



Victorian Equal Opportunity  
& Human Rights Commission

8 November 2013

Ms Bridget Akers  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY NSW 2000

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

Dear Ms Akers

**Application for an exemption under the Disability Discrimination Act 1992 (Cth) by Department of Families, Housing, Community Services and Indigenous Affairs**

Thank you for the invitation to make a submission regarding the application for an exemption under the *Disability Discrimination Act 1992 (Cth)* by the Department of Families, Housing, Community Services and Indigenous Affairs. A copy of our submission is **attached**.

We make our submission as Victoria's lead agency in promoting and protecting human rights and equality under Victorian laws including the *Equal Opportunity Act 2010*, the *Religious and Racial Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006*. The Commission considers the exemption application raises important issues regarding rights to equality and non-discrimination at work for people with an intellectual disability. Our submission also recognises that the conduct for which the exemption is sought may also be discriminatory under Victorian law. We therefore provide information that is relevant to the application in Victoria.

If you have any questions regarding this submission, please contact Prue Elletson at [prue.elletson@veohrc.vic.gov.au](mailto:prue.elletson@veohrc.vic.gov.au) or (03) 9032 3416.

Yours sincerely

A handwritten signature in purple ink, appearing to read 'K Jenkins'.

Kate Jenkins  
Commissioner

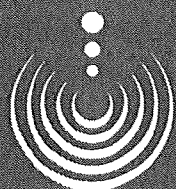
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## Submission to the Australian Human Rights Commission

Application for an exemption by the Department of Families,  
Housing, Community Services and Indigenous Affairs

8 November 2013

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# 1. Key observations and recommendations

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) is an independent statutory authority that is Victoria's lead agency in promoting and protecting human rights and equality. It has responsibilities under the *Equal Opportunity Act 2010* (**EO Act**), the *Religious and Racial Tolerance Act 2001* (**RRTA**) and the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**), which apply in Victoria alongside the *Disability Discrimination Act 1992* (Cth) (**DDA**). The Commission undertakes to fulfil its role through the provision of an impartial dispute resolution service, working to eliminate discrimination through project and policy advocacy and the provision of public information and education about human rights and equality.

The Commission makes the following observations regarding the application for an exemption by the Department of Families, Housing, Community Services and Indigenous Affairs (**Department**).<sup>1</sup>

- The objects of the DDA (and Victorian legislation, such as the EO Act and the Charter), are to eliminate discrimination and to promote the right to equality before the law. In light of these objects, exemptions from the operation of anti-discrimination law should only be granted in limited circumstances.
- Anti-discrimination legislation, such as the DDA, protects the rights of all members of our community to equality before the law. People with disabilities have the right to participate in employment without discrimination and are entitled to equal remuneration for work of equal value.
- The application by the Department seeks the exemption to permit it to continue to discriminate (specifically against people with an intellectual disability) for a three-year period. The ongoing discrimination will have a significant impact on people with an intellectual disability who have their wages assessed using Business Services Wages Assessment Tool (**BSWAT**). Ongoing discrimination is not consistent with the objects of the DDA, or with the rights to equality recognised in the Convention on the Rights of Persons with Disabilities and in Victoria, the Charter.
- An exemption under the DDA should only be granted in limited circumstances, where there is information provided justifying the grant of an exemption. The Commission considers that the information provided by the Department at this time does not provide the AHRC sufficient information to justify the grant of an exemption, particularly for the time period requested (three years).
- It is the Department's responsibility to demonstrate the case for any exemption from equality laws. They should be able to demonstrate steps taken towards transition since the *Nojin* decision and why further time is required.
- If the Department provides justification for the exemption to the AHRC, the impact of ongoing discrimination should be limited by the time for which an exemption is granted, and through the adoption of interim measures.
  - The time for any exemption should be demonstrably justified. For example, if the Department is able to demonstrate the need for consultation and transition over a 12 month period, the exemption should only be granted for 12 months, not three years.
  - If any exemption is granted, the Department should also be required to meet specific measureable outcomes over the period of any exemption to ensure that there is progress towards equality. It is not clear from the exemption application why a three year period is required.
  - In considering conditions on any exemption granted, the AHRC may consider:

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<sup>1</sup> Now the Department of Social Services.

