



Inclusion Australia

acting locally - representing nationally - connecting globally

“To promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent human dignity.” - UN Convention on the Rights of Persons with Disabilities

What discrimination?

*Take the money, give up your rights,
if you wanna keep your job.*

Real jobs pay real wages!

Statement to Senate Standing Committees on Community Affairs from Inclusion Australia (formerly the National Council on Intellectual Disability) in relation to:

Business Services Wage Assessment Tool Payment Scheme Bill 2014

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

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Crisis

There is an unemployment crisis for people with intellectual disability in Australia.

In 2012-13, just 6.9% of people with intellectual disability of age 15 to 64, who received national disability services reported work in the open labour market. This is down 4.6% from 2011-12 when it was 11.5%. In raw figures, just 4,805 people from a population of 69,354 between the ages of 15 to 64 reported work in the open labour market.¹

The open employment program - on the whole, with few exceptions - is not effectively building the employment participation of people with intellectual disability.

In 2012-13, the supported employment program which funds Australian Disability Enterprises, assisted 21.3% (14,778) of people with intellectual disability between the ages of 15 to 64 who received national disability services.

The supported employment program has demonstrated over several decades that it is unable to provide - on the whole, with few exceptions - meaningful employment in viable businesses and pay fair award wages without discrimination, or adhere to the integration object of the Disability Services Act.

In stark contrast, research and demonstration over several decades show that people with intellectual disability have the capacity to work in the open labour market, in productive positions for real wages, when provided skilled support. Being in an ADE is not evidence of an inability to work in the open labour market, just as living in an institution is not evidence of an inability to live in the community.

Evidence based programs continue to demonstrate that people with significant intellectual disability are capable of working in the regular labour market for both full award wages or pro-rata award wages using the SWS when necessary.

Many individuals and families, however, have little choice but to choose an ADE or a non-work day program because of the large gaps of support to help them move into open employment, earn a real wage, and reduce their reliance on the pension.

To address this crisis, Inclusion Australia (formerly the National Council on Intellectual Disability (NCID)) has provided the Joint Parliamentary Committee on the NDIS with strong recommendations seeking the replication of evidence based school-to-work and open employment programs for people with intellectual disability.

¹ Australian Institute of Health and Welfare. Disability Services National Minimum Data Set (DS NMDS)

We believe it is important for the nation to “stop and think” about “what works” in terms of achieving meaningful employment outcomes for people with intellectual disability in terms of both fair wages and in taking their rightful place in the open labour market. This is what the principle of inclusion in the UN Convention on the Rights of Persons with Disabilities requires Australia to do.

Without this consideration, people with intellectual disability are forced to accept poor quality employment options that have repeatedly shown an inability to uphold their employment rights or provide the support they need to participate in the workforce.

The BSWAT Bill before the Senate represents the failure of the supported employment program to provide employment for people with intellectual disability that upholds their human rights to work for fair and non-discriminatory wages.

It is a Bill to protect those who have perpetrated the systemic discrimination of up to 15,000 people with intellectual disability who have had their wages determined by the unlawful BSWAT.

The Bill does not offer an apology or recognition of the role of the Commonwealth and ADEs in discriminating against people with intellectual disability for at least the past ten years.

The Bill does not offer relief from the continued discrimination of BSWAT which is still happening today.

Instead, the Bill offers a payment in return for the rights of people with intellectual disability, to make justice go away.

The argument being put forward to justify this legislation is that if people with intellectual disability were to receive justice, compensation and fair non-discriminatory award wages, ADEs would struggle to remain viable. This is an argument constructed to create fear amongst individuals and families even though evidence of viability concerns are limited, anecdotal and, according to the Federal Court, not a justification to discriminate against people with intellectual disability in employment.

The "jobs" that the Bill seeks to provide certainty for, are jobs that are based on unlawful wage practices under disability discrimination law. Real jobs, however, pay real wages!

The Bill is therefore constructed to ensure that people with intellectual disability remain in employment that is discriminatory. According the Federal Court this is "neither necessary nor reasonable". The purpose of the Bill is to protect the perpetrators - the Commonwealth

and ADEs - from being held to account for the discrimination imposed on people with intellectual disability.

We ask that the Senate reject the Bill on the basis that it promotes the continued discrimination of people with intellectual disability in employment, and offers no remedy to stop the discrimination currently being suffered.

