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**Submission about the temporary  
exemption application under s55 *Disability  
Discrimination Act 1992 (Cth)* by DSS  
(formerly FaHCSIA) in relation to the use of  
the BSWAT**

Thank you for inviting the Intellectual Disability Rights Service (IDRS) 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 (DSS)) for a temporary exemption under the *Disability Discrimination Act 1992 (Cth)* (the Act).

**About Us**

IDRS is a community legal centre and disability advocacy service that provides legal services and related advocacy for people with intellectual disability throughout New South Wales. IDRS advocates for policy and law reform and undertakes a range of community education activities with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports people with intellectual disability when they come into contact with the criminal justice system.

## **Response to DSS's Application for a Temporary Exemption**

IDRS opposes DSS's application for a temporary exemption under s55 *Disability Discrimination Act 1992* (Cth) (the Act).

In summary, we believe a temporary exemption should not be granted by the Commission because:

1. Since the decisions of the Full Federal Court and the High Court of Australia in the *Nojin & Prior* cases, it is clear that in relation to the majority of workers in Australian Disability Enterprises (ADEs) the use of the BSWAT constitutes unlawful discrimination under the Act;
2. The proposed exemption would not further the objects of the Act, but would instead enable continued unlawful discrimination against the majority of people with disability working in ADEs, particularly people with intellectual disability;
3. The application for the exemption only offers a commitment to a general process for moving towards a new wage setting approach, rather than a detailed process for achieving a specific outcome;
4. There is no demonstrated necessity for the proposed exemption, as acceptable alternative wage setting arrangements are presently available, most obviously the Supported Wage System (SWS);
5. The proposed exemption would permit continuation of a wage setting and payment arrangement that is contrary to the advancement of the human rights of people with disabilities;
6. No terms and conditions could be attached to a grant of an exemption that would justify or outweigh its negative consequences.

### **Use of the BSWAT constitutes unlawful discrimination in many cases**

In *Nojin v Commonwealth of Australia*,<sup>1</sup> the Full Federal Court found that the structure of the BSWAT (in particular, the competency elements) unlawfully discriminates against many employees with disabilities. Buchanan J found that 'the BSWAT is skewed against intellectually disabled workers'.<sup>2</sup> Katzmann J found that:

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<sup>1</sup> [2012] FCAFC 192

<sup>2</sup> [2012] FCAFC 192 at 141

*The BSWAT may be fair in its application to some disabled employees. Powerful evidence was given in these cases, however, that it was unfairly skewed against the intellectually disabled.*<sup>3</sup>

When the Commonwealth made an application for special leave to appeal to the High Court of Australia, the High Court found:

*...the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court.*<sup>4</sup>

At the original hearing, evidence was given by Mr Phil Tuckerman, Director of Jobsupport, an organisation providing vocational training, placement and ongoing support services for people with an IQ less than 60. It was Mr Tuckerman's evidence that 'the majority of people in ADEs have an intellectual disability'.<sup>5</sup>

Use of the BSWAT therefore constitutes unlawful discrimination against the majority of workers in ADEs.

### **Proposed exemption would not further the objects of the Act**

The first object of the Act is to eliminate, as far as possible, discrimination against persons on the ground of disability in areas including work.

It is possible for the Commonwealth and ADEs to use an acceptable wage-setting tool, the Supported Wage System (SWS) (see discussion below). It is not necessary for them to continue to use the BSWAT.

The second object of the Act is 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.

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<sup>3</sup> [2012] FCAFC 192 at 268

<sup>4</sup> *Commonwealth of Australia and Anor v Prior; Commonwealth of Australia v Nojin and Anor* [2013] HCATrans 101 (10 May 2013) per Crennan J

<sup>5</sup> Cited by Buchanan J in the Full Federal Court proceedings, [2012] FCAFC 192, at 102

It is practicable for workers with intellectual disability to have their wage assessments conducted using the SWS (see discussion below).

The third object of the Act is 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.

The application for exemption proposed by DSS does not guarantee that, within the time period requested for exemption, workers with intellectual disability will be treated equally to the rest of the community in the assessment of their wages.

### **Commitment to a general process rather than a specific outcome**

DSS seeks the proposed exemption to allow 'further consultation, investigation and determination of potential ways forward' and to allow transition to, and implementation of, actions yet to be identified. What this means, and what actions could be identified for implementation, are unknown.

