

29 October 2013

The Manager  
Legal Section  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001

Per: email [legal@humanrights.gov.au](mailto:legal@humanrights.gov.au)

Dear Sir / Madam,

**re : Application by the Department of Families, Housing, Communities and Indigenous Affairs for exemption under s.44 of the *Disability Discrimination Act 1992 (Cth)* from sections 15, 24 and 29**

I am writing to ask the Australian Human Rights Commission to reject the Department's application for exemption to allow Australian Disability Enterprises (ADEs) to continue to use the Business Services Wage Assessment Tool (BSWAT) after the decision of the Full Court of the Federal Court in the cases of *Nojin and Prior v Commonwealth of Australia* [2012]FCAFC 192. My reasons, briefly, are as follows:

- (1) The Department has been on notice that the use of the BSWAT was being challenged on the ground of unlawful discrimination due to lack of fairness at least since the applications were first filed in the Federal Court in 2008 and no doubt for some time previously. It has had ample time to consider alternative assessment methods.
- (2) An exemption in such circumstances at the conclusion of lengthy court application and appeal processes would set an unfortunate precedent and encourage further attempts by respondents who have unsuccessfully defended discriminatory practices in the courts to continue to implement them despite judicial pronouncement of unlawfulness.
- (3) The problem addressed by the Federal Court judgements is the potential unfairness of the competency tests if not relevant to an individual's actual duties. Such tests could be removed from individual assessments where they had the potential to cause unfairness. Alternatively, the competency tests could be removed altogether from the assessment to eliminate the problem: evidence surveyed in the judgement of Buchanan J. clearly indicates that the competency component has always been controversial. While either approach would presumably result in at least a temporary wage increase for numbers of ADE employees this would represent a powerful incentive for the Department to devise, as quickly as possible, an alternative wage assessment which met the requirement of fairness.

(4) The disability standards with which funded ADEs need to comply are determined by the Minister (s.7 and s. 5A(1) *Disability Services Act 1986*). This should allow the Minister to make such temporary accommodations as needed for the ADEs to continue to receive funding.

(5) The three-year period of exemption sought is unnecessarily long: solving the problems which the Full Court addressed does not require the extensive consultation outlined in the Department's application.

Yours Faithfully,

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