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Willing to Work
Australian Human Rights Commission
GPO Box 5218
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Via email: ageanddisabilityinquiry@humanrights.gov.au

Dear Commissioner Ryan,

***SUBMISSION TO THE WILLING TO WORK: NATIONAL INQUIRY INTO
EMPLOYMENT DISCRIMINATION AGAINST OLDER AUSTRALIANS AND
AUSTRALIANS WITH DISABILITY***

1. Australian Lawyers for Human Rights (ALHR) thanks the Australian Human Rights Commission for the opportunity to comment on the Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability ('Willing to Work Inquiry').
2. ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.
3. In summary:
 - 3.1. ALHR recognises the Willing to Work Inquiry addresses the perspectives and

experiences of older Australians and Australians with disability in employment. This submission will address only the human rights obligations owed to Australians with disability in employment and the workplace.

- 3.2. ALHR identifies article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD) as the central international human rights obligation which Australia must meet to provide people with disabilities with their basic human rights in the workplace and in employment.
- 3.3. Critically, ALHR examines the domestic laws, practices and cases which highlight the systemic failing of Commonwealth laws to permit people with disabilities to enjoy the fundamental human rights to work and employment.
- 3.4. A specific issue that causes great alarm for ALHR from a human rights perspective is the use of Australian Disability Enterprises and the treatment of wages applied to people who are employed in that setting. ALHR submits that these practices violate the international human rights of people with disabilities and provides specific recommendations to the Commissioner on that issue.
- 3.5. An appendix attached to this submission is a case study of *Njon v Commonwealth* (2012).

International Human Rights Obligations

4. Australia signed the CRPD on 30 March 2007 and ratified it on 17 July 2008 however; the CRPD has not been formally adopted in Australian domestic law. Australia has developed the National Disability Strategy to outline how implementation across a range of areas will occur. However, at present, while the CRPD prescribes the standards to which Australia has committed, there are presently no formal avenues of recourse for breach of its terms.
5. Australia acceded to the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities on 21 August 2009. The Optional Protocol came into force for Australia on 20 September 2009 and empowers the Committee on the Rights of Persons with Disabilities to receive complaints from individuals and groups who believe that their country has breached the convention after all domestic remedies have been exhausted.
6. Specific to this submission is article 27 of the CRPD which provides for work and employment of persons with disabilities.

International human rights – brief overview of the current issues faced in Australia

7. Article 27 of the CRPD requires that State Parties recognise the right of people with disabilities to work on an equal basis with others in an open, inclusive and accessible labour market.¹

¹UN Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008)

8. Article 27 clearly provides that people with disabilities have a right to work on an equal basis with others which extends to an open labour market and work environment that is inclusive and accessible.
9. To realise and promote this right, specific steps are provided in article 27 (1) (a) – (k). ALHR urges for *all* of these steps to be taken by Australia immediately.
10. ALHR has identified three key employment markets where people with disabilities have been found to not be provided with the right to work, namely; self-employment, public sector and private sector.
11. ALHR holds grave concerns that Australia is in breach of article 27 of the CRPD with current practices and laws concerning the work and employment of people with disabilities.

Article 27(1)(f) – Self-employment and entrepreneurship

12. Article 27(1)(f) requires that a party must:

Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

13. ALHR understands that self-employment is often an attractive option for people with disabilities in many circumstances including; when there are difficulties in accessing assistance to personal care in the workplace, there is a need for flexible working hours, there are concerns regarding stigma in the workplace, and difficulties adapting to an employer-employee relationship.² ALHR strongly advocates for the importance of this employment avenue for people with disabilities.
14. The Australian Bureau of Statistics found that people with disabilities that were employed were more likely to run their own business (13 percent) or work from home (9 percent), than employed people without disability (10 percent and 6 percent).³ Graduates with disabilities were also more likely to start their own small business immediately after their studies.⁴

Article 27(1)(g) – Public Sector

15. Article 27(1)(g) requires Australia to:

Employ persons with disabilities in the public sector.

² Human Rights and Equal Opportunity Commission, *National Inquiry on Employment and Disability Interim Report: Chapter 5* <<https://www.humanrights.gov.au/publications/national-inquiry-employment-and-disability-interim-report-chapter-5>>.

³ Australian Bureau of Statistics 2012, *4102.0 Australian Social Trends*, March Quarter 2012 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40March+Quarter+2012>>.

⁴ Education to Employment Package, *New Enterprise Incentive Scheme*, <<http://pubsites.uws.edu.au/ndco/employment/programs/new.htm>>.

16. Action has been taken to realise this right most notably through the National Disability Strategy 2010-2020 which includes *As One – APS Disability Employment Strategy*⁵.
17. However, the State of the Service Report identified a decline in the number of people with disabilities working in the Australian Public Service (from 4.8 percent in 1999 to 3.1 percent in 2014) and reported consistently low work satisfaction.⁶ Additionally, people with disabilities were twice as likely to report bullying or harassment in the past twelve months (30 percent compared to 15 percent) and are retrenched at a higher rate (46 percent compared to 41 percent).⁷

Article 27(1)(h) – Private Sector

18. Article 27(1)(h) of the CRPD provides that a party must:

Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.

19. Despite reforms by the Australian Government addressing discrimination and support for people with disabilities to obtain employment in the private sector, ALHR remains concerned that people with disabilities remain disadvantaged in the workforce.⁸
20. ALHR advocates that increasing the employment of people with disabilities is not only important to ensure their full participation in society. It also has important benefits for employers and the economy broadly. A diverse workforce can increase productivity and creativity.

Current domestic laws, practices and cases which highlight the systemic failing of Commonwealth laws to permit people with disabilities to enjoy the fundamental human rights to work and employment.

21. When stacked up against the international human rights obligation of article 27 including the specific employment markets described above, the following Commonwealth practices and laws were identified by ALHR as examples of systemic failings to permit people with disabilities to enjoy the fundamental human rights to work and employment.

