

**Submission to Australian Human Rights Commission Opposing the  
Temporary Exemption for Employer ADEs to Continue Using the  
Business Services Wage Assessment Tool (BSWAT)**



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## I WHO IS DDLS?

1. The Disability Discrimination Legal Service Inc (**DDLS**) is a statewide independent community legal centre that specialises in disability discrimination legal matters. We provide free legal services in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform.
2. The DDLS works actively towards the eradication of disability discrimination and facilitates and promotes justice for people with disabilities through community legal education sessions to professional and community groups to raise disability awareness and provide information on the *Disability Discrimination Act 1992 (Cth)* (**DDA**) and the *Equal Opportunity Act 1995 (Vic)* (**EOA**).
3. We also undertake community development research projects to investigate and challenge current social, economic and legislative issues affecting persons with disabilities in the community.

## II WHY IS DDLS INVOLVED?

1. In the recent case *Nojin v Commonwealth of Australia*,<sup>1</sup> two men with intellectual and physical disabilities, Gordon Prior and Michael Nojin, successfully argued they were discriminated against. Both filed claims alleging unlawful discrimination under the *Disability Discrimination Act 1992*.
2. Prior is legally blind and has a mild-to-moderate intellectual disability. Stawell Intertwine Services Inc, an Australian Disability Enterprise (**ADE**), employed him on less than \$3 an hour to maintain gardens.
3. Nojin has cerebral palsy, a moderate intellectual disability and epilepsy. He earned \$1.85 an hour destroying documents for ADE Coffs Harbour Challenge Inc.
4. ADEs engage in contract arrangements with local businesses to perform a variety of jobs, which usually involves process and lower level skilled work. ADEs operate like any other everyday business employing people without disabilities.
5. The employers used the business services wage assessment tool (**BSWAT**), which measures disabled workers' competency and productivity, to determine their pay.

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<sup>1</sup> [2011] FCA 1066 and later appealed in *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

6. Prior and Nojin argued the tool compared disabled people without intellectual disabilities to those with intellectual disabilities, meaning those with intellectual disabilities would always recover less.
7. The Federal Government accepted liability if the employers were found liable, due to its having approved the BSWAT and distributed information about it.
8. In federal court decision, Justice Buchanan stated:
 

*The basic defect in the use of BSWAT is that it reduces wages to which intellectually disabled workers would otherwise be entitled by reference to considerations which do not bear upon the work that they actually do. In my view, that approach is not reasonable.*<sup>2</sup>
9. Currently there are slightly less than 600 ADEs across Australia. Recent studies show that there could be up to 80% of people with intellectual disabilities working at these ADEs.
10. It was recorded in June 2012, that since 2004 the BSWAT has been used by around 90 businesses to determine the wage levels of around 9,000 supported workers.
11. DDLS believes this tool has not been independently assessed as an appropriate and accurate way of measuring the competency and productivity of employees with disabilities. This will in effect allow other employers of ADEs to discriminate against employees because of their intellectual disability, and consequently deny and/or limit their access to certain employment benefits.
12. This tool has been the employer ADEs' wage assessment tool of choice for years and many employees in ADEs are unhappy with their calculated rate of pay.

### III TYPES OF DISCRIMINATION

13. The EOA is the primary anti-discrimination legislation in Victoria.
14. The DDA is the federal antidiscrimination legislation
15. The EOA and DDA protect certain people with certain attributes from discrimination on the basis of their attribute(s).<sup>3</sup>
16. Attributes protected under the EOA and DDA include disability or presumed disability (including physical, intellectual or psychological disabilities and diseases).<sup>4</sup>

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<sup>2</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at [148].

<sup>3</sup> EOA, s 7. DDA s4

17. **Discrimination** means direct or indirect discrimination on the basis of an attribute.<sup>5</sup>
18. **Direct Discrimination** occurs when a person with a particular attribute is treated (or proposed to be treated) unfavourably because of that attribute.<sup>6</sup>
19. **Indirect Discrimination** occurs when an unreasonable requirement, condition or practice is imposed in a particular situation that has or is likely to have, the effect of disadvantaging a person with an attribute.<sup>7</sup>
20. The discriminatory application of the BSWAT can be classified as indirect discrimination.