The right to work as a human right

The following text on the rights of persons with disabilities and employment is taken from from a report prepared by the United Nations High Commissioner for Human Rights, with minor adaptations, on the issue of employment and persons with disabilities.²

The right to work is a fundamental human right. The Universal Declaration on Human Rights recognises that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

The right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity. Work usually provides livelihood to the person and her or his family, and insofar as work is freely chosen or accepted, it contributes to the person's development and recognition within the community.

The human right to work has been codified in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights guarantees the right to work in a broad sense. It explicitly develops the individual dimension of the right to work through the recognition of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions. The right to work is further guaranteed under the International Covenant on Civil and Political Civil Rights.

Article 27 of the Convention on the Rights of Persons with Disabilities sets out the right to work of persons with disabilities. It constitutes one of the most detailed provisions of the Convention, establishing the legal framework for State obligations in relation to work and employment of persons with disabilities.

The Convention obligates States parties to recognise the right of persons with disabilities to work, on an equal basis with others. It states that the right of persons with disabilities to work includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible.

² Report of the Office of the United Nations High Commissioner for Human Rights. Thematic study on the work and employment of persons with disabilities. 17 December 2012.

The prohibition of discrimination on the basis of disability is an obligation with immediate effect. Protection from discrimination covers all forms of employment: in the open labour market as well as in sheltered or supported employment schemes. Prohibition cover all aspects of employment, including, terms and conditions of employment such as remuneration rates, work hours and leave.

In Australia, disability discrimination in employment is unlawful.

BSWAT discriminates against employees with intellectual disability as a class of people

In 2008, two Australians with intellectual disability made a complaint. They said their employers discriminated against them by using the Business Services Wage Assessment Tool (BSWAT) to assess their wages.

The Full Court of the Federal Court in December 2012 agreed (FCAFC 192), and found that BSWAT discriminates against people with intellectual disability as a class of people, stating;

139. Fourthly, part of the reason why, in my view, use of BSWAT is not reasonable is because it is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned. Such persons make up the bulk of workers in ADEs. As a class of people they have had imposed on them a tool to measure their work contribution, compared to that of a Grade 1 worker, which does not measure like for like and which subjects them to a disadvantage. The likely result in most cases, and the actual result for Mr Nojin and Mr Prior, is a calculation which understates their actual contribution relative to the work for which the Grade 1 rate of pay is fixed. Understatement of the value of the actual work contribution of an intellectually disabled worker is, in my respectful view, neither necessary nor reasonable.

141. I accept that BSWAT is skewed against intellectually disabled workers. The preponderance of the evidence was to that effect. The findings of the trial judge are to that effect. That feature of BSWAT has the consequence, in my view, that intellectually disabled workers are disadvantaged by comparison with other disabled workers.

142. In my view, the criticism of BSWAT is compelling. . . .

The High Court of Australia agreed with the Federal Court's decision in May 2013, stating;

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

The decision of the High Court of Australia clearly indicates that BSWAT is discriminatory against people with intellectual disability as a class of people.

The Commonwealth and ADEs, however, have been falsely and mischievously reporting to the community and the Parliament that the decision only applies to the circumstances of the two men with intellectual disability which complained. A communication strategy to avoid responsibility and liability.

A corollary to this fact, is that several more thousand people with intellectual are also subject to disability discrimination through the use of wage assessment tools other than BSWAT that use competency based wage assessment. Although these other wage tools have not been the subject of court proceedings, they contain features of wage assessment similar to BSWAT that the Full Federal Court has deemed to discriminate against people with intellectual disability.

The Government bill before the Senate

The Business Services Wage Assessment Tool Payment Scheme Bill 2014 has been proposed by the government as a response to the decision by the Full Court of the Federal Court of Australia in *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

The Explanatory memorandum explains that the purpose of the Bill:

Following this decision, this Bill establishes a payment scheme to provide reassurance to supported employees, and their families and carers, by removing perceived liability that could impact the ability of Australian Disability Enterprises to deliver ongoing employment support.

The Statement of Compatibility with Human Rights also explains:

In light of this decision, this Bill establishes a payment scheme to improve certainty for supported employees, and their families and carers, about their future employment with the Australian Disability Enterprises.

