory wage setting in ADEs. They ought not to be rescued from a predicament that is entirely of their own making and about which they were comprehensively warned and on notice. This is particularly the case when one considers that a temporary exemption, if granted, would deprive supported employees of ADEs of a remedy in relation to this deliberate act of discrimination, including in relation to claims for lost wages. In our submission it would be utterly offensive to the equality of persons with intellectual disability before the law if they were to be deprived of a remedy for such blatant and intentional discrimination.

23. In this respect it is not remotely "impracticable" for supported employees to continue to have a remedy in relation to discriminatory wage setting in ADEs. It is trite to observe that the Commonwealth and ADE's may not wish to be liable for, and exposed to, claims of discrimination in relation to wage setting in ADEs. Arguably, no perpetrator of disability discrimination desires such liability and exposure. However, there is nothing impracticable about such liability and exposure that would justify supported employees with disability being treated unequally before the law.

Application is disingenuous and an abuse of process

24. In our submission, the Application is disingenuous and an abuse of the AHRC's process. According to its own terms, the Application seeks from the AHRC a sledgehammer to crack and egg. It ought not to be entertained for this reason.

25. FHCSIA continues to fundamentally resist the idea that the DDA applies to wage setting for supported employees of ADEs. It also continues to deny that BSWAT has any broader discriminatory effect beyond the specific circumstances of Mr Nojin and Mr Prior. Since Nojin was handed down in December 2012, and particularly following the refusal of its Special Leave Application for Appeal to the High Court in May 2013, FHCSIA has sought to discount the implications of the decision for wage setting for supported employees in the ADE sector.

26. Remarkably, even in its temporary exemption Application, where prudence might have suggested a more contrite stance, FHCSIA has continued to discount the implications of Nojin for the broader ADE sector (at page 2). The Application is put on the basis that "BSWAT **may potentially** be unlawful under the DDA in **some** circumstances" (emphasis added).

27. If FHCSIA is genuinely convinced that Nojin only potentially applies to wage setting in ADEs in some circumstances, its Application ought properly to be limited precisely to those circumstances. Instead, FHCSIA's Application is plenary in nature, it seeks exemption from the DDA in relation to 194 ADEs and 10,000 supported employees the majority of which or whom are, on FHCSIA's own reasoning, unaffected by the Court's decision in Nojin. If granted, this Application would therefore (continuing with FHCSIA's own reasoning) unnecessarily deprive thousands of supported employees of certain employment rights. Such an Application is an abuse of the AHRC's process and repugnant public policy.

28. We also note that FHCSIA's Application may have the purpose, and if granted, may have the effect, of frustrating a number of DDA claims in relation to wage setting made by or on behalf of supported employees working in ADEs which are currently before the AHRC. This is so even if these claims do not come within the ambit of those limited circumstances in which FHCSIA is prepared to contemplate that its wage setting arrangements may be discriminatory. In other words, FHCSIA's Application has the purpose, and if granted would have the effect, of preventing any further development or clarification of the law in this area. It would 'shut-down' legal challenges to its wage setting policy, and deprive persons with intellectual disability of any prospect of a remedy for discriminatory wage setting across a very broad front. In this further respect, in our submission, the Application is an abuse of the AHRC's process.

Remedial potential of an exemption extremely limited or non-existent

29. FHCSIA's highly qualified acceptance of the implications of Nojin for wage setting in ADEs provides no proper basis for the AHRC to draw confidence that it would use the period of a temporary exemption to eliminate disability discrimination in wage setting in ADEs. As outlined above, FHCSIA clearly does not accept, even now, that Nojin has any broad implication for wage setting in the ADE sector. Logically, any action that FHCSIA could be expected to take during the period of a temporary exemption would be limited

to those unspecified limited circumstances in which FHCSIA believes there is liability and exposure under the DDA.

30. Any fair and objective reading of the reasons for judgement of the plurality in Nojin would lead to the proper conclusion that the case has broad and substantial implications for wage setting for supported employees of ADEs. That is the objective reality against which the AHRC must assess FHCSIA's exemption Application.