#### IV DISCRIMINATORY APPLICATION OF THE BSWAT

##### A What is the BSWAT?

21. The BSWAT combines a competency and productivity assessment in order to determine an employees' wage.
22. The BSWAT measures not only work productivity (simple example: how long does it take a standard worker to mow a particular lawn, and how long does it take the nominated worker) but also competency, including abstract questions (such as 'what meetings do you attend, what are they for?').
23. The *competency assessment* is comprised of eight units of competency. This includes four 'core units' against which all workers are assessed and up to four 'industry based' units which directly relate to the work being performed by the worker. Not all workers will be assessed against 4 industry-specific units of competency, as their role may be fully described by one or two units. In this case, fewer than 8 units will be assessed, but the wage outcome will be based on a possible score of 8 units.
24. The *productivity assessment* looks at how much each worker produces. It compares the workers output with an industry benchmark or able-bodied person. To ensure accurate assessment it is highly desirable that the Australian Disability Enterprise provides productivity data for both worker and comparator. The benchmark or comparator may be: a non-disabled co-worker, a supervisor, another worker with a

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<sup>4</sup> *Equal Opportunity Act 2010* (Vic), ss 4 & 6(e), DDA s4.

<sup>5</sup> *EOA* s 7(1), DDA s 4 .

<sup>6</sup> *EOA*, s 8(1), DDA s 5.

<sup>7</sup> *EOA* s 9(1), DDA s 6.

disability who is able to perform that particular task to the expected standard, a published standard for a job or the usual output of a machine in industry.

25. The competency component and the productivity component are scored separately, with the results combined to determine an overall pro-rata wage rate.
26. Whilst this assessment, on its face, appears reasonable, the test does have a potential discriminatory effect.

## **B Potential Discriminatory Effect**

### *Content of BSWAT*

27. The principle issue with the BSWAT test is that workers are tested on competencies that are not actually required in their job. For example, one of the questions under the *Work With Others* competency is “what are some other jobs that people do here?” This does not accurately represent whether a person is ‘competent’ in their own role.
28. Additionally, there is a workplace observation assessment criterion which requires workers to adapt to changing work roles. The assessor is required to observe the workers in changing work roles. This appears to be a particularly harsh method of assessment given that persons with intellectual disability may require more time to adapt.
29. The Australian Government website states that this wage tool should not be used by anyone who has not received the appropriate training and assessments should be conducted over a number of assessment sessions. This will enable the assessment to be left open for some time and minimises a 'snapshot' effect in the assessment.
30. DDLS is concerned that parameters stated in paragraph 28 are too open ended to assessors and the degree of “appropriate training” and interpretation of “number of assessment sessions” can vary with each application of the tool. This may lead to some workers being considered competent, with others considered not yet competent.

### *Assessment Style of the BSWAT*

31. It is argued that people with intellectual disabilities find it difficult to perform well in a 'question and answer' style of interview assessment as they find it more challenging to articulate their answers.
32. The test uses subjective questioning techniques that may not be understood by persons with certain intellectual disabilities. For example, under the assessment criteria *Communicate In The Workplace*, one of the relevant question is "what are the meetings for?" whereby the worker is expected to describe the role and function of different meetings. The answers to these questions will inevitably differ amongst individuals.
33. Further, an individual's answer to questions such as a "if you had a disagreement with someone in the workplace, what would you do?" depend on a variety of factors. Such factors may include the nature of the dispute, the relationships between the parties and the individual themselves. Thus, answers may legitimately differ between individuals.
34. The potential discriminatory effect of the test is further compounded by the 'all or nothing' approach to competencies. If the worker answered one question out of 16 incorrectly, the worker automatically scores "zero" for that competency. If the worker only did one job in the business services office, they would automatically score "zero" for competencies that that they could have attained in theory (but never actually attained because of the extent of their disabilities).
35. The basic defect in the use of BSWAT is that it reduces wages to which intellectually disabled workers would otherwise be entitled, by reference to considerations which do not bear upon the work that they actually do.

#### *The design of the BSWAT benefits employers*

36. For the *competency assessment* whereby a worker's role may be fully described by only one or two units (rather than the four industry-specific units), fewer than 8 units will be assessed. This seems reasonable except that the overall wage outcome will be based on a possible score of *all* 8 units. This is denying the worker a large proportion of the overall wage before they have even taken the test.
37. For the *productivity assessment* (whereby a comparison is made between the workers output with an industry benchmark or able-bodied person) the ADEs can

submit their own wage assessment *before* the formal wage assessment. The assessor can take this information into consideration. This provides the ADEs with significant benefits over the worker.

38. Variation in the workers performance over time can be captured by the ADEs and given to the assessor. This means that if the variation in the workers performance is damaging to their assessment at the current time, this will have the effect of lowering their wage.
39. The above are examples of how this tool disadvantages the person with a disability, ultimately enabling employers to manipulate their employment wage rate.

*Disabled Workers suffer due to BWSAT compared to non-disabled workers*

40. The workers generally suffer because of:
- a. They cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them.
  - b. Their contribution is discounted further because they are unable, due to their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them.
41. Neither the Grade 1 rates, nor persons employed on that rate, are assessed by reference to any notion of competencies of the kind measured by BSWAT.
42. Testing for competencies at this level of employment is not used at all in open employment at this level. If used, it would suggest a wage reduction for workers without disabilities at the Grade 1 level.