ADEs using BSWAT are not providing ongoing employment support that respects the rights of people with intellectual disability. ADEs using BSWAT are providing ongoing discrimination in employment. The certainty or reassurance the Bill provides is that discrimination in the determination of Award wages for employees with intellectual disability will continue without remedy.

The stated purpose of the Bill conceals the real purpose of the Bill which is to:

- allow the Commonwealth and ADEs to avoid responsibility and liability for the systematic discrimination of employees with intellectual disability,

- prevent people with intellectual disability from receiving justice for discrimination perpetrated by the Commonwealth and ADEs over more than a decade,
- maintain the ongoing discrimination of people with intellectual disability in the setting of wages in ADEs funded by the Commonwealth.

The Bill provides no certainty or reassurance that the Commonwealth will immediately act to ensure that the discrimination of people with intellectual disability will stop and instead ensure that employees with intellectual disability are paid fairly and justly by ADEs.

The proposed payment is effectively a handing over of money in exchange for people with intellectual disability to give away their rights without any remedy to address the current or future discrimination in the setting of wages.

To purchase the rights of this vulnerable group of citizens with not even a sorry, or a solution to ensure that tomorrow they will not be discriminated against, is a national disgrace.

It undermines the credibility of our nation's signature to international human rights instruments including the UN Convention on the Rights of Persons with Disabilities.

It makes a mockery of the principles, objectives and standards of the Disability Services Act 1986.

It undermines the purpose of the Disability Discrimination Act to adjudicate what is unlawful and ensure compliance to the objects of the Act by all, including the Commonwealth.

It threatens the capacity of the NDIS to support people with intellectual disability in paid employment where employment conditions uphold equal rights.

It is disingenuous of the Commonwealth to pretend that it is protecting the jobs of people with intellectual disability, when the conditions of this employment are discriminatory. Jobs without fair pay are not real jobs.

The current representative complaint in the Federal Court could be resolved quickly. The Commonwealth could settle the case by accepting liability and agreeing to pay fair compensation for the discrimination of all individuals with intellectual disability that have been paid wages on the basis of BSWAT. This would acknowledge and respect the rights of people with intellectual disability. It would mean taking responsibility and providing redress of past and current wrong doing.

The Commonwealth and ADEs wish to avoid responsibility

There has been no public acknowledgment from the Commonwealth of the 15,000 employees with intellectual disability who have been discriminated against by BSWAT.

Rather, the Commonwealth has mischievously associated the decision of the Federal Court with being responsible for putting the jobs of people with intellectual disability at risk. Jobs that are currently based on discriminatory wage practices.

This is generating fear amongst people who find it difficult to understand complicated issues and vulnerable to acquiesce to the interests of ADEs and the Commonwealth.

Little is spoken by the Commonwealth and ADEs about the systemic discrimination of employees with intellectual disability and the need to immediately correct this ongoing discrimination.

The offer or acceptance of the Payment will not change the act of ongoing discrimination. It will, however, remove the rights of people with intellectual disability to complain and seek justice.

The offer provides no guarantee that an employee with intellectual disability will receive a wage determined by a fair non-discriminatory wage assessment.

Claims that the purpose of the Bill are to provide certainty about the future employment of people with intellectual disability are disingenuous when discrimination is being permitted to continue without redress.

The Bill essentially seeks to protect the Commonwealth and ADEs from being held responsible as the perpetrators of disability discrimination in employment.

And in so doing, distracts the Parliament from the urgent need to stop the discrimination and ensure that employees with intellectual disability are paid non-discriminatory wages.

Acceptance of liability

The Commonwealth is using its legislative power to avoid being held to account under our disability discrimination law.

Once the proposed payment is offered and accepted, people with intellectual disability will no longer have the right to seek legal redress for discrimination caused by BSWAT.

The Commonwealth and ADEs will no longer be answerable for the discrimination that they are responsible for.

The deal is being promoted to people with intellectual disability as a protection of their jobs. Fear is being used to coerce this vulnerable group to acquiesce to the interests of ADEs and the Commonwealth.

It is being argued that if the Commonwealth and ADEs were held responsible for the discrimination then compensation would have to be paid, and ADEs would have to pay fair non-discriminatory wages which would increase business costs. As a result it is argued that ADEs may not be able to continue operating, and employees may lose their jobs.