- whether an alternative wage setting tool should be used while the Department conducts further consultation, or
  - requiring the Department to ensure that workers who ultimately receive a higher wage under a new wage tool are paid the difference between their BSWAT –assessed wage and their new wage for the period of the exemption.
- As ADEs operate and employ people in Victoria, the Commission notes that the conduct subject to the exemption application is also likely to be unlawful under the EO Act.

## 2. The Department's exemption application

The Department seeks an exemption on behalf of Australian Disability Enterprises (ADEs) from sections 15 and 24 of the DDA, and for the Commonwealth and its officers from section 29 of the DDA.

The exemption will permit ADEs to continue to assess wages for employees using BSWAT, and to pay wages based on assessments conducted using BSWAT. The exemption will permit the Commonwealth to continue to administer wage programs that use BSWAT.

BSWAT is a tool used by ADEs to assess the competency and productivity of employees with a disability. The wage an employee receives depends on the score they achieve under BSWAT. Across Australia, approximately 20,000 people with a disability are employed in ADEs, with roughly half of these individuals receiving wages assessed using BSWAT.<sup>2</sup>

In December 2012, the Full Federal Court declared in *Nojin & Prior v Commonwealth* [2012] FCAFC 192 (**Nojin**) that in that case the use of BSWAT to assess the wages of persons with an intellectual disability constitutes unlawful discrimination.<sup>3</sup> It found that the nature and structure of the competency tests in BSWAT can make it difficult, or impossible, for a person with an intellectual disability to score well and improve their wages using BSWAT. The Court found that BSWAT involves employees being assessed on their understanding of tasks they are unlikely ever to undertake, and imposes a higher standard for disabled employees than is imposed on non-disabled employees against whose wages their wages are benchmarked.

The Commonwealth appealed the decision to the High Court but special leave was refused.<sup>4</sup>

The Department seeks an exemption in order to *consider, devise and/or establish and implement alternative wage setting arrangements*.<sup>5</sup> The exemption is sought for three years to 'allow further consultation, investigation and determination of potential ways forward which may include a new wage setting approach, and to allow all parties to transition to, and implement, actions identified'.<sup>6</sup> No justification is provided as to why three years is the period required or detail of the steps that have been taken since the *Nojin* decision to support the transition.

The Department's exemption application is expressed in broad terms. It seeks the exemption to permit the use of BSWAT to determine wages of all employees of ADEs. It states that the basis for the exemption application is 'unresolved issues' in relation to the *Nojin* decision, and cites difficulties in moving immediately to alternative wage setting arrangements. The Department also notes that consultation has occurred.

<sup>2</sup> Application by the Department, p 2.

<sup>3</sup> *Nojin & Prior v Commonwealth* [2012] FCAFC 192 ("**Nojin**").

<sup>4</sup> *Commonwealth of Australia v Prior* [2013] HCATrans 101.

<sup>5</sup> Application by the Department, p 1.

<sup>6</sup> Application by the Department, p 4.



The Commission is concerned that the Department's application provides insufficient information for the AHRC to properly assess the application. The application does not identify the scope of the discrimination that is currently occurring, nor address whether reasonable alternatives to the use of BSWAT have been considered. In these circumstances, it may be appropriate for the AHRC to seek further information from the Department.

### **3. The Commission's interest in the exemption application**

The Commission has functions under the EO Act and the Charter to promote and advance the objectives of those pieces of legislation which apply in Victoria. The Commission promotes and advances the objectives of the EO Act and is an advocate for the EO Act.<sup>7</sup> The Commission considers the Department's application raises matters relevant to the objectives of the EO Act and the equality rights of Victorians.