Proposed “Jobs Plan” in the report, A New System for Better Employment and Social Outcomes

22. In the Report of the Reference Group on Welfare Reform to the Minister for Social Services: *A New System for Better Employment and Social Outcomes*, the Reference

⁵ Australian Public Service Commission, *State of the Service Report 2013-2014* <<http://www.apsc.gov.au/about-the-apsc/parliamentary/state-of-the-service/state-of-the-service-2013-14/appendices/diversity>>.

⁶ Ibid.

⁷ Australian Public Service Commission, *State of the Service Report 2013-2014* <<http://www.apsc.gov.au/about-the-apsc/parliamentary/state-of-the-service/state-of-the-service-2013-14/appendices/diversity>>.

⁸ Australian Government, *Discussion Paper: Improving the Employment Participation of People with Disability in Australia*, December 2012 <<http://www.acpet.edu.au/uploads/files/NMU2012/May/Improving%20the%20employment%20participation%20of%20people%20with%20disability%20in%20Australia%20Discussion%20Paper.pdf>>.

Group proposes developing a ‘Jobs Plan’ for disadvantaged groups, commencing with people with disability and mental health conditions. The rationale for this is that a Jobs Plan would help to ensure everyone has the opportunity to find employment, with a particular focus on providing support for people with disability and mental health conditions.

23. This recommendation was developed following numerous recommendations by stakeholders on the need for such an initiative, in light of the challenges facing disadvantaged groups in finding sustainable employment.
24. It was determined that the Jobs Plan should initially focus on people with disability and mental health conditions, and subsequently be extended to include other disadvantaged groups.
25. The key components of the Jobs Plan are:
 - a) tailored support services
 - b) awareness raising campaign
 - c) a leaders group
 - d) awards to recognise best practice
 - e) government employment targets
 - f) procurement practices
 - g) an employment covenant
 - h) wage subsidies.
26. ALHR briefly consider each of these components in turn, in the context of the extent to which they address Australia’s obligations to protect the human rights of people with disability, by providing them with equal opportunities to engage in productive work in the labour market.

a) Tailored support services

27. Despite the continued strength and expansion of the Australian economy in the face of the unstable global financial conditions of recent times, there are significant groups which are marginalised both from and within the labour market, including people with disabilities. **The significant underrepresentation of people with disability in the workforce is well documented.**⁹ The underemployment of this group perpetuates despite an understanding, documented in the research literature, of the significant economic advantages that flow from increasing the proportion of the population actively involved in the labour market.¹⁰

⁹ Australia’s employment of people with disability is lower than the OECD average. Indeed, Australia has one of the lowest employment participation rates for people with a disability, ranking 21st out of 29 OECD countries, with an employment rate of 39.8% for people with a disability compared to 79.4% for people without a disability: PriceWaterHouse Coopers, *Disability Expectations: Investing in a Better Life, a Stronger Australia*, 2011.

¹⁰ Barbara Pocock, ‘Work Life “Balance” in Australia: Limited progress, dim prospects’ (2005) 43(2) *Asia Pacific Journal of Human Resources* 198, 202.

28. The benefits of employment for people, including people with disability, are many and varied – income is only one, albeit an important, factor. Work is documented to be a source of satisfaction, identity and pride and an important and socially valued way of contributing to society and personal growth.¹¹ As the Reference Group noted in its Interim Report on Welfare Reform to the Minister for Social Services: *A New System for Better Employment and Social Outcomes*: “Employment is associated with a range of positive outcomes for people and communities. Engaging in work generates financial, health and psychological benefits for the people working and for their families.”
29. Many people are highly motivated to engage in meaningful work.¹² ALHR submits that this includes many people with disability. A research study exploring the attitudes and experiences of people with disability regarding employment documented that most Disability Support Pension recipients under the age of 35 have a strong desire to work, with the inability to work a source of anguish for many.¹³ The noted barriers, aside from the severity of the person’s disability and the failure by many workplaces to make appropriate physical modifications to the environment to enable proper access by people with disability, were workplace cultural issues such as discrimination and inflexible working hours.¹⁴
30. ALHR acknowledges that some people with disabilities, like many people from vulnerable groups need additional help and support to find and maintain appropriate employment. In providing support, it is important to distinguish between support that is properly effective and that which is tokenistic only. The kind of support really required is that aimed at dismantling the structural and systemic barriers precluding or limiting people with disability from working. Tokenistic support, in the form of mandatory appointments with Centrelink staff designed to target employment opportunities or other like bureaucratic processes are futile in the face of workplace cultures that fail to embrace diversity. Instead of assisting people with disability into employment, the latter form of support can add to the hurdles they face.
31. Many people with disability and their families report that they have been unsupported by a range of Disability Employment Services (DES). Some have been offered menial jobs only despite having the qualifications for highly skilled work. Others report that assurances have been offered but rarely delivered. In many instances programs are driven by the service rather than by the client, and DES are often seen as ‘unproductive, inflexible and without creativity’. There is a small number of DES who demonstrate good practice, but people with disability cannot expect the same quality of service dependant on their geography and access to such a service.¹⁵

¹¹ Ian Wolcott and Australian Institute of Family Studies, *Work and Family: Employers’ Views* (Commonwealth of Australia, 1991), 9.

¹² Alain De Botton, *The Pleasures and Sorrows of Work* (Penguin Books, 2009), 78-80; Barbara Pocock, *The Labour Market Ate my Babies: Work, Children and a Sustainable Future* (The Federation Press, 2006), 1.

¹³ Alan Morris, “Pain and Mythology: Disability Support Pension Recipients and Work” (2006) 7(1) *Australian Review of Public Affairs* 41, 47.

¹⁴ Alan Morris, “Pain and Mythology: Disability Support Pension Recipients and Work” (2006) 7(1) *Australian Review of Public Affairs* 41. Discussed in Queensland Advocacy Incorporated. Submission on the Review of Australia’s Welfare System, 4 August 2014.

