



DANA Disability Advocacy
Network Australia

Australian Human Rights Commission
Level 3,
175 Pitt St
Sydney NSW 2000

17 October 2013

Dear Australian Human Rights Commission,

Submission on the application for an exemption under the *Disability Discrimination Act 1992* (Cth)

Thank you for inviting DANA to make a submission in relation to the application made by the Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services). Disability Advocacy Network Australia, or DANA, is the peak body for independent disability advocacy agencies and aims to support and strengthen the work of our members to advocate for and with people with disabilities so that they are valued and included members of the community, their fundamental needs are met and their human rights are respected.

We submit that the Australian Human Rights Commission should not grant the three year exemption from crucial sections of the *Disability Discrimination Act 1992* (Cth) that is sought by the Department of Social Services (DSS). DANA considers that granting an exemption for the Commonwealth and Australian Disability Enterprises (ADEs) permitting the use of a wage assessment tool that was found in *Nojin & Prior v Commonwealth [2012] FCAFC 192* to operate in an unlawful and discriminatory manner towards people with intellectual disability, would be inconsistent with the objects of the *Disability Discrimination Act* (DDA) and contrary to the advancement of the human rights of people with disabilities.

An exemption is sought for alternative wage setting arrangements to be considered, devised and/or established by DSS. However, a suitable option exists in the Supported Wage System tool, or SWS, which does not incorporate the problematic component measuring competency that the Federal Court found to disadvantage people with intellectual disability. The SWS is already in use in some ADEs and provides a coherent and just assessment of wages. DANA challenges the necessity and reasonableness of the exemption sought. We believe that the reasons advanced in favour of an exemption are outweighed by the nature and extent of its likely discriminatory effects.

Along with other peak disability representative organisation, DANA believes the BSWAT judgment is an opportunity for the Federal government to address the discrimination occurring in ADEs – that of employees earning wages which are sub-award and/or unjustifiably lower than those earned by people in mainstream employment. This manifest inequality violates the right of workers to equal pay for work of equal value. This right is protected in Article 27 (1)(b) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which requires state parties to take appropriate steps, including through

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Her Excellency Ms Quentin Bryce AC CVO
Governor-General
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legislation, to protect the rights of persons with disabilities on an equal basis with others to equal remuneration for work of equal value.

At the conclusion of its tenth session, the United Nations Committee on the Rights of Persons with Disabilities expressed concern that employees with disabilities in ADEs are still being paid wages based on the BSWAT and recommended its use be immediately discontinued.¹

Granting an exemption from disability discrimination law would be inconsistent with explicit statements of international human rights law and with the objects of the DDA itself, including:

- To eliminate, as far as possible, discrimination against persons on the ground of disability (in the area of work)²
- To ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law³

We would contest any conclusion that exempting this type of discrimination and suspending legal rights is the best possible and practicable solution available for the continuing governance of ADEs.

Furthermore, broader consequences arise from authorising the payment of reduced wages to employees with disabilities, as the worth of their labour may be seen as devalued on the basis of disability. Such perceptions among people with disabilities, employers and the wider community cannot be conducive to the achievement of the objects of the DDA, specifically Section 3(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.

We contend that granting a three year exemption would undermine the achievement of the DDA objects, rather than further them. We do not believe any terms and condition could be attached to a grant of exemption that would justify the removal of the right to be paid a fairly determined wage, or outweigh its negative consequences. The advancement of DDA objects, of non-discrimination, equality before the law and recognition of fundamental rights, will necessarily be undermined by legitimising the continued use of the BSWAT for any period of time.

We repeat the call previously made by DANA, along with People with Disability Australia, the Australian Federation of Disability Organisation and the National Council on Intellectual Disability, for an immediate transition away from the sheltered employment model, which often segregates and exploits people with disability, to genuine work training, skills building opportunities, and evidence based service support that leads to open mainstream employment for people with disabilities. If the implementation of the SWS across the sector challenges the viability of some ADEs, DSS may provide temporary support to assist these organisations to move to compliance to protect the interests of employees. Rather than artificially maintaining unsustainable business models reliant on the abuse of employees' rights, DSS should be encouraged to prioritise the development of an explicit strategy to achieve the vision of accessible and responsive support for people with disabilities to work in the open labour market.

Sincerely,



Simon Viereck
Acting CEO
DANA

¹ Concluding observations on the Australia, adopted by the Committee at its tenth session 4/10/2013. CRPD/C/AUS/CO/1. 49-50.

² *Disability Discrimination Act 1992* (Cth), Section 3(a)(i).

³ *Disability Discrimination Act 1992* (Cth), Section 3(b).