Of course, the right thing to do is to pay the compensation, and ensure employees with intellectual disability are paid award wages based on the available non-discriminatory pro-rata award wage assessment (i.e. SWS). Otherwise, the Commonwealth is arguing that the solution to the Federal Court decision is to maintain an employment program where thousands of people with intellectual disability must accept discrimination in the setting of their wages as part of their package of support.

The Federal Court did consider this argument, and was very clear that it was not necessary nor reasonable to operate a business on the basis of imposing a disadvantage on people with intellectual disability.

The onus is on the employer to operate a business that honours the human rights of its employees, even if employees have an intellectual disability.

The Australian Human Rights Commission also found that there was limited and anecdotal information about viability concerns expressed by ADEs and the Commonwealth.

The only legal protection provided by the Bill is to protect ADEs and the Commonwealth from legal responsibility of the discrimination that employees have suffered, and are continuing to suffer.

The Commonwealth could, however, take responsibility and settle the class action before the Federal Court. It could agree to pay fair compensation to employees that have had their wages determined by BSWAT.

In this regard, people with intellectual disability would not need to give up their rights. In fact, it would be an acknowledgement of their right to wages without discrimination, provide justice, and accordingly receive compensation for their loss.

No guarantee of non-repetition

Approximately ten thousand employees with intellectual disability are still being paid wages based on BSWAT. Many more people with intellectual disability are subject to other wage assessments that also use competency measures to determine wages.

The Bill offers a payment without any guarantee of stopping this ongoing discrimination.

The Bill offers no solution to addressing the current discrimination in wage assessment through the use of BSWAT, and other competency based wage assessment tools being used by ADEs.

We already have a non-discriminatory pro-rata award wage assessment - the Supported Wage System

A valid and reliable wage assessment tool and system already exists - the Supported Wage System (SWS). There is no need to develop another tool. The argument that ADEs need more time to develop a new wage tool is simply a strategy of delay to avoid upholding the rights of employees with intellectual disability.

The SWS has successfully been used for people with intellectual disability in open employment and in ADEs for many years. It was recognised by the High Court of Australia that ADEs already have the option of using the SWS.

In the second reading debate of the Bill in the House of Representatives there was discussion by members about the supposed development of a new wage tool.

There is, however, no indication of any work on a new wage assessment tool.

Commonwealth officials reported the following to the Senate Estimates Hearing of the Community Affairs Legislation Committee (4/06/2014) :

Senator McLUCAS: Is there any work in the department to look at developing another tool?

Ms Angus : We continue to look at all of the options and what the implications of those would be. Because it has been such a dynamic and fluid situation, it has been really hard to land in any one space. We are aware and we are continually having drawn to our attention, as I am sure the minister also experiences, that the ADEs are very concerned about viability and their ongoing capacity to offer employment to this particular cohort. We are mindful of trying to provide support across all of those issues, but moving forward we would like to get some clarity around some of these other aspects.

The answer from Commonwealth officials is evasive and focused on generating fear rather than addressing the ongoing discrimination of people with intellectual disability.

According to Mr Varvaris, Member for Barton;

This is a government that recognises that productivity is the key feature to consider when determining the value of work, especially when less concrete features are difficult to adjudicate in the case of vulnerable individuals with an intellectual impairment.

If this is indeed the government's position, then why doesn't the government simply adopt the SWS, which is available, and provides immediate redress to the current discrimination?

The Bill, however, offers no remedy of the continued use of BSWAT and other competency based wage assessment tools being used to discriminate against thousands of employees with intellectual disability.

Fear

Employees with intellectual disability, families, the general community and members of parliament have been fed a *steady diet* of fear since the Federal Court decision which found BSWAT to discriminate against people with intellectual disability.

The Court decision has been mischievously interpreted by the Commonwealth and the ADE industry as being linked to employees with intellectual disability losing their jobs, on the basis that they will not be able to afford an increase in wages. This is forcing people, who already find it difficult to understand the issue, to immediately become fearful.

This "increase" must not be confused with a pay rise due to adjustments to the federal minimum wage or a negotiated increment. This is simply what employees are entitled to as their right under our laws.