**V CONVENTION ON THE RIGHTS OF PERSONS WITH A DISABILITY**

43. DDLS refers to the “Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013).”

**Right to work (art. 27)**

49. The Committee is concerned that employees with disabilities in Australian Disability enterprises (ADE) are still being paid wages based on the Business Services Wage Assessment Tool (BSWAT).

50. **The Committee recommends that the State party:**
- (a) Immediately discontinues the use of the BSWAT**
  - (b) Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support employment.**
  - (c) Adopts initiatives to increase employment participation of women with disabilities by addressing the specific underlying structural barriers to their workforce participation.**

## VI RECOMMENDATIONS

44. DDLS supports the United Nations position. It considers that the BSWAT method of assessment is not appropriate for persons with intellectual disabilities. There are a number of other assessment tools available for employer ADEs to assess wages.
45. The Commonwealth and ADEs should not be permitted to continue to use this tool.
46. The new wage assessment tool needed to be devised and implemented, should consider the following reasonable adjustments:
- a. The individual should only be tested on competencies that relate to the core components of their job description;
  - b. Allowances should be made for persons with intellectual disabilities in terms of the number of competencies assessed; the time taken to prepare answers and the quality of the response (provided that the question does not present an Occupational Health and Safety issue).
  - c. The wage calculation should only be assessed on the criteria related to the job description.
  - d. Training and support should be given to the worker before the test to improve their competency scores.
  - e. The overall grading of the test should not be an “all or nothing” approach. If a worker is deemed *not yet competent* in an assessment criterion, they should be allowed to be retested and given guidance on how to improve their answer or performance.
  - f. The assessor should compare the productivity assessments of the employer and the current assessment made by him or her, and make a decision as to what is the best reflection of the worker. If the worker is currently (or has had



in the past) experiencing difficulties in maintaining their usual standard of productivity, this should be taken into account and reasons why the worker's productivity has varied should be discussed with the worker. This will ensure the assessor makes the most accurate decision.

## VII THE TEMPORARY EXEMPTION SHOULD NOT BE ALLOWED

47. The Department of Social Justice has lodged a section 55 exemption application under the *Disability Discrimination Act (1992) (Cth)*. Their reasons being that it will take time to work through all the issues and that they want to make sure that a changing industrial landscape does not lead to unintended consequences.
48. It is our submission that these reasons are not valid. It will take time to work through all the issues, but there is already a practical alternative of the Supported Wage System, which is a productivity only tool. This tool meets the standards listed in the decision in the High Court and Full Federal Court.
49. If the temporary exemption is granted by the Commonwealth this will allow employer ADEs to continue using BSWAT for a specified period of three years, until it can devise and implement a new wage assessment tool. Until that time, BSWAT will continue to unfairly discount the wages of intellectually disabled people and produce poor wage outcomes for disabled workers.
50. DDLS submit that a temporary exemption should not be granted by the Australian Human Rights Commission because:
  - a. It undermines the decision of the Full Federal Court and the High Court of Australia which held that the BSWAT discriminates.
  - b. It is not consistent with the objects of the *Disability Discrimination Act 1992 (Cth)*, in that an exemption would endorse the continued unlawful discrimination against people with disabilities by sanctioning lower wage rates.
  - c. An exemption should only be granted in circumstances that allow a party to right the alleged discrimination. In this case, the use of BSWAT has already passed through the legal system and therefore the opportunity for an exemption is over.

- d. The Australia Human Rights Commission does not have the power to override a decision from the Full Federal Court particularly whereby it has been upheld by the High Court.

## VIII CONCLUSION

51. The BSWAT tool is discriminatory due to the differentiation of outcomes between people with an intellectual disability and those without.
52. Competency wage assessment is the core element of discrimination that the Federal Court and now the High Court has ruled on. The use of other competency based wage assessment tools, other than BSWAT, should be employed.
53. The Supported Wage System should be used in ADEs.
54. In order to devise and implement a new wage assessment tool, a discussion with people with intellectual disabilities, their families, and representative organisations is recommended to ensure that the strategy upholds the UN Convention on the Rights of Persons with disabilities.
55. It is DDLS's belief that Australia should move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market. There are evidence based employment support strategies to include people with intellectual disability in the open labour market for decent wages. All people with intellectual disability should have access to support to get a job in the open labour market to enjoy inclusion, meaningful employment and fair wages. It is arguable that ADEs do not provide inclusion, meaningful employment and fair wages.
56. Action must be taken regarding the current situation of supported employees who are still being paid wages under BSWAT following the High Court decision in May 2013.

**This submission was prepared by Placido Belardo and volunteers on behalf of the Disability Discrimination Legal Service Inc (DDLS).**