### **No demonstrated necessity for the proposed exemption**

Alternative wage-setting arrangements to the BSWAT are presently available. More use should be made of the SWS, a tool that is already used in mainstream employment and in some ADEs. The SWS does not measure competency. It is one of the alternatives for wage setting in supported employment identified by FaHCSIA (now DSS) in its July 2013 publication 'Inclusive Employment 2012-2022: A Vision for Supported Employment Future wage setting arrangements: a discussion guide'.<sup>6</sup> Advantages of the SWS identified in the guide are:

- It puts supported employment on the same standard of wage setting as mainstream employment; and
- It is already accepted by the Australian community as a fair and transparent way of working out wages for people with disability.<sup>7</sup>

The SWS assessment tool is owned by the Australian Government.<sup>8</sup> In the mainstream labour market all modern Awards and many enterprise agreements

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<sup>6</sup> Department of Families, Housing, Community Services and Indigenous Affairs, 'Inclusive Employment 2012-2022: A Vision for Supported Employment Future wage setting arrangements: a discussion guide' at p7

<sup>7</sup> Department of Families, Housing, Community Services and Indigenous Affairs, 'Inclusive Employment 2012-2022: A Vision for Supported Employment Future wage setting arrangements: a discussion guide' at p7

<sup>8</sup> Department of Social Services website <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/wage-assessments-in-australian-disability-enterprises> at 1 October 2013

allow for the Supported Wage System to be used.<sup>9</sup> The SWS is specifically recognised as a 'transparent assessment tool' under Standard 9 of the Disability Employment Standards, Rehabilitation Program Standards and Key Performance Indicators forming Schedule 1 to the Disability Services Standards (DEWR) 2007 under the *Disability Services Act 1986* (Cth).

Concerns about an inability of the SWS to meet immediate demand for assessments can be addressed by temporarily using the productivity assessment element in BSWAT. Buchanan J noted in his judgment in the *Nojin & Prior* case that:

*So far as it measured productivity, BSWAT was similar to the SWS tool. No complaint is made about that aspect of its use.*<sup>10</sup>

SWS assessments can be rolled out progressively.

DSS claims that an ADE may be required to use the BSWAT by an enterprise agreement or another industrial instrument. DSS refers to s47 of the Act, which effectively provides that the prohibition on disability discrimination under the Act does not render unlawful anything done by a person in direct compliance with an industrial instrument that has specific provisions relating to the payment of salary or wages to persons who would otherwise be eligible for a disability support pension and that determines those persons' salary or wages 'by reference to the capacity of the person'.

Buchanan J has pointed out that the BSWAT introduces into a wage assessment 'an examination or assessment of matters which play no part in the evident range of work for which a Grade 1 rate (under the relevant award) is fixed.'<sup>11</sup> His Honour concluded:

*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.*** (our highlighting)

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<sup>9</sup> Department of Social Services website <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/wage-assessments-in-australian-disability-enterprises> at 1 October 2013

<sup>10</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at 60

<sup>11</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at 135

Determining salary or wages by reference to the BSWAT is therefore not determining them 'by reference to the capacity of the person' to do the person's work.

Industrial agreements requiring the use of the BSWAT should be amended. In the meantime, as discussed above, a temporary use of the BSWAT productivity score would be appropriate in light of the decision in the *Nojin & Prior* case.

DSS has expressed concerns about continuing viability of the operations of ADEs should use of the BSWAT be stopped. However, it has not provided evidence to substantiate these concerns. The application for exemption does not set out actual or estimated costs to individual ADEs of using wage assessment tools that do not unlawfully discriminate against workers with intellectual disability. SWS assessments would allow any such costs to be determined.

### **Use of BSWAT is contrary to the advancement of human rights of people with disabilities**

Article 27(1)(b) of the Convention on the Rights of Persons with Disabilities (CRPD) provides that States Parties must take appropriate steps to:

*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*

Having considered Australia's initial report on issues relating to Article 27 of the CRPD, the United Nations CRPD Committee on 12 September 2013 recommended that Australia:

*Immediately discontinues the use of the BSWAT<sup>12</sup>*

### **No terms and conditions could be attached to a grant of an exemption that would justify or outweigh its negative consequences**

Use of the BSWAT is causing a large number of workers with disability in ADEs to experience unlawful discrimination that results in them receiving wages than lower than can be properly justified. When alternative arrangements are immediately available to redress this injustice, exemptions from the provisions of the Act should not be granted, on any terms.

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<sup>12</sup> CRPD/C/AUS/CO/1



In conclusion, IDRS opposes the application by DSS for a temporary exemption under s55 *Disability Discrimination Act 1992* (Cth) (the Act) and urges that action be implemented to redress this long term discrimination against people with intellectual disability in ADEs.

Please contact Margot Morris on 02 9318 0144, Principal Solicitor at IDRS if you require any further information or wish to discuss this submission.

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