Just thirteen days after the High Court of Australia rejected the Commonwealth's application to appeal the Full Federal Court decision, the Commonwealth gave \$4 million to the ADE sector to help access expert advice.³ The media statement headline for this funding to ADEs was "More support for workers with disability". This funding was not however to support workers with disability. Rather it was funding to support employers who had just been found to be party to the discrimination of thousands of people with intellectual disability.

It begs the question as to whether the Commonwealth cares at all for the human rights of people with intellectual disability, when the Commonwealth is so keen to reward and help those found to discriminate against people with intellectual disability.

³ ("More Support for workers with disability," 13 June 2013, Joint Media Release with Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs, Minister for Disability Reform; Amanda Rishworth MP Parliamentary Secretary for Disabilities and Carers)

No resources have ever been provided to assist individuals and families to enable them to discuss the Court decision, with experts, independent of the Commonwealth or ADEs.

The behaviour of the Commonwealth suggests that the goal of the Commonwealth and ADEs is to maintain the employment of people with intellectual disability in ADEs under unlawful disability discrimination conditions. The Bill allows the Commonwealth to make a payment to achieve this end.

Vulnerability

People with intellectual disability are highly vulnerable to manipulation by people in positions of authority within legal and industrial relation processes.

There is no better example than the BSWAT itself.

BSWAT is a wage assessment tool that exploited the nature of intellectual disability by requiring an irrelevant question and answer test that employees would struggle to complete successfully. The average competency score as reported to the Senate Estimates in 2008, was just 5.7%. The effect of which was to severely discount wages beyond what is reasonable and fair.

BSWAT was given an air of authority which the Commonwealth used in its defence in the courts. BSWAT had a host of so called authorities willing to endorse BSWAT as fair. We now know, however, the evidence of discrimination BSWAT imposed on people with intellectual disability was compelling.

It is critically important that wage assessments used to determine pro-rata award wages is not influenced by the conflicted interests of ADEs and the Commonwealth who have an historical habit of developing and supporting wage assessment tools that disadvantage employees with intellectual disability. The issue demands independent leadership that is able to safeguard the rights of people with intellectual disability.

In 2000, families of people with intellectual disability from Coffs Harbour, NSW, alerted Inclusion Australia (formerly NCID) to an industrial agreement being negotiated by an ADE with their sons and daughters. They were of the opinion that their sons and daughters did not have the capacity to understand the agreement and give valid consent.

It should be noted that people with intellectual disability at times have a desire to please others perceived to be in power. They may respond to questions in a certain manner because they think that it is the “expected” or “desired” response. This tendency may contribute to “acquiescence,” or the tendency to answer “yes” to questions.

In 2001, Senior Deputy Drake of the Australian Industrial Relations Commission decided to meet with employees with intellectual disability from Coffs Harbour to determine whether they understood the industrial agreement. In her decision, she states;

229. When I was with the group of employees I put the entire range of propositions before me to them in very simple terms. They answered yes to all questions I asked them even if the questions were diametrically opposed. I believe that occasionally if they thought a “no” would be preferable to me they answered “no”. I spent some time putting a variety of scenarios to a range of employees. They were happy and co-operative when they answered my questions. They endeavoured to please. I believe they would have answered in any fashion that they thought would please me. Some employees did not speak to me at all. These employees would not look at me or converse with me or any other person in the room concerning the Agreement. There were a number of those employees present.

Senior Deputy President Drake quite rightly ruled that there was no informed consent of the agreement being put forward by Coffs Harbour Challenge. Her discovery found that people with intellectual disability can be easily manipulated by those in authority or powerful positions - like an employer, or like the Commonwealth.

The nature of intellectual disability and the difficulties this poses in understanding complex issues, and the tendency to acquiesce to those in power, raises several questions about the morality and legitimacy of the BSWAT Bill as an effective strategy.

Who is, like Deputy President Drake, going to independently check whether employees with intellectual disability have provided genuine valid consent to apply and accept a Payment from the Commonwealth, together with an understanding of the implications of such a decision?

We are already witnessing a *steady diet of fear* being delivered by ADEs and the Commonwealth by interpreting the Court decision to employees and families as meaning that jobs are at risk. Even though the Australian Human Rights Commission found that there was limited and anecdotal evidence of viability being at threat. And in the view of the Federal Court, viability is not an acceptable basis for discriminating against employees with intellectual disability.

