

Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

23 July 2014

Dear Sir or Madam,

**Re Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014**

I am writing in support of the submission of AED Legal Centre to the Inquiry.

I am a university teacher and researcher with over twenty years' experience in the area of anti-discrimination law. This legislation is put forward as a response to the decision of the Full Federal Court in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 that the BSWAT was discriminatory in its application to workers with intellectual disabilities employed by Australian Disability Enterprises, by assessing their wage levels partly on the basis of competency tests that were not related to productivity and on which they received lower scores than workers without an intellectual disability.

The normal result of such a decision would be to provide a remedy in the form of an adjusted non-discriminatory rate of pay, and back pay for the period of time during which the impugned test was used to determine pay. As this remedy has not been provided, workers whose wages were assessed on the basis of the discriminatory tool have had to initiate legal action to seek a remedy. However, the proposed legislation would preclude this remedy and would result in the workers who have suffered discrimination settling for less than they would be entitled to in damages by way of compensation for the significant breach of their human rights involved in underpaying wages for discriminatory reasons. As the Minister's second reading speech states 'If eligibility is established, the payment amount to be offered will be calculated, based on half of the amount the worker would have been paid had the productivity element only of the Business Services Wage Assessment Tool been applied.' No explanation or justification was provided as to why the scheme should provide only half of the fair amount of compensation for the discriminatory effect of the BSWAT on pay.

Adoption of these bills could be seen as further unfair treatment of these workers by reducing the remedy to which they would normally be entitled as a result of the finding of discrimination in the BSWAT. This would pile a second discriminatory response by the Commonwealth government on top of the original discriminatory use of this wage assessment tool.

I note that the Parliamentary Joint Committee on Human Rights in its examination of these Bills for compliance with human rights in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* reported that it had questions for the Minister about whether the Bills met Australia's obligations to provide an effective remedy for breaches of the human right to non-discrimination

under A 2 of the International Covenant on Civil and Political Rights (Parliamentary Joint Committee on Human Rights, Ninth Report of the 44<sup>th</sup> Parliament).

I fully support the submission of the AED Legal Centre on the Bills and oppose the adoption of these Bills. Government respect for the human rights of everyone, and equal respect for the rights of people with a disability, is undermined by legislation such as this.

Yours sincerely

