

Our Ref:LR2013:SVT

30 October 2013

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

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

**Submission on Exemption Application**  
**by Department of Families, Housing, Communities and Indigenous Affairs**  
**(FaHCSIA)**  
**- now Department of Social Services (DSS)**



**General  
Legal Service**  
07 4031 7688  
1800 062 608

**Disability Discrimination  
Legal Service**  
07 4031 7358  
1800 650 197

**Seniors Legal  
& Support Service**  
07 4031 7179  
1800 650 931

**Family  
Law Service**  
07 4031 7688  
1800 062 608

**Consumer  
Law Service**  
07 4031 7688  
1800 062 608

## Introduction

### Background to the Cairns Community Legal Centre Inc (CCLC)

The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding to assist socially and financially disadvantaged persons in Far North Qld with various legal problems and issues they face. It offers free legal services in the areas of criminal law, traffic matters, family law, civil law (including motor vehicle accidents and debt recovery matters), consumer complaints, employment law, discrimination work (other than disability discrimination), neighbourhood disputes, bankruptcy matters and other miscellaneous matters.

The CCLC offers other free legal services in addition to the cores service above.

The Disability Discrimination Legal Service (DDLS) provides legal advice and case work which relates to disability discrimination complaints under the Federal Disability Discrimination Act 1992 (DDA) and the Queensland Anti-Discrimination Act 1991 (Queensland Act).

The Seniors Legal and Support Service offers legal and support services for the benefit of seniors affected by elder abuse or financial exploitation.

Family Law Service offers legal services in relation to family law matters which involve children's issues.

Consumer Law Service offers legal services for consumers in relation to a range of consumer law matters including credit and debt matters, disputes about consumer products and services, bankruptcy matters and other consumer law matters.

Community education and awareness-raising activities as well as law reform work are important aspect of all the services.

### Our interest in the consultation

Our client base is amongst the most vulnerable in society and we make submissions to protect and expand the protections of their human rights.

Our DDLS undertakes law reform projects to address systemic issues concerning disability discrimination. The Application for Temporary Exemption (the Application) by DSS meets our criteria for that work.

## Observations

### Funding

According to the Federal Government website, Australian Disability Enterprises (ADEs) (previously known as Business Services) are funded by the Australian Government Department of Social Services (DSS) (renamed from the Department of Families, Housing, Communities and Indigenous Affairs). The funding recognises the additional operating costs such as employing staff to support their employees with disability. It is not used to subsidise the wages and salaries of employees with a disability.

It also states that ADEs are commercial enterprises and that employees enjoy the same working conditions as those in the general workforce. We expect therefore that the various products and services offered by the ADEs would be based on competitive commercial rates. We note however that in 2000 only 53% of the Business Services industry broke even or were able to return a profit.

In Mr Nojin's appeal to the Federal Court of Australia - Full Court, Buchanan J noted that:

*Use of an approved method (for measuring the work value of disabled employees) was an important ingredient in securing support by way of Commonwealth funding, but there was no suggestion in the present case that either of the ADEs in question would lose funding, or that Mr Nojin or Mr Prior would lose their employment, if BSWAT was not used to measure their work value.*

We would expect therefore that other ADEs using Business Services Wage Assessment Tool (BSWAT) or hybrid assessment tools previously accepted by DSS as complying with legal obligations, similarly would not lose Commonwealth funding or have to lay off intellectually disabled workers.

It was acknowledged in the appeal matter that use of BSWAT led to lower actual wages, and that using the Supported Wage System tool (SWS) would result in higher wages.

In refusing leave to appeal the matter, the High Court focused on unchallenged expert evidence that BSWAT produced a differential effect for intellectually disabled persons and reduced their score (and income). The High Court saw no reason to doubt the conclusion of the Full Federal Court (that competency assessments in BSWAT disadvantaged intellectually disabled persons financially).