The Department seeks an exemption for conduct that will occur across Australia, including in Victoria. Mr Prior, one of two applicants in *Nojin*, works in Victoria. ADEs operate in Victoria, employing people with a disability in a range of industries. The Commonwealth funds and administers ADEs in Victoria.

ADEs who operate in Victoria must comply with the EO Act. ADEs who use the BSWAT to assess and pay wages to people with an intellectual disability may unlawfully discriminate under the EO Act. Like the DDA, the EO Act provides a process for a person to apply for an exemption to permit conduct that would otherwise be discriminatory.<sup>8</sup> The Commission therefore has an interest in the outcome of the Department's exemption application under the DDA.

Our submission addresses relevant considerations under the AHRC guidelines. However, we also comment on matters relevant to the use of BSWAT in Victoria. The Charter also provides specific human rights considerations relevant to an application for an exemption in Victoria.

### **4. Should an exemption be granted?**

The DDA provides that the AHRC may grant exemptions from the operation of the prohibitions of disability discrimination in work and other areas of life.<sup>9</sup> When considering whether to grant an exemption, the AHRC considers:

- whether an exemption is necessary
- the objects of the DDA
- the applicant's reasons for seeking an exemption
- submissions by interested parties, and
- all relevant provisions of the DDA.<sup>10</sup>

When granting an exemption, the AHRC can:

- impose terms and conditions; and/or
- limit the exemption to particular circumstances and activities.<sup>11</sup>

The Commission considers that when the factors above are considered, and on the face of the material currently before it, the AHRC should not grant an exemption to the Department in the form it has sought. Our reasons are set out below.

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<sup>7</sup> *Equal Opportunity Act 2010* (Vic) (EO Act), s 155.

<sup>8</sup> EO Act, s 89.

<sup>9</sup> *Disability Discrimination Act 1992* (DDA), section 55.

<sup>10</sup> Australian Human Rights Commission, *Temporary exemptions under the Disability Discrimination Act 1992* (Cth).

<sup>11</sup> DDA, section 55(3).

## 4.1 Is an exemption necessary?

The decision of the Full Federal Court in *Nojin* found that the use of the BSWAT to determine the wages of Mr Nojin and Mr Prior was discriminatory under the provisions of the DDA. The Department in its application seeks to distinguish the effects of *Nojin*, noting that the decision concerned the circumstances of two individuals and not to all employees of ADEs. The Commission also notes that *Nojin* was decided under a different test of indirect discrimination to the current test in section 6 of the DDA.<sup>12</sup>

The Commission considers that the conduct of the Department and ADEs in using BSWAT to assess employees with an intellectual disability is discriminatory under the current test in the DDA and that an exemption is necessary to make that conduct lawful.

### *Discriminatory conduct*

Under the current DDA, indirect discrimination occurs if a person requires another person to comply with a requirement or condition with which they cannot comply because of their disability, and that requirement or condition has the effect of disadvantaging the person with the disability.<sup>13</sup>

Indirect discrimination also occurs if a person fails to make reasonable adjustments that would enable a person with a disability to comply with a particular requirement or condition with which they are otherwise unable to comply.<sup>14</sup>

Indirect discrimination does not occur if the requirement or condition is reasonable, having regard to the circumstances of the case.<sup>15</sup> The onus of showing reasonableness rests on the person imposing the requirement or condition.

Discrimination is unlawful in the area of work,<sup>16</sup> the provision of services,<sup>17</sup> and in the administration of government funds and programs.<sup>18</sup>

Applying the test of indirect discrimination in the current legislation, the Commission is of the view that the use of BSWAT to assess and pay wages unlawfully discriminates against people with an intellectual disability.