¹⁵ Queensland Advocacy Incorporated. Submission on the Review of the National Disability Employment Framework. July 2015.

32. ALHR submits that progress in this area will be driven by creative input from interested parties on ways to create real employment opportunities for people with disability and calls for the discussion to move beyond the rhetoric of opportunity to create real opportunities for people with disability in the workforce.¹⁶ In doing so, the human rights of people with disabilities to work and be treated on an equal basis with others must be kept at the forefront of developing those opportunities.
33. In facilitating the employment of a greater portion of people with disability within the Australian labour market, ALHR stresses the importance to avoid relying on assumptions and stereotypes about the types of employment that may be appropriate. As with all important decisions concerning a person's life, ALHR takes the position that, for people with disability as for all other people, ownership of decision-making is critical. For a significant majority of people with disability, ownership of employment-related decision-making is possible with appropriate support.
34. The role of individuals in the community cannot be underestimated in establishing relationships and contacts in social and work spheres. People with disability and their families will benefit from advocacy, advocacy supports and services (particularly citizen advocacy for people without informal supports) to assist with decision-making, to establish and maintain employment connections and relationships and to negotiate employment roles and agreements.
35. Technology is a powerful tool assisting people with disability to interact with others on a level playing field. Information technology has become of heightened relevance in the context of an increasingly globalised labour market, where technology facilitates the transcendence of temporal, physical and geographical boundaries. Access to, and proficiency with, information technology is fundamental at the point of entry to the labour market. Accordingly, ALHR support measures that increase the technological skills of people with disability, coupled with initiatives that ensure that appropriate technological equipment is affordable and available to all people with disability. ALHR consider that appropriate measures in this regard could include subsidies for people with disability to purchase and install appropriate information technology and investment in information technology training for people with disability.¹⁷

b) Awareness raising campaign

36. ALHR submits that negative employer attitudes to people with disability is a significant obstacle to greater labour market participation by people with disability. The existence of this attitudinal barrier is particularly concerning given the documented evidence that people with disability are often proven to be highly productive, loyal and flexible workers when given the opportunity. Dismantling negative mindsets towards people with disability in the employment context is particularly paramount given the considerable

¹⁶ Queensland Advocacy Incorporated. Submission on the Review of Australia's Welfare System, 4 August 2014.

¹⁷ Queensland Advocacy Incorporated. Submission on the Review of Australia's Welfare System, 4 August 2014.

obstacles faced by people with disability that commence well before labour market participation becomes possible. In particular, ALHR note the significant impediments people with disability encounter in the educational system¹⁸ and by virtue of the imposition of onerous assessment and appraisal requirements not applicable to people without disability.¹⁹

37. The government can play a role here in helping to develop increased awareness on the part of employers of the benefits of employing people with disability, to help to dispel some of the negative stereotypes that have existed to date. Inclusive strategies that promote the benefits of a diverse workforce and help to dispel stereotypes are greatly needed to dismantle the barriers to entry to the labour market for people with disability. This is particularly so in the context of people with an intellectual or cognitive disability or a mental illness, as there has historically been a stigma about mental illness, and the conflation of intellectual or cognitive disability with mental illness. As Caivano notes:²⁰
- People with disabilities, particularly those with intellectual and psychosocial disabilities, have long been subject to limitations on their right to legal capacity. They have endured arbitrary detention and have been deprived of access to basic health interventions. They have faced cruel, inhumane, and degrading treatment, including physical abuse, confinement in squalid institutions, and subjection to restraint and seclusion. Due to stigma and discrimination, people with disabilities in many parts of the world continue to be deprived of legal capacity despite being able to make and communicate decisions, either by themselves or with support.*

c) A leaders group

38. The minority of companies that have adopted a more inclusive work paradigm that not only tolerates but embraces a diverse workforce have generally reported highly positive results. For example, both Westpac and IBM are corporate examples that showcase how a company can prioritise diversity in its workforce whilst remaining commercially highly successful in a competitive market. These companies not only highlight the possibilities but also provide industrial leadership in exemplifying the viability of such changes for other workplace organisations.
39. The leadership demonstrated by corporate bodies and entities such as these could be furthered by formally developing an alliance of leaders in this area. This could build upon the positive measures already in place and provide space for brainstorming and development of ideas for further improvement. Doing so would move toward realisation of article 27(1)(h) of the CRPD.

d) Awards to recognise best practice

40. ALHR supports the proposal to publicly recognise those companies who are leading the way in developing real employment opportunities for people with disability. The

¹⁸ For example, many students leave school with literacy and numeracy inadequacies that have not been fully addressed by specialist educational assistance.

¹⁹ For example, Job Capacity Assessments (JCAs), Job Seeker Classification Instruments (JSCIs) and wage assessment tools.

²⁰ Nicholas Caivano, 'Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention' (2014) 4(1) *Western Journal of Legal Studies* 1, 2-3.

companies who are developing innovative responses in this area should be publicly recognised, to support their work in this regard and to help to develop a public awareness of the link between workplace diversity and successful business outcomes.