Since over 75% of persons employed by ADEs have intellectual disabilities (figures obtained from the Appeal matter) and may therefore be eligible for increased wages, those ADEs using tools other than SWS will face increased wage costs.

It can be deduced therefore that the main concern is the ability of the ADEs or DSS to adequately fund the increased wages which would result in consequence of the Nojin decision, and is not related to any particular physical barrier to avoiding the discrimination identified by that matter.

We expect therefore that increased wages will have to be reflected in the longer-term by renegotiated prices for products and services offered by the ADEs. In the short-term, we expect that DSS will be called on to make up any shortfall.

We would suggest that DSS, as funder for the ADEs, cannot plead unjustifiable hardship for having to meet the financial obligations of avoiding the discrimination identified in the Nojin matter.

## Use of Assessment Tools

We note that according to material put before the Federal and High Courts in the Nojin matters relating to assessment tools used by ADEs:

- approximately 10% use SWS, which is the only tool approved for use in open employment and measures productivity only (not competency)
- approximately 50% use BSWAT (which assesses productivity and competency)
- the remaining 40% use other hybrid tools which incorporated some or only competency assessment

We question therefore why DSS has applied for an exemption related to the use of BSWAT for all existing ADEs when only 50% are affected. The ADEs which use SWS do not need the exemption, and those using other hybrid assessment tools would still be subject to formal Complaints of Disability Discrimination.

Alternatively, those 40% of ADEs using other hybrid tools may be persuaded by DSS to move temporarily to using BSWAT assessment so as to be covered by an exemption. This would require a massive investment in re-assessing employees currently working for those ADEs, an investment which could be put to better use to pay the increased wages.

## Quality assurance

In its Application DSS refers to:

*the emerging need to ensure that ADEs are able to meet legislated quality assurance requirements, particularly Standard 9, Employment Conditions. Failure to meet these requirements jeopardises the ability of organisations to continue to receive government funding to deliver supported employment.*

We note that:

- Standard 9: Employment conditions referred to, forms part of the *Disability Service Standards (FaCSIA) 2007* (underlining added). It mandates that each person with a disability enjoys working conditions comparable to those of the general workforce (that is, in open employment). The ADEs have had to comply with that Standard for the past six years.
- One Key Performance Indicator (KPI) for that Standard requires service providers to ensure that people with a disability in open or supported employment (such as with ADEs) receive pro-rata wages where they are unable to work at full productive capacity due to disability, with those wages determined through a transparent assessment tool or process, such as the SWS or tools that comply with criteria referred to in the Guide to Good Practice Wage Determination (the GP Guide).
- The GP Guide was published in May 2001 (before the consultation process which led to the development of BSWAT) and acknowledges that SWS is a valid, reliable and accepted form of wage assessment and is deemed to comply with relevant legislation and Standards.
- In relation to Standard 9, the GP Guide also confirmed that Government contributions do not subsidise the wages and salaries of employees with a disability.

We find it incongruous for DSS to suggest that the organisations will lose funding and consequently affect their ability to provide supported employment, when it has set the Standards, and mandated and accepted the compliance certifications for the past six years.

Since Quality Assurance Audits have consistently certified as conforming to the Standards those ADEs using BSWAT and other hybrid assessment tools, we see no reason why DSS would not allow those organisations sufficient time to modify practices to regain compliance certification (address non-conformities), to ensure continuance of funding which now may be at risk based on the Nojin decision.

Since DSS allowed the ADEs to continue to operate on the basis that the BSWAT and other hybrid assessment tools did in fact conform with Standard 9, DSS should not penalise those ADEs for having to transition to different assessment tools now which would conform with audit requirements.

## Alternate Assessment Tools

The Nojin matter has confirmed that persons with intellectual disabilities are more likely to have difficulty demonstrating understanding of competencies, for the purposes of the BSWAT, than persons without intellectual disabilities.

It is our submission that any other assessment tool incorporating competency testing would also be discriminatory.