31. The Application simply does not rise to the challenge set by the Court's decision. It merely seeks to relieve FHCSIA and ADEs from liability and exposure to discrimination claims in relation to wage setting (in circumstances where it continues to discount the existence of any broad-based liability or exposure) while it pursues a range of oblique policy processes in the context of an entirely aspirational Inclusive Employment Strategy (which is not so far as we are aware is not endorsed by the current Government).

32. The exemption application does not, in any respect whatsoever, propose concrete targets for overcoming the inequality in employment to which supported employees in ADEs are exposed or for the achievement of the vision set out in the Inclusive Employment Strategy (for example, by committing funds for inclusive employment support services or setting targets for public sector employment of persons with intellectual disability).

Alternative, non-discriminatory wage setting tools already exist

33. The gravamen of FHCSIA's application is to the effect that it requires three years exemption from the DDA to develop and implement a new non-discriminatory wage assessment tool for supported employees working in ADEs. In our submission, this rationale is disingenuous.

34. There is already in existence and use in the ADE sector a wage assessment tool, being the Supported Wage System (**SWS**), that does not include a competency assessment, such as that impugned in Nojin, and which was referred to with apparent approval by the plurality in Nojin.

35. In our submission, it is open to FHCSIA and to ADE's to immediately commence transfer of all BSWAT assessed employees to the SWS. We accept that this may take some time to achieve. However, that is not itself a reason why FHCSIA and ADEs ought to be relieved of liability from, and exposure to claims under the DDA is relation to discriminatory wage setting. As noted above, continuing liability and exposure to such claims is likely to be highly motivational. It is likely to ensure that this process is achieved in a timely and concerted manner.

36. Moreover, there is no just and proper reason why supported employees ought to be deprived of a remedy for such discrimination to the extent that it has occurred in the past and to the extent that it continues to occur. Such an outcome would be repugnant to the equality of persons with intellectual disability before the law. Until these new arrangements are in place, the

proper course for ADEs and the Commonwealth would be to settle any proper claims made by or on behalf of supported employees in relation to discriminatory wage setting in ADEs.

CRPD Committee called for immediate discontinuation of BSWAT

37. In September 2013 the Committee on the Rights of Persons with Disabilities (**Committee**) considered Australia's initial report submitted pursuant to Article 35 of the Convention on the Rights of Persons with Disabilities (**CRPD**). With respect to Article 27 (Work and employment) the Committee expressed concern that employees with disabilities in ADEs are still being paid wages based on BSWAT. It recommended that Australia immediately discontinue the use of BSWAT.

37. FHCSIA's exemption Application, in effect, seeks the authority of the AHRC to continue to use BSWAT to set the wages of supported employees of ADEs for a period of three years. Such a proposal is contrary to, and in defiance of, the Committee's observations and recommendations.

38 Australia has a solemn obligation to respect, protect and fulfil human rights as these are recognised or declared in international instruments, such as the CRPD, it has ratified. These obligations extend to remedying violations identified by the Committee on the Rights of Persons with Disabilities. In our submission this has two implications for the AHRC in determining this Application:

(a) The AHRC must take into account that the Application is one that, if granted, would involve Australia acting contrary to a recommendation of a human rights treaty body which has recently considered the precise subject matter of the Application and found it to be a violation of international law.; and

(b) If it granted the Application, the AHRC, as Australia's national human rights institution, would be facilitating the continuing violation of the right to work and employment for supported employees of ADEs and associating itself with that continuing violation.

Exemption would undermine public confidence in the DDA

36. As noted at the outset, Nojin is the first case decided under the DDA in which there has been a substantial positive outcome for persons with intellectual disability. The case recognises and applies an entirely normative principle; namely, supported employee wages should be assessed according to the employee's actual work performance (productivity) and not on the basis of competencies which are merely theoretical and entirely extraneous to their particular job role. This is a principle of basic fairness.

37. Mr Nojin and Mr Prior did not seek and were not granted monetary compensation for the discrimination they complained of. However, it is an implication of the case that other supported employees whose wage levels

have been unjustly determined according to BSWAT may be entitled to compensation, including for lost wages. To the extent that proper claims of this nature are available and are pursued by or on behalf of supported employees they will result in modest redress for the most poorly paid employees in the whole of the Australian workforce. That is hardly an outcome capable of ridicule. In fact, it is an outcome that justice demands.