Firstly, ADEs that use BSWAT to assess wages impose a requirement or condition on existing employees that in order to secure a higher wage, they must undergo a wage assessment using BSWAT.<sup>19</sup> Secondly, people with an intellectual disability may be unable to comply with the requirement or condition. It was accepted in *Nojin* that people with an intellectual disability are less likely to secure a higher wage when the BSWAT tool is used.<sup>20</sup> This happens because the BSWAT tool requires people to undertake both productivity and competency assessments, and it is more difficult for a person with an intellectual disability to succeed at the competency assessment.<sup>21</sup> A person with an intellectual disability working is disadvantaged by undergoing a BSWAT (competency based) assessment. In the case of Mr Prior and Mr Nojin, the effect of using BSWAT meant they were unable to secure higher wages.<sup>23</sup>

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<sup>12</sup> Relevantly, to make a claim of indirect discrimination, it was necessary conduct a proportionality assessment of whether a requirement or condition disadvantages a person with a disability. The person alleging discrimination was also required to prove that the requirement or condition was not reasonable.

<sup>13</sup> DDA s 6(1)

<sup>14</sup> DDA s 6(2).

<sup>15</sup> DDA, s 6(3).

<sup>16</sup> DDA, s 15.

<sup>17</sup> DDA, s 24.

<sup>18</sup> DDA, s 29.

<sup>19</sup> The formulation of this 'requirement or condition' was accepted by the Full Federal Court in *Nojin*: see [124] per Buchanan J, [189] per Flick J, [237] per Katzmann J.

<sup>20</sup> *Nojin* [126] per Buchanan J, [242] per Katzmann J.

<sup>21</sup> *Nojin* [127], [131] per Buchanan J, [242] per Katzmann J.

<sup>23</sup> *Nojin* For instance, Mr Nojin's wage assessments using BSWAT initially increased and then fell below his pre-BSWAT wage.



The *Nojin* case clearly illustrates the difficulties that a person with an intellectual disability can face in achieving positive results in the competency component of BSWAT. It is likely that many other people who have an intellectual disability and have their wages assessed by BSWAT, will be disadvantaged.

The Full Federal Court also found the use of BSWAT was not reasonable, having regard to the circumstances of the case. BSWAT involved an assessment of employees' understanding of tasks they were unlikely ever to undertake, and imposed a higher standard for employees with disabilities than was imposed on employees without disabilities, against whose wages their wages were to be benchmarked.<sup>24</sup>

The Commission agrees that it is not reasonable to use and apply BSWAT to assess wages for people with an intellectual disability. In its application, the Department has advanced no reasons that support the use of BSWAT as a tool in favour of other tools, such as the Supported Wage System, which has the support of some people with an intellectual disability.<sup>25</sup>

The Commission acknowledges, as the Department has observed, that it may be lawful to use the BSWAT in certain circumstances.<sup>26</sup> However, the Department has not provided any information regarding how commonly these scenarios may arise, for instance, by stating how many people may be assessed by BSWAT because that is stipulated in an award. In these circumstances, the AHRC should consider the application from the position that the continued use of BSWAT is likely to discriminate against people with an intellectual disability.

The Commission notes that the Department has not relied on a defence of unjustifiable hardship.<sup>27</sup>

#### *Exemptions and special measures*

The Commission considers that there are no applicable exemptions, special measures or defences that make the continued use of BSWAT lawful.

The special measures exemption in section 45 of the DDA does not apply in relation to the rates of salary or wages paid to persons with disabilities.<sup>28</sup> Section 47 of the DDA provides an exemption for actions taken to comply with an industrial instrument, order, award or determination. It may be lawful to assess and pay wages using BSWAT, if that is specified in an industrial instrument or award. The Department has not identified how many employees of ADEs have their wages assessed using BSWAT because it is the prescribed test in an award.

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

In broad terms, the objects of the DDA are to:

- eliminate, as far as possible, discrimination against persons on the ground of disability in work, education, access to premises, the provision of goods, services and facilities and accommodation;

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<sup>24</sup> *Nojin* [148] per Buchanan J.