The unchallenged expert evidence accepted by the Courts was that BSWAT produced a differential effect for intellectually disabled persons and reduced their score (and income) due to the competency assessment component. This supports the position of persons with intellectual disability and their families in their consistent opposition to the development and use of BSWAT.

The only tool fully approved and also used in open employment is SWS.

Since BSWAT assessed productivity (in addition to industry competencies), we see no need to undertake an extensive consultation process suggested by DSS to determine a new wage assessment tool. SWS is available and is currently used by 10% ADEs. This indicates that DSS still intends to develop a tool which does not rely on productivity assessment alone (as SWS does), and wants to incorporate competency assessment in some capacity.

In our view, this is inconsistent with its obligations under Standard 9 and the objects set out in the DDA.

Avoiding discrimination by ADEs using BSWAT can be achieved simply and efficiently by using only the productivity components of BSWAT to determine pro-rata wages. There is no need to approve the exemption applied for.

ADEs using other assessment tools, can develop Disability Action Plans to address the identified discrimination, setting out what process they will use to undertake productivity assessments in lieu of the competency testing.

## DSS views on lawfulness of continued use of BSWAT

We find DSS views expressed in the footnote of its Application to be contradictory and misleading.

Its view that BSWAT '*may reasonably measure the actual capacity of an employee to undertake or perform the requirements of their job*' is immediately followed by an acknowledgement of the failure of that tool to accurately measure that same actual capacity. DSS has not provided any examples which might explain the first proposition, and the Court decision firmly and clearly detailed the second.

It is also misleading to suggest that an industrial instrument or enterprise agreement may require the use of BSWAT (thereby invoking the exemption available under section 47 DDA) when the vast majority of existing awards specifically assess *productive capacity* of employees employed under the supported wage system.

DSS has not identified any industrial instruments which do require the use of BSWAT. If any existed, the employer and employees generally would not be able to access the supported wage system and would need to vary their agreements to add the SWS provisions (according to the Supported Wage System Handbook July 2013 published by JobsAccess, an Australian Government initiative, and referenced in the awards).

For the small minority of employees with physical disabilities whose competency assessments managed to actually increase their score in BSWAT (and therefore their income), such positive discrimination is not available to workers in open employment. Their current wages can be protected as previous processes have done, in any move to productivity assessment only to avoid the discrimination identified in the Nojin decisions.

The operational needs (funding considerations) of ADEs should not influence the determination of the Application by the Commission. As we stated above, the development of a Disability Action Plan will serve to meet the exception available under section 21B DDA for unjustifiable hardship, with an effective plan providing a suitable defence to a Complaint.

## Inclusive Employment 2012-2022

We note that this document which was developed by the previous Government to align with the National Disability Insurance Scheme framework does not address how wages for workers with disability will be assessed. Its focus is on ensuring that persons with disability control the assistance they get to support them in employment, and have real options and choices about their future working lives.

It has the stated goal that by 2022 those workers will receive a comparable hourly rate that increases over time *in line with that of the general working population*.

Since even wages calculated using BSWAT will increase over time, based on the Awards for Level 1 workers (which will receive CPI increases over the 10 years), the '*vision*' in this document does nothing to address discrimination which the Courts now identified well after its publication. In our view it should not be used to justify delaying the remedy to address identified discrimination.

## Is the exemption necessary?

Yes, the activities of ADEs using assessment tools other than SWS constitute discrimination contrary to the DDA.