38. FHCSIA's exemption Application seeks to avoid the implications of this decision for a period of three years effectively removing wage setting in the ADE sector from the ambit of the DDA, frustrating any current and future claims with respect to discriminatory wage setting. In this respect the Application seeks to put FHCSIA beyond the law in circumstances in which it was at all material times in the development, trial and implementation of BSWAT on notice that the effect of that instrument was discriminatory.

39. Furthermore, as noted above, the Application seeks the authority of Australia's national human rights institution to continue a wage setting method that has recently been identified by the Committee on the Rights of Persons with Disabilities as a violation of the right to work and employment; a violation which is associated with a Committee recommendation tthat Australia immediately cease using BSWAT to determine supported employee wage levels in ADEs.

40. For each of reasons, it would be repugnant to the objectives of the DDA for this Application to be granted, and if an exemption were to be granted, it would bring the DDA and its administration by the AHRC into disrepute.

Application is vague and uncertain

41. In our submission, the grant of an exemption from the DDA pursuant to section 55 of that Act, is at all times, and is particularly now, some 20 years after the DDA's coming into force, a very serious matter. Among other things, this requires a high degree of precision and certainty in relation to the scope of the exemption and the precise entities and conduct to which it applies.

42 It is implicit to the concept and temporal range of a temporary exemption that the DDA contemplates that the discriminatory conduct sought to be exempted will be eliminated as far as possible during the period of any exemption. In our submission this requires genuine detailed, substantial and observable pathway from the discriminatory state to (as far as possible) a non-discriminatory state of affairs.

43. In our submission, it is also to be implied that section 55 may also be used to authorise exemptions for the strictly limited period it necessary to eliminate the discriminatory conduct (as far as possible). The AHRC ought not to grant a temporary exemption, where on the face of the Application, it is plain that a non-discriminatory state of affairs could reasonably be expected to be achieved in a lesser period of time including by an alternative means to that which may be proposed by the proponent of the exemption.

44. In our submission, the Application fails to meet these requirements. It is plenary, vague and uncertain. As outlined above, it is not limited to the precise circumstances where FHCSIA as proponent of the Application believes wage setting may be discriminatory under the DDA and which therefore – within the terms of Application – justifies the exemption. It does not state with specificity which ADEa are proposed to be covered by the exemption, or the specific circumstances of each of those ADEs and their ability to comply with the implications of the Court's decision in Nojin.

45. The processes FHCSIA proposes to undertake during the period of the proposed exemption do not lay down a detailed, substantial and observable pathway towards a non-discriminatory wage setting system. They may or may not lead to a non-discriminatory state of affairs upon the lapse of the exemption. There is no indication whatsoever in the Application of substantial measures that will be taken in the period of the proposed exemption to overcome discrimination (for example, as noted above, the funding of competitive employment support services or establishing targets for public sector employment of persons with intellectual disability).

46. Moreover, as noted above, an alternative non-discriminatory wage setting tool – the SWS – already exists. It is an alternative feasible way of eliminating discrimination as far as possible in wage setting by ADEs. Much of the activity proposed to be undertaken by FHCSIA in the period of the exemption is simply not required, and certainly it is insufficient to satisfy the granting of a temporary exemption that would deprive 10,000 people with intellectual disability of a remedy for breach of the right to equal remuneration.

Conclusion

47. By this temporary exemption application FHCSIA asks the AHRC to relieve 194 unspecified ADEs and the Commonwealth of the obligation to ensure that approximately 10,000 supported employees working in ADEs are remunerated on an equal basis with others for a period of three years. This Application is unjustifiable according to its own terms, and it is repugnant from an objective point of view. The grant of a temporary exemption in the circumstances of this application would be contrary to the objects of the DDA and bring that Act, and its administration by the AHRC into disrepute. For each of the foregoing reasons the Application ought to be refused.

48. Thank you for the opportunity to make these submissions.

Yours sincerely

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Director/solicitor