If ADE viability is a consideration in making a decision to apply for the proposed payment, how will this be explained to individuals with intellectual disability independently from the employer and based on facts?

We already have heard in the parliamentary debate that an employee has written a poem expressing fear for her job. How did this employee reach such a state of fear? Did the

individual receive a briefing from an independent source setting out the nature of the Court decision, what a non-discriminatory wage would mean, together with an economic analysis of how this would impact the viability of the ADE, and a list of business options for the ADE to put in place to adopt commercial practices that took into account fair wages, instead of sacking workers? Clearly, the poem is the result of fear transacted by the employee's ADE, in addition to already transacting disability discrimination in the determination of the employees's wages. It is an example of how vulnerable employees are being (ab)used to promote the interests of ADEs and the Commonwealth who are comfortable with discriminating against people with intellectual disability.

How will the BSWAT Bill control the undue influence of ADEs on vulnerable employees with intellectual disability to apply and accept the Payment on the basis of messages about losing their job?

How will the BSWAT Bill determine if the appointment of a nominee is justified or whether the individual was coerced into making such a decision?

How will the BSWAT Bill determine if a nominee unduly influences the person with intellectual disability?

How will the BSWAT Bill ensure that employees with intellectual disability receive independent support and information about their options?

It is the view of Inclusion Australia that the BSWAT Bill unnecessarily puts people with intellectual disability in a situation that makes it difficult for them to address the proposition of the Payment without the influence of their employer and the Commonwealth. A position of disadvantage not too dissimilar to the BSWAT's use of question and answer testing, where employees with intellectual had no choice but to comply. We believe that people with intellectual disability are being put in a position where they will be at risk of acquiescing to the interests of their employer and the Commonwealth.

We believe it is in the best interests of employees with intellectual disability for the Commonwealth to acknowledge and accept liability for the discrimination caused by BSWAT.

This would provide people with intellectual disability with a payment of compensation, without having to make decisions in an environment of fear and vulnerability to the interests of others within a complex legal framework that takes away their basic human rights to complain about discrimination.

The views of people with intellectual disability and families

We note that it was people with intellectual disability with the support of their families that brought the discrimination of BSWAT to the attention of the Courts.

We also note that it is people with intellectual disability with the support of their families that are leading the representative complaint in the Federal Court.

We also recognise that there are people with intellectual disability and families that have indicated, rightly or wrongly, that they are not concerned by the discrimination caused by BSWAT.

Some have argued that ADEs are not about real employment, and the wage is therefore merely a token amount, not a real wage. This argument is usually associated with the belief that “these people” can not work in the open market.

ADEs however have been officially marketed and funded as an employment program. Fair and non-discriminatory employment conditions has been the object of the Disability Services Act since 1986.

The solution should not become a proposition that trades-off the human rights of people with intellectual disability. If ADEs are real employment, then individuals should be paid a real and fair wage.

A simpler way to address the Court decision

It is Inclusion National's (NCID) view that if the Commonwealth wants to provide a payment to people with intellectual disability as a result of the Federal Court decision, the most simple method would be:

- to admit liability for the discrimination caused by BSWAT
- settle the class action and
- agree to pay fair compensation to every person with intellectual disability who has receive wages based on BSWAT

The Commonwealth has a record of all individuals with intellectual disability who have or are continuing to receive wages based on BSWAT.

The Commonwealth has access to all BSWAT assessments conducted.

The Commonwealth collects the data on the primary and associated disabilities of all ADE employees.

The Commonwealth already has sufficient information to identify individuals with intellectual disability, and determine underpayment caused by the competency element of BSWAT.

It is not necessary to set up an administrative process which requires people with intellectual disability to prepare an application and give away their rights.

It only requires the Commonwealth to admit that people with intellectual disability have been discriminated as a class of people, as per the finding of the Court, and agree to pay compensation directly to each employee.

The proposed amendments to taxation and social security rules could be retained to support a simple and more honourable and honest redress of this systemic discrimination.

A Commonwealth strategy of accepting liability would not require employees with intellectual disability to make decisions about complex legal matters. They would only need to be provided what is owed to them.

The Commonwealth should then declare the SWS as the national standard wage assessment to determine the pro-rata award wages of people with intellectual disability, when this is necessary. SWS assessments should be rolled out immediately or as quickly as possible.