<sup>25</sup> Submission of the Australian Federation of Disability Organisations, National Council on Intellectual Disability and AED Legal Centre: Response to an application by FaHSCIA for an exemption (17 October 2013).

<sup>26</sup> The Department submits that it will be lawful to use BSWAT if:

- the assessment under BSWAT results in a more favourable outcome to the employee than they would have received under any other available tools
- the assessment under BSWAT reasonably measures the actual capacity of the employee in question to undertake or perform the requirements of their job
- there are circumstances relating to the operational needs/demands of an ADE which justify the use of BSWAT despite any failure of the tool to accurately measure or assess the actual capacity of the employee to undertake or perform the requirements of their job
- an ADE is required to use the BSWAT by an enterprise agreement or another industrial instrument (see s 47 of the DDA).

<sup>27</sup> DDA, s 29A.

<sup>28</sup> DDA, s 45(2)(b).

- 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
- 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.<sup>29</sup>

The Commission considers that the grant of an exemption is not consistent with the objects of the DDA.

The grant of an exemption will authorise continuing discrimination in the workplace against people with an intellectual disability. Over 75 per cent of persons employed by ADEs have intellectual disabilities.<sup>30</sup> If the exemption applies, ADEs will be permitted to use a wage assessment tool that means that people with an intellectual disability are unlikely to, or simply, cannot achieve, better wages outcomes.<sup>31</sup> People with an intellectual disability will continue to be denied the right to substantive equality at work.

The grant of this exemption would send a message that the right to equality and non-discrimination is subservient to the financial and administrative concerns of the Department and ADEs. The financial viability of ADEs is relevant and job viability should be considered as one of the reasons the applicant puts forward for an exemption. However, it is for the Department to demonstrate the evidence for this need. Financial concerns or administrative convenience do not trump the right of people with disabilities to be treated with dignity and respect.

The Department and ADEs should consider alternative funding models to ensure that people with disabilities are paid a fair wage. Economic participation is an issue of equality of opportunity, and one which government policies and programs should address fairly and lawfully. This is consistent with the Department's commitment to economic security for people with a disability, and to creating 'a supported employment system that provides economic and social participation benefits for people with a disability, and for Australia'.<sup>33</sup>

Fundamentally, the exemption application contradicts the recognition and acceptance of the principle that persons with disabilities have the same fundamental rights as the rest of the community. The rights of people with a disability to work, on an equal basis with others, is recognised in the United Nations Convention on the Rights of Persons with Disabilities.<sup>34</sup> An element in fulfilling this right is that persons with disabilities are entitled, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value.<sup>35</sup> The UN Committee on the Rights of Persons with Disabilities has called for the use of BSWAT to be discontinued immediately.<sup>36</sup>

Permitting wage discrimination further entrenches a segregated labour market where people with a disability are denied choice. The Department has acknowledged that:

Work is essential to an individual's economic security and is important to achieving social inclusion. Employment contributes to physical and mental health, personal wellbeing and a sense of identity. Income from employment increases financial independence and raises living standards.<sup>37</sup>

<sup>29</sup> DDA, s 3.

<sup>30</sup> *Nojin* [131] per Buchanan J.

<sup>31</sup> As noted above, the Department has not provided any indication of the number of people who may be lawfully assessed using BSWAT.

<sup>33</sup> Department of Families, Housing, Communities Services and Indigenous Affairs, *Inclusive Employment 2012 – 2022*, (May 2012) p 7.

<sup>34</sup> Convention on the Rights of Persons with Disabilities, (opened for signature 30 May 2007, A/RES/61/106 entered into force 3 May 2008), (CRPD) Art 27

<sup>35</sup> CRPD, Art 27(1)(b)

<sup>36</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the committee at its tenth session* (2-13 September 2013) (CRPD/C/AUS/CO/1).

<sup>37</sup> *National Disability Strategy 2010–2020*, p 42.