However, in our view the exemption is NOT necessary:

- Not all ADEs whose assessment of employees has been identified by the Nojin matters to be discriminatory, would be covered by the exemption applied for by DSS. Those 40% of ADEs which do not use BSWAT would not be covered by the exemption.
- As funder of ADEs and administrator of the Supported Wage System, the Commonwealth, through DSS, would still be a respondent in Complaints against those ADEs not using BSWAT.
  - Since the Nojin decisions were based on the particular circumstances of the two Complainants (use of BSWAT for their assessment), DSS would need to amend their Application to cover those ADEs currently using other hybrid tools. Such an amendment has not been requested.
  - Expanding the Application to add ADEs' current use of assessment tools other than BSWAT and SWS would be an acknowledgment that the competency component of any current assessment is discriminatory.
- A suitable defence to complaints of discrimination based on use of competency assessment for wage determination, can be mounted by all ADEs which are potentially subject of complaint (not just those using BSWAT), by developing an effective Disability Action Plan to address the identified discrimination within the same timeframe as proposed by DSS (three years) if necessary.
- The removal of the discriminatory aspect of BSWAT assessment (competency) can be achieved simply by using only the productivity component of assessments already conducted.
  - It does not require a lengthy and involved consultation process as suggested by DSS to avoid the identified discrimination.
  - It does not require additional assessment of employees' productivity.
  - A new pro-rata wage can be calculated easily using existing data (from the productivity component of the BSWAT assessment) and implemented in a timely manner.
- The main aspect which DSS seeks to avoid is not the discrimination itself, but the financial implications of the Nojin decisions.
  - As funder of ADEs, DSS cannot reasonably argue that avoiding the discrimination would cause it unjustifiable hardship.
  - Those ADEs which use BSWAT and other competency based assessment tools can reasonably pursue DSS for financial assistance for any back pays due to the findings in the Nojin matters. DSS accepted certification of those ADEs whose assessment of their employees with intellectual disability has now been shown to be discriminatory.
- As we noted above, we dispute the suggestion that ADEs which currently use BSWAT are at any real risk of having certification revoked or funding withdrawn. Both of those outcomes are firmly within the scope and power of DSS to rectify.

## Is granting an exemption consistent with the objects of the DDA?

In our view the exemption sought would only perpetuate the current discrimination which the DDA seeks to remove.

The continued use of BSWAT is inconsistent with the objects of the DDA as they relate to:

- eliminating, as far as possible, discrimination in the area of work

- ensuring, as far as practicable, the same rights to equality before the law as the rest of the community

Standard 9 (referred to above) requires that each person with a disability enjoys working conditions comparable to those of the general workforce.

The Nojin decisions have clearly shown that employees assessed using BSWAT are subjected to more onerous assessment conditions than those placed on other Level 1 employees in open employment, with significant detrimental impact on their income.

The unchallenged expert evidence accepted by the Courts was that BSWAT produced a differential effect for intellectually disabled persons and reduced their score (and income) due to the competency assessment component.

As we noted above, avoiding the identified discrimination resulting from use of BSWAT can be achieved simply and efficiently by using the productivity component only of existing BSWAT assessments conducted, to calculate pro-rata wages.

Delaying the implementation of available mechanisms which would avoid identified discrimination, to allow time for (repeat) consultation in order to develop yet another assessment tool which still incorporates some form of the (discriminatory) competency assessment, is inconsistent with, and would undermine the objects of the DDA.

In addition, the continued use of BSWAT to calculate (lower) pro-rata wages, would maintain the competitive advantage to some ADEs promoting their products and commercial services to the business community such as:

- *commercial advantages to outsourced manufacturing*
  - *very competitive rates*
- *outsourced work proudly provided by people with disabilities*
- *our skilled team provides outstanding commercial services to your business*

## Is it appropriate to grant an exemption subject to terms and conditions

Since the ADEs and DSS have the means available to them currently to avoid the discrimination identified in the use of BSWAT to calculate wages for persons with intellectual disability, in our view no terms or conditions imposed on an exemption would justify the continued use of that discriminatory practice.

## Conclusion

Based on our reasoning above, we strongly recommend to the Commission that the Application by DSS be rejected outright.

We thank you for the opportunity to make a submission on this matter. Please contact Sue Tomasich of our office if you have any queries.