If fair non-discriminatory wages threaten the viability of ADEs, the Commonwealth should consider each claim on a case by case basis, and provide short term financial assistance while the employer adjusts business practices that take into account the rights of people with intellectual disability to a fair award wage. This protects jobs that are meaningful and respectful of the human rights of people with intellectual disability.

Appendix: An outline of steps for an effective remedy

The National Council on Intellectual Disability believes that it is imperative that the Commonwealth ensure that there is an immediate and effective remedy that stops the discrimination and ensures that pro-rata award wage assessment of people with intellectual disability upholds their right to just and favourable conditions of work.

Apologise

1. The Commonwealth and Australian Disability Enterprises that have used or are using BSWAT for employees with intellectual disability should publicly accept responsibility for this discrimination and apologise for the disadvantage this has imposed on employees with intellectual disability.

Settle the class action

2. The Commonwealth should immediately settle the class action and pay fair compensation for the discrimination against employees with intellectual disability.

Stop the Discrimination

3. The discrimination should stop immediately. Employees with intellectual disability currently being paid by BSWAT should have their wage immediately - as a temporary measure - determined exclusively by the productivity component of BSWAT. This removes the discriminatory competency element of BSWAT.

Protect rights

4. The Commonwealth should immediately amend industrial relations legislation to deem the Supported Wage System (SWS) as the single national pro-rata award wage assessment for workers with intellectual disability unable to work at Award level of productivity - whether this be in open or sheltered employment settings. The SWS provides a non-discriminatory assessment of productivity that is fair and valid for people with intellectual disability across all employment settings. This would ensure that the rights of employees with intellectual disability are protected against discrimination from pro-rata award wage assessments that lack fairness or validity.

Roll out SWS Assessments

5. The Commonwealth should immediately develop a plan to build its capacity to roll out SWS assessments for all employees with intellectual disability in ADEs unable to work at full Award productivity.

Independent Audit of ADEs

6. The Commonwealth should immediately fund an independent audit of the viability of ADEs to employee people with intellectual disability on the basis of just and favourable conditions of work. Claims that fair award wages will mean that employees with intellectual disability will lose their job should be tested. The benchmark of wage costs should be based on the SWS. There must be an investigation of business practices constructed on the basis of disability discrimination. The Australian Human Right Commission notice of temporary exemption found that *the viability of the ADEs was limited and mostly anecdotal*. Inclusion Australia (NCID) has made it clear that the Commonwealth should consider financial assistance to ADEs who may require temporary assistance to meet higher wage costs based on fair assessment of the SWS as business practices are adjusted to remove discrimination.

Viability is not a justification to discriminate

7. It is important that the Commonwealth re-state that the employment of people with intellectual disability - in an ADE or open employment - must uphold the right to a fair award wage without disability discrimination, and that business viability is not a justifiable reason for discrimination against people with intellectual disability. This is already set out in the Disability Service Act Service Standards.

Ensure Commonwealth funding does not support discrimination

8. The hiring of new employees with intellectual disability in ADEs should not be permitted under ADE employment contracts or via the NDIS until an ADE ensures that employees with intellectual disability unable to work at full Award productivity wages are paid non-discriminatory wages via the SWS. This is to ensure that the Commonwealth is not aiding or abetting the disability discrimination of people with intellectual disability.

A national plan to recognise the capacity of people with intellectual to work in open labour market with the right support

9. The Commonwealth should develop a national employment plan for people with significant intellectual disability that require long term ongoing support that addresses the principle of inclusion and Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD).⁴ Many people with significant intellectual disability have the

⁴ United Nations. Thematic study on the work and employment of persons with disabilities Report of the Office of the United Nations High Commissioner for Human Rights. 17 December 2012.

capacity to work for full award and pro-rata award wages in the open labour market. IA has provided the Joint Parliamentary Committee of the National Disability Insurance Scheme with a submission outlining the need for the Commonwealth and the NDIA to replicate the NSW Transition to Work program throughout Australia, and for the Commonwealth to establish specialist DES Open Employment service contracts for people with moderate intellectual disability. It is important that we don't restrict the employment options of people with intellectual disability to segregated employment services such as ADEs when they have the capacity to work in the open labour market when provided with skilled support.