41. In developing a vision of what ‘best practice’ may look like in this area, the international community provides inspiration. The International Labor Organisation coined the phrase ‘decent work’ as the aspirational standard for its economic and social reform program,²¹ developing a normative ideal of ‘decent work’ to which all members states are encouraged to adhere. The ‘decent work’ model is built on respect for freedom, equality and security and takes a multi-disciplinary perspective to this issue.²² The decent work platform is an ideal standard to aspire to in the context of employment for people with disability. ALHR endorses this model.
42. Another model with many positive features is the European Commission’s ‘flexicurity’ model.²³ This welfare state/pro-active labour market policy model promotes flexible and secure labour market work, with opportunities expanded by a strong continuing education system and robust welfare and social security systems to provide income support during transitions between employment.²⁴ Flexicurity is designed to benefit both those inside and out of the labour market, by increasing the inclusiveness of European labour markets and lessening the divide between those in secure and precarious employment (or unemployed).²⁵ ALHR encourages Australian models to learn from aspects of this model in the context of improving employment for people with disabilities.

e) Government employment targets

43. As was highlighted earlier, people with disabilities must be employed in the public sector in accordance with article 27(1)(g) of the CRPD.
44. In developing a proposal for government employment targets as part of the Jobs Plan, the Reference Group noted that the focus should be on the outcome in terms of number of people with disability in meaningful employment, rather than on increasing number of job-seekers. ALHR considers this an important point and wishes to emphasise that any programs of reform at the labour market/disability interface must explicitly recognise the

²¹ International Labour Organisation (ILO), *Report of the Director General: Decent Work* (ILO, 1999); Owens, Riley and Murray, above n 35, 311.

²² Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007), 311.

²³ The term was first coined by the social democratic Prime Minister of Denmark Poul Nyrup Rasmussen in the 1990s.

²⁴ For a detailed discussion of flexicurity, see: Colin Crouch, *Social Change in Western Europe* (Oxford University Press, 1999); Gosta Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford University Press, 1999); Gosta Esping-Andersen and Marino Regini (eds), *Why Deregulate Labour Markets?* (Oxford University Press, 2000); European Foundation for the Improvement of Living and Working Conditions, *Flexicurity*, <http://www.eurofound.eu.int/areas/industrialrelations/dictionary/definitions/FLEXICURITY.htm> (2007); Sonja Bekker, Ton Wilthagen, Per Kongshoj Madsen, et al, ‘Forum: Flexicurity - a European Approach to Labour Market Policy’ (2008) 43(2) *Intereconomics* S68–111.

²⁵ Guideline No.21 of the Integrated Guidelines for Growth and Employment requires Member States to: ‘...promote flexibility combined with employment security and reduce labour market segmentation, having due regard to the role of the social partners’: European Commission, *Working Together for Growth and Jobs. Integrated Guidelines for Growth and Jobs (2005-2008)* (Office for Official Publication of the European Communities, 2005). This Guideline was adopted by the European Council for the period 2005 to 2010.

importance of helping people with disability to attain work that is commensurate with their ability, skills, experience and career trajectory.

43. **ALHR proposes that all government, medium and larger business should be required to implement affirmative action policies and quotas pertaining to the employment of people with disability.**²⁶ We recommend that smaller businesses be encouraged to review the work of other employees and determine if niche roles could be created for someone with a disability. Governments should be leading the way and setting the example for all employers by significantly increasing the rates at which they employ people with disability and by applying affirmative action. Small business can play an integral role in drawing upon the unique strengths of people within communities to create opportunities. Many people with disability, particularly those with an intellectual or cognitive disability or a mental health condition, have strengths that may translate more effectively within the environment offered by a small business. It is highly likely that niche roles developed for employees with disability can be mutually beneficial. When people with disability are supported to work in niche roles in their local community and in particular where one small business does not have sufficient work to support an employee with a disability, there is potential for the worker to have more than one job with more than one employer in their local area. However, it is important not to make assumptions and generalisations about what might suit all or any people with disability best.
44. This will help to develop a culture of respect for workplace diversity and an understanding of the benefits of employing a diverse workforce from the perspective of employers and workers alike. Many people with disability have significant, untapped potential to contribute to the labour market. To capitalise on this potential, all that is required is a shift in mindset that embraces the opportunities for flexible working arrangements that accommodate the varying needs of people with disability and a recognition of the potential of different forms of technological and non-technological support in facilitating this employment.²⁷

f) Procurement practices

45. ALHR supports the introduction of mandatory thresholds as regards the employment of people with disability in meaningful roles as part of the standardised procurement practices of all medium and large companies and government bodies. We recognise that the imposition of this requirement may pose greater difficulties for small companies.
46. By ingraining minimum thresholds for the employment of people with disability in this way, it would help to increase the baseline level of employment of people with disability.

g) An employment covenant

²⁶ We acknowledge that it would not be tenable to introduce affirmative action or quotas for small business. However, proposals to increase the employment of people with disability by micro business is discussed below.

²⁷ Queensland Advocacy Incorporated. Submission on the Review of Australia's Welfare System, 4 August 2014.

47. **While ALHR endorse the proposition that people with disability will benefit from a targeted initiative, we do not consider that the solution is a covenant.** Measures of this nature have historically not proven to be an effective means of addressing the plight of a disadvantaged group in Australia.
48. A preferable approach would be to direct attention towards making the provisions of the CRPD specifically enforceable by Australian domestic law. In the intervening period, ALHR propose the enactment of specific, targeted legislation governing the employment of people with disabilities, which focuses on phasing out sheltered workshops and introducing minimum wages and working conditions.

h) Wage Subsidies

49. Rather than wage subsidies as an incentive to employers, there should be a public awareness campaign of the benefits of employing people with disability for both the workplace and co-workers. People with disability are proven to be loyal and hardworking employees who generally demonstrate greater reliability, have higher attendance records with fewer sick days, have better retention rates, exhibit greater than average flexibility and productivity and do not incur greater workplace risk or compensation claims when compared with employees without a disability. Workplaces that offer a supportive environment for people with disability often report better working relationships and higher staff morale and customer loyalty.²⁸ Yet despite these documented benefits of employing people with disability, there remain significant barriers to employment for people with disability. ALHR recommends that government should take a proactive approach to ensure employers are made aware of the benefits of employing a person with disability.
50. **ALHR are concerned that the use of wage subsidies has the effect of decreasing the status of a person with disability in the workforce, creating the perspective that a worker with a disability is of lesser value than an equivalent worker without the disability.** Instead, ALHR submits that there be greater supports for people with disability to be included in the workplace and that employment agencies should work with employers to create niche roles for employees with disabilities.
51. It is imperative that all workers, including workers with disability, are remunerated at a rate that is equal or greater to the minimum award wage for the particular industry in which the worker is engaged. We consider that the supported wage system, and Australian Disability Enterprises (ADEs), functions as a significant disincentive to employment for people with disability and can have the effect of demeaning and undervaluing the contribution made by people with disability to the labour market, in terms of the grossly insufficient remuneration provided and the concentration and confinement of workers to a small and undervalued sector of the labour market.