In order to provide the benefits of dignity associated with work, people with an intellectual disability must be paid a fair wage for the work they perform. Devaluing the work of people with disabilities by unfairly and unlawfully assessing their wages is not supportive of the objectives of the DDA.

The AHRC guidelines also provide that if an exemption seeks to allow conduct 'that is inconsistent with, or would undermine, the objects of the...Act, this will be a significant reason not to grant an exemption.'<sup>38</sup> In light of this inconsistency with the objects of the DDA, the Commission considers that the exemption should not be granted.

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

Based on the current material provided in the Department's application, the Commission considers that an exemption should not be granted given the significant limitations on human rights that would be involved.

However, if the Department presents evidence to AHRC to justify the exemption, we consider that it must be limited in scope and duration and should be directed to minimising the discriminatory impact of using BSWAT.

At this time, ADEs continue to use BSWAT to assess wages. If an exemption is granted, the Commission recommends the introduction of interim measures that minimise the discrimination experienced by people with a disability. These measures may have regard to the interests of ADEs and the practical concerns that there may be difficulty for existing systems to meet immediate demand for assessments.<sup>39</sup>

The Department's application does not address reasonable alternatives to the use of BSWAT. For instance, it may be appropriate to assess people with an intellectual disability using the productivity component of BSWAT on an interim basis.<sup>40</sup> It may also be appropriate for ADEs to use the Supported Wage System to determine wages for people with an intellectual disability.<sup>41</sup> The AHRC should consider the evidence for any barriers or opportunities for the use of these systems, and whether these alternatives could form appropriate conditions for the exemption.

The Department should be required to report to the AHRC on progress at least six monthly intervals. The Department should, with the Commission's approval, develop a detailed plan for actions through the exemption period to ensure that a new DDA compliant tool is in use by ADEs within three years. This will be necessary, as the current Inclusive Employment 2012-2022 strategy contains broad long-term goals. Concrete milestones are required.

Furthermore, the financial disadvantage experienced by people with a disability could be reduced if the Department agreed to fund a repayment to any person disadvantaged during the three year exemption period (if granted). That is, a person who is paid a lesser wage using BSWAT during the exemption period, and who is subsequently assessed using a different tool, could be paid the difference in their wage at the time the new tool is implemented. The Department seeks the exemption to permit the continued use of BSWAT; this recommendation ensures fairness to people with disabilities who are adversely affected by its continuing use.

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<sup>38</sup> Australian Human Rights Commission, *Guidelines on applications for temporary exemption under the Disability Discrimination Act*.

<sup>39</sup> Application for exemption, p 3.

<sup>40</sup> Submission of the Australian Federation of Disability Organisations, National Council on Intellectual Disability and AED Legal Centre: Response to an application by FaHSCIA for an exemption (17 October 2013).

<sup>41</sup> Ibid.

## 5. Human rights considerations under Victorian law

The Commission considers that applying a human rights framework can assist when considering an exemption application. In Victoria, the right to equality is a mandatory consideration for exemption applications made under the EO Act.<sup>42</sup>

A human rights framework is also relevant to the AHRC's consideration of the exemption application in light of Australia's obligations under international human rights instruments. Given the Australian Government's obligations under international human rights law to protect and respect human rights, the specific human rights considerations in the Charter provide useful guidance regarding how these obligations may be fulfilled. Furthermore, the AHRC has a duty to consider the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.<sup>43</sup>

ADEs that operate in Victoria currently employ people with an intellectual disability and use the BSWAT to assess and pay their wages. The use of BSWAT to assess and pay wages in Victoria may also be unlawful under the EO Act. Discrimination on the basis of disability in employment and in the provision of services is unlawful under the EO Act.<sup>44</sup> The EO Act also imposes a positive duty on organisations covered by the Act to take reasonable and proportionate measures to eliminate discrimination. This means employers in Victoria have a legal obligation to take proactive measures to prevent discrimination on the basis of particular attributes, including disability.<sup>45</sup>

Like the DDA, the EO Act provides a process by which exemptions may be sought to allow discriminatory conduct that may be unlawful. ADEs may need to seek an exemption under the EO Act to continue to use BSWAT.