²⁸ Australian Government, “Strengthening your business through diversity: A guide for employers”, at <<http://www.reconciliation.org.au/workplace/resources/strengthening-your-business-through-diversity-a-guide-for-employers>>.

52. As noted above, it is documented that workers with disability have increased reliability and loyalty, lower rates of absences and fewer associated costs of insurance and workplace claims. In this context, it is critical to place additional value on the quality of the work a person can deliver. This should constitute a measure of contribution equal to or greater than the mere volume of output.
53. In the present socio-economic climate, employers will more likely respond to incentives to employ a person with a disability. However, the status of a person with disability in the workforce can be eroded by the ‘discounted’ rates of pay and incentives. The implication that flows from this is that a worker who has a disability is somehow ‘less’ valued than someone without a disability.
54. **ALHR calls on the abolition of ADEs as the most effective means of removing the disjunct between ADEs and open employment. ADEs represent a failed experiment that have as their cost the dignity of the people with disability who have been sheltered within them.** They are effectively a dead end; the irony of ADEs is that while on one hand they fail to equip some people with disability with skills for more appropriate engagement in the labour market, on the other hand they retain highly productive workers to maintain the viability of the service rather than supporting them to move to open employment. The stated vision of ADEs has not translated into any positive outcomes for people with disability.²⁹
55. Volunteer work can potentially be an effective means by which people with disability can make a valuable contribution to the workplace, demonstrate their capabilities and simultaneously develop skills that are valuable to the workplace. To foster and support the involvement of people with disability in the labour market in a voluntary capacity, funding incentives should be developed for people with disability who contribute to society through unpaid work. However, we qualify this submission by emphasising the importance of implementing safeguards to ensure that people with disability are not exploited, by remaining engaged in a voluntary capacity where their role could, but ultimately does not, lead to paid employment.

The strength and scope of protection offered by the Disability Discrimination Act 1992 (Cth) in the context of the CRPD

56. In the absence of a federal Human Rights Act or Charter (or Bill of Rights), the anti-discrimination legislative regime, comprised of Commonwealth and State legislation that prohibits direct and indirect discrimination on the basis of particular attributes in specific areas, provides the most comprehensive regime for the protection of human rights of people with disability in Australia.
57. The federal *Disability Discrimination Act 1992 (Cth)* (DDA), and its State counterparts (for example, the *Anti-Discrimination Act 1991 (Qld)*) are relevant to note as the legislative basis for the prohibition of discrimination, both in Queensland and at a Commonwealth level. **In the absence of a Queensland or Commonwealth Bill of Rights or Human Rights Charter, the anti-discrimination legislative regime remains the most powerful tool for the prohibition of discriminatory treatment against**

²⁹ Queensland Advocacy Incorporated. Submission to National Disability Employment Framework. July 2015.

people with disability in the workplace. The DDA aims to eliminate, as far as possible, discrimination against persons on the ground of disability in areas including work; 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; and 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.

58. Part 2 of the DDA prohibits discrimination on the grounds of disability in the area of work.
59. Section 15 of the DDA provides as follows:
- 1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:
 - a) in the arrangements made for the purpose of determining who should be offered employment; or
 - b) in determining who should be offered employment; or
 - c) in the terms or conditions on which employment is offered.
 - 2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:
 - a) in the terms or conditions of employment that the employer affords the employee; or
 - b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
 - c) by dismissing the employee; or
 - d) by subjecting the employee to any other detriment.
 - 3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.
60. Section 16 of the DDA pertains to discrimination against commission agents, section 17 to discrimination against contract workers, section 18 to partnerships, section 19 to qualifying bodies, section 20 to registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth) and section 21 to employment agencies.
61. There are two exceptions prescribed by the DDA to actions otherwise deemed discriminatory in contravention of the DDA: the inherent requirements exception (section 21A) and the unjustifiable hardship exception (section 21B). These exceptions significantly weaken the scope of the DDA in comparison to the CRPD.

62. The CRPD defines discrimination on the basis of disability to include all forms of discrimination.³⁰ The Disability Discrimination Act, however, allows discrimination to take place against an individual with a disability so long as the discrimination is reasonable having regard to the circumstances of the case.³¹
63. It is stated in the CRPD that States Parties must provide reasonable accommodation for persons with disabilities.³² This applies in the context of work and employment as provided by article 27(1)(i) of the CRPD. The DAA, on the other hand, states that unjustifiable hardship is a relevant exception to discrimination on the ground of disability.³³ These exceptions to discrimination water down the DDA to the point that its effectiveness is compromised.
64. The right to work in a role that is freely chosen by a person, in fair working conditions and to be appropriately remunerated are therefore fundamental human rights that are recognised as such, most forcefully in the International Bill of Rights and the CRPD, but to a lesser extent statutorily in Queensland and the Commonwealth of Australia.

Case law on wages for people with disabilities

65. **ALHR considers that the application of the BSWAT assessment tool is anathema to workers with intellectual impairment. It enables discrimination against these workers, by authorising them to be paid at rates that would cause outrage in any other part of our community as they are essentially slave rates of pay.** In 2012, the Full Federal Court of Australia found that the practice of using the BSWAT assessment tool to determine reduced rates of pay for persons with an intellectual or cognitive disability amounts to unlawful discrimination in contravention of the federal laws.³⁴ However, the Federal Government sought and was granted an exemption to the operation of the anti-discrimination laws, purportedly as a transitional arrangement pending the implementation of a new wage setting approach.
66. Yet this transitional arrangement has recently been extended for a further year, thus continuing to sanction the discriminatory treatment of people with disability in the workplace. This is particularly concerning given that Australian Disability Enterprises are the employers who most commonly use the BSWAT assessment tool, reducing the wages paid to workers with intellectual impairment to an amount that is well below the standard minimum wage and amounts to ‘sweat shop’ conditions.³⁵
67. While it is important to recognise that some disabilities do impact upon an individual’s ability to perform work, the restrictive and dated approach to measuring workplace productivity discriminates against many people with disability. ALHR submits that a more appropriate approach would be to measure contribution in ways other than units produced per hour and to place weight on the quality of work a person can deliver.

³⁰ Article 2 “Discrimination on the basis of disability”.

³¹ *Disability Discrimination Act 1992 (Cth)* s6(3).

³² CRPD article 5 (3).

³³ *Disability Discrimination Act 1992 (Cth)* s21B.

³⁴ *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

³⁵ In 2012, the average hourly wage rate for workers with disability in supported employment was \$3.65: *Inclusive Employment 2012-2022 – A Vision for Supported Employment*.

Recommendations regarding wages for people with disability

68. ALHR holds particular concern regarding the use of Australia Disability Enterprises and the wages provided to people working in them. The following recommendations are made with specifically with respect to those circumstances:
- a. All people with disability currently working in sheltered workshops (Australian Disability Enterprises) have the right to be paid at least minimum award rates, rather than the current productivity rates of pay. No other citizens in Australia are subjected to this kind of assessment and rate of pay according to their level of productivity. When people with disability work the hours to their best ability it should be sufficient for the people to receive the same pay as anyone else. Any shortfalls that employers cannot meet should be met by government support.
 - b. It is imperative that all workers, including workers with disability, are remunerated at a rate that is equal or greater to the minimum award wage for the particular industry in which the worker is engaged. ALHR considers that the supported wage system, and Australian Disability Enterprises, function as significant disincentives to employment for people with disability and can have the effect of demeaning and undervaluing the contribution made by people with disability to the labour market, in terms of the grossly insufficient remuneration provided and the concentration and confinement of workers to a small and undervalued sector of the labour market.
 - c. The experience of ADEs has been that people are indirectly compelled into sheltered workshops because that is their only choice. If they want to work they must work under the circumstances that are available for them. This does not amount to choice by any analysis and is an exploitative and debasing model. It contravenes article 27 of CRPD as it is essentially servitude.
 - d. Some form of appraisal may be required to determine how well a person with disability is able to perform their job and to determine an appropriate rate of pay. However, any wage assessment tool that, when applied, reduces the wages of a person to a level of such diminished proportions that it does not sustain affordable living is a breach of article 16 of the CRPD, which assures freedom from exploitation, violence and abuse, and article 17, which protects the mental integrity of the person. The self-esteem of any person with disability is gravely diminished when they are subjected to such harsh processes. This exploitation seems to be prevailing mostly but not exclusively in sheltered workshop situations.
 - e. ALHR recommends that workers be given the opportunity to be assessed for rates of pay under whatever measure produces the best result. We also commend those workplaces that prefer to pay reasonable rates of pay in accordance with the effort and work performed by workers with disability. It is not unreasonable to assert that people who work a certain number of hours and who do their best efforts be paid accordingly. Non-disabled workers in Australia doing the same jobs have differing levels of productivity in the workplace. They are not paid according to their productivity but by the prevailing award rate. It is only those workers who are paid 'piecemeal' who are paid for higher productivity – for example, highly productive fruit pickers will earn more than slower workers but they are all paid at the same rate.

- f. ALHR notes that the 2015 budget has brought some long-overdue reform to this area, introducing changes to Disability Employment Services funding rules whereby people employed in ADEs or sheltered workshops are able to access support to achieve employment in the open labour market. This amendment to the rules will mean that people with disability who are employed by an ADE will be permitted to job-seek in the general labour market, without their access to DES funding being blocked. However, while welcome, this improvement only touches on the surface of the significant changes needed in this area.

Conclusion

69. Based on the evidence canvassed in this submission and the international human rights obligations owed by Australia to people with disabilities, ALHR submits:
 - a. There is a significant underrepresentation of people with disability in the workforce.
 - b. All government, medium and larger business should be required to implement affirmative action policies and quotas pertaining to the employment of people with disability.
 - c. Attention needs to be directed towards making the provisions of the CRPD specifically enforceable by Australian domestic law
 - d. The use of wage subsidies has the effect of decreasing the status of a person with disability in the workforce, creating the perspective that a worker with a disability is of lesser value than an equivalent worker without the disability.
 - e. Abolishing ADEs is the most effective means of removing the disjunct between ADEs and open employment and must be acted upon immediately. ADEs represent a failed experiment that have as their cost the dignity of the people with disability who have been sheltered within them.
 - f. The application of the BSWAT assessment tool is an abomination of the human rights of workers with intellectual impairment. It enables discrimination against these workers, by authorising them to be paid at rates that would cause outrage in any other part of our community as they are essentially slave rates of pay.

If you would like to discuss any aspect of this submission, please contact Nathan Kennedy, President via email at president@alhr.org.au

Yours faithfully,

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Appendix: *Nojin v Cth*

In the 2012 Full Federal Court decision of *Nojin and Prior v Commonwealth of Australia*,³⁶ the applicants were persons with disabilities employed in Australian Disability Enterprises. Each underwent an assessment to determine the level of wages they would receive for the work they performed. The employees argued that using a particular method of assessing the level of wages to be paid to disabled employees resulted in unlawful discrimination.

At first instance, Gray J in the Federal Court³⁷ held that the only requirement or condition with which the applicants were required to comply was that their wage levels be determined by assessment using the test and that they were able to comply with this requirement or condition.