In Victoria, exemption applications are considered by the Victorian Civil and Administrative Tribunal (**Tribunal**).<sup>46</sup> Section 90 of the EO Act requires the Tribunal to consider similar factors to those addressed by the AHRC, including if an exemption is unnecessary, and whether any exceptions or exemptions apply to the relevant conduct. In addition, the Tribunal must consider whether the proposed exemption is a reasonable limitation on the right to equality that is protected in the Charter.<sup>47</sup>

Section 8 of the Charter sets out the right to recognition and equality before the law as follows:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Fulfilment of the right to equality is fundamental to achieving the objects of anti-discrimination legislation. Victorian Tribunal decisions that have considered the right to equality in the context of exemption applications have recognised:

- "The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification".<sup>48</sup>

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<sup>42</sup> EO Act, s 90(2).

<sup>43</sup> *Australian Human Rights Commission Act 1986* (Cth), s 10A.

<sup>44</sup> EO Act, s 18 and s 44.

<sup>45</sup> EO Act, s 15.

<sup>46</sup> EO Act, s 89.

<sup>47</sup> EO Act, s 90(3). The Tribunal must also have regard to human rights in its interpretation of the EO Act generally. Section 32(1) of the Charter requires the Tribunal to interpret section 89 of the EO Act (which permits exemption applications) compatibly with the human rights identified in the Charter: *Momcilovic v The Queen* [2011] HCA 34.

<sup>48</sup> *Lifestyle Communities (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (**Lifestyle Communities**) at [107].

- Whether an exemption application is a reasonable limitation on the right to equality is determined by reference to the framework set out in section 7(2) of the Charter.<sup>49</sup>

Section 7(2) provides that a human right may be subject only to ... 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- The nature of the right, and the importance of the purpose of the limitation on the right, are 'foundational'.<sup>50</sup>
  - Any limitations should impair human rights as little as possible and will not be proportionate and justified if they go further'.<sup>51</sup>

The above factors point to a stringent approach to limitations on the right to equality. They illustrate that close, careful consideration is required of exemption applications, and the impact they have on the broader objectives of anti-discrimination legislation to promote and protect the right to equality.<sup>52</sup> It is appropriate that a stringent approach also be applied to applications under the DDA in order that the DDA fulfil its objects to promote equality.<sup>53</sup>

The Department's application expresses the purpose of the exemption it seeks in general terms: to 'allow further consultation, investigation and determination of potential ways forward which may include a new wage setting approach, and to allow all parties to transition to, and implement, actions identified'.<sup>54</sup> The Commission considers that it is important to ensure that employees with disabilities receive fair wages that are determined appropriately. The information provided by the Department to date is unlikely to demonstrate that limitations on the right to equality are justified.

Under the Charter, it is necessary to consider less restrictive means of ensuring that employees with disabilities receive fair wages that are determined appropriately. Some relevant considerations are set out above regarding possible terms and conditions for the exemption application. For instance, it may be possible to use an alternative wage setting tool while an appropriate tool is determined. Without further information, the limitation of the right to equality is unlikely to be justified.

The human rights framework above requires attention to the justification for limiting human rights. Australia has obligations to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law. Before an exemption is granted to permit the continued use of BSWAT in circumstances where it is known to be discriminatory, the AHRC should be satisfied there is sufficient justification for that limitation on human rights.

<sup>49</sup> *BAE Systems Australia Limited (Anti-Discrimination Exemption)* [2012] VCAT 349 at [77].

<sup>50</sup> *Lifestyle Communities (No 3)* at [327].

<sup>51</sup> *Lifestyle Communities (No 3)* at [332].

<sup>52</sup> EO Act, s 3(b).

<sup>53</sup> DDA, s 3.

<sup>54</sup> Application by the Department, p 4.



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