- (a) Disabled workers who are not intellectually disabled are more likely to achieve advantageous results on BSWAT than intellectually disabled workers, such that s6 (a) and (c) of the Act are satisfied. [127], [133], [199], [244] (followed *Hurst v Queensland* (2006) 151 FCR 562)
- (b) Despite the widespread support for its use, the assessment of the appellants' wages using BSWAT is not reasonable. [134]-[140], [215], [265]
- (c) S45 of the Act does not render the respondents' acts lawful, as the appellants' employment does not depend on the use of BSWAT. [150]-[157], [216], [269]

The matter was appealed to the Full Federal Court.

Facts:

The Appellants claimed that their ADE employers had discriminated against them,³⁸ in applying BSWAT to assess their wages. The appellants claimed that the respondents had engaged in indirect discrimination within s6 of the Act by requiring them to comply with a requirement or condition:

- (a) With which a substantially higher proportion of persons without the disability were able to comply;
- (b) Which was not reasonable having regard to the circumstances of the case; and
- (c) With which the appellants were not able to comply

Under the relevant award,³⁹ rates of pay for disabled workers employed at Australian Disability Enterprises (ADEs) were set at a percentage of the lowest rate applicable to Grade 1 employees thereunder. This can be adjusted by applying the Business Services Wage Assessment Tool (BSWAT).

BSWAT assesses the following:

³⁶ (2012) FCAFC 192.

³⁷ [2011] FCA 1066.

³⁸ Contrary to s15 (2) of the *Disability Discrimination Act 1992* (Cth).

³⁹ Rates of pay for disabled workers (including those with intellectual disabilities) employed at ADEs are fixed in accordance with an award made by the Australian Industrial Relations Commission (now Fair Work Australia), *Nojin v Commonwealth* [2012] 208 FCR 1, [10] (*Nojin*)

- (a) Workers productivity
- (b) Workers core and industry ‘competencies’, which were measured in part by question and answer sessions, were generally knowledge-based, abstract concepts unrelated to the basic, process-orientated tasks required to be performed
- (c) ‘An assessment of competencies does not relate necessarily, and often will not relate, to work actually carried out, or the way it is performed.⁴⁰ Rather, an assessment of competencies tests more general knowledge, and perhaps aptitude’⁴¹
 - ‘Testing for, measuring or assessing competencies is not the same thing as testing for, measuring or assessing competency in a given task’⁴²
- (d) These ‘competencies’ were not required to be demonstrated by Grade 1 employees
- (e) The idea of measuring or assessing competencies rather than, or in addition to, productivity was not immediately embraced, and still does not apply in open employment⁴³

While a specific issue before the Court was whether BSWAT was the appropriate tool or whether another tool, such as the SWS should have been used, the issues between the parties were contested in a broader context. At issue was the suitability of BSWAT as a measure of work value.

No detailed or rigorous assessment of the use of BSWAT has been undertaken by reference to the particular concerns expressed in the present proceedings⁴⁴

The suitability of BSWAT as a measure of work value:

The approach taken by SWS tools was described by the Commonwealth Human Services and Health Department,⁴⁵ “a productivity-based wage essentially requires a standard to be set of the productivity needed for award-level pay; and then an assessment of the worker’s achievement against that standard”.

The comparison contemplated by this approach is between the tasks for which an award rate of pay is actually fixed and the work actually carried out by a disabled worker. As mentioned, consistently with this approach the SWS tool remains the only one which is approved for use in open employment⁴⁶

⁴⁰ ‘The use of the term (‘competencies’) in this context refers to something that is more theoretical than practical’ *Nojin* [11].

⁴¹ *Nojin*, [11]

⁴² *Nojin*, [41]

⁴³ *Nojin*, [23]

⁴⁴ *Nojin*, [48]

⁴⁵ ‘Supported Wage System Handbook’ (1995), cited in *Nojin* at [26].

⁴⁶ *Nojin*, [27]

In the 2005 version of the award,⁴⁷ in clause 14A.2.1 provided that, ‘no employee with a disability will have their rate of pay reduced as a result of a wage assessment made pursuant to clause 14A.1.1 as at 11 May 2008, or any variation of the award arising from the decision of the Commission in PR961607’.

During the development of the BSWAT an initial trial of the draft wage tool in 19 Business Services sites produced results which were regarded as yielding wage outcomes that were too high, as such the tool was revised.⁴⁸

- One change was to more closely align the competency-based component with a Certificate II level of competency rather than a Certificate I level, thus raising the standard to be satisfied⁴⁹
- This was justified on the basis that the competency based component was to rudimentary for operation in a number of industry settings; the shift to Certificate II level was a more accurate reflection of a full wage earner in an open employment setting, and where their skills were expected to be⁵⁰
- Certificate II levels assumes (1) knowledge and competency transmitted usually by some post-secondary school training, or experience, and (2) achievement at least part way up the scale which the overall scheme reflects⁵¹
- Evaluation of the standard of knowledge, understanding and ability to communicate that knowledge and understanding at a Certificate II level was bound, on the expert evidence in the present case, to present a further disadvantage to intellectually disabled people⁵²
- According to Paul Cain (Director of Research and Strategy at the National Council on Intellectual Disability), *the competency component of the BSWAT bears little relationship to the productivity assessment and operates to diminish wages for employees with disability. The lack of relationship with the competency assessment to actual work tasks suggests that the BSWAT competency component is measuring skills and knowledge not directly relevant to the job tasks that employees are employed to perform.*⁵³ Further, that *people with intellectual disability will struggle with the question and answer tests that require effective communication and comprehension; many people with intellectual disability will find a formal interview difficult and intimidating.*⁵⁴

⁴⁷ The Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001.

⁴⁸ Nojin, [79]

⁴⁹ Nojin, [79]

⁵⁰ Richard Giles, a principal of Evolution Research engaged as a consultant to develop the wage assessment tool, cited in Nojin at [79].

⁵¹ Nojin, [80]

⁵² Nojin, [81]

⁵³ Nojin, [84]

⁵⁴ Nojin, [84]

- Mr Giles' own research revealed that the notion incorporated in BSWAT of a fixed four industry competence units did not accord with reality at the wage level taken as the starting point for assessment of pay in ADEs⁵⁵
- The BSWAT applies an industry competency assessment that is not comparable to standards of award based wages in open employment by expecting workers with disability to meet a higher number of industry specific competencies than people without disability⁵⁶

On the evidence, disabled people who are not intellectually disabled are more likely to achieve results on BSWAT to their advantage, than intellectually disabled people.⁵⁷ This is in 'two senses':⁵⁸

1. They are not at the same risk of having their productivity score effectively reduced through an inability to score at least as well on competencies
2. They have the realistic possibility of enhancing their productivity score, if it is low due to a physical disability, by demonstrating knowledge and understanding which is not reflected in actual work performance. By contrast, the prospects for intellectually disadvantaged people are worse because they cannot take advantage of their aspect available to disabled people without intellectual disability

The present appellants fall within the principles discussed in *Catholic Education Officer v Clarke*⁵⁹ and *Hurst v Queensland*.⁶⁰

- Both cases considered a requirement that a deaf child receive education in a normal school environment without the assistance of an AUSLAN interpreter – it was possible for each to undertake their education in that way, *but they suffered serious disadvantage as a result*⁶¹

Held:

The Court held that the use of the Business Services Wage Assessment Tool (BSWAT) was discriminatory. In particular, it was found that the use of competency assessment for a person with an intellectual impairment was discriminatory and not reasonable and that '*...the tool was adjusted so that it would not produce a better result than a simple productivity measure. The only alternative was a worse result. The disparity between the two results has, on the evidence, simply grown over the years.*' The Court allowed that the use of competency assessments may well favour other workers with disability but there was 'powerful evidence' that it was unfairly skewed against workers with intellectual impairment.

⁵⁵ *Nojin*, [85]

⁵⁶ *Nojin*, [85]

⁵⁷ *Nojin*, [127]

⁵⁸ *Nojin*, [127]

⁵⁹ *Catholic Education Officer v Clarke* (2004) 138 FCR 121 ('*Clarke*')

⁶⁰ *Hurst v Queensland* (2006) 151 FCR 562 ('*Hurst*')

⁶¹ *Nojin*, [128]

Developments post-Nojin

Watts v Australian Postal Corp and *Abela v State of Victoria* have both referred to *Nojin v Commonwealth*. *Abela* concerned a disability discrimination case involving an allegation of direct disability discrimination in education services, by failure to provide reasonable adjustments resulting in less favourable treatment. A reasonable degree of precision is necessary for this formulation and the requisite precision was absent in this case. There was no contravention of standards found and the application was dismissed.

On 5 June 2015, the Fair Work Commission made orders by consent varying the SES Award, the effect of which was to remove the BSWAT as an approved wage assessment tool from the Award. The order required the Australian Disability Enterprises, within one month, to inform the FWC in writing of the approved wage assessment tool the ADE's proposed to transition to.⁶²

On the 25 June 2015, the Secretary of the Department of Social Services notified the AHRC that, as at 30 April 2015, only three ADE's had not chosen an alternative approved wage assessment tool (down from 24 in the previous quarter).⁶³

The recent case of *People with Disability Australia v Australian Human Rights Commission*⁶⁴ concerned a decision made in April 2015 by the Australian Human Rights Commission to grant the Commonwealth and certain Australian Disability Enterprises an exemption from the operation of provisions of the DDA. The effect of the exemption was that, during the period that it is granted, actions that would otherwise be rendered unlawful by provisions of the DDA are not unlawful. This followed the application made by the Department of Social Services in September 2013 for a three year exemption under section 55 of the DDA from the operation of ss15, 24 and 29 of the Act, which make it unlawful to discriminate directly or indirectly on the basis of disability. That application, which was posted on the AHRC website, received over 100 submissions, the majority of which recognised the need to transition to a new assessment tool (rather than using BSWAT). In April 2014, the Australian Human Rights Commission granted a 12 month exemption on certain conditions. In April 2015, the Commission granted a further exemption that was the subject of this case. It was held that the Commission did not act in accordance with the requirements of procedural fairness in granting the exemption on 30 April 2015 and that its decision must be set aside.⁶⁵ However, a further exemption was granted on the basis that the AHRC was making a decision that directly affected the interests of persons including supported employees and that it was bound to afford them procedural fairness.⁶⁶

⁶² Cited in *People with Disability Australia v Australian Human Rights Commission* [2015] AATA 548, at [59]

⁶³ Cited in *People with Disability Australia v Australian Human Rights Commission* [2015] AATA 548, at [60]

⁶⁴ [2015] AATA 548.

⁶⁵ At [63].

⁶⁶ At [22].

In the recent case of *Watts v Australian Postal Corp*,⁶⁷ the Court held that the concept of ‘benefits associated with employment’ was sufficiently broad to encompass the matters identified by Watts in the present case, namely attending work, performing work, exercising her skills and using accrued entitlements are a time and for a purpose of the employee’s own choosing.⁶⁸ It was further found that Watts was treated less favourably than an Australian Post employee without her disability would have been treated in the same circumstances;⁶⁹ and that Australia Post engaged in unlawful discrimination on the grounds of Watts’ disability within the meaning of s4 of the DDA by failing to make reasonable adjustments to her work, as a result Watts was denied the ability to attend work, exercise her skills and be able to use her sick and recreation leave as she chose, which were benefits associated with her employment.⁷⁰

⁶⁷ (2014) 311 ALR 680.

⁶⁸ At [66].

⁶⁹ At [247], [246], [253]-[255], applying *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

⁷⁰ At [10], [264], [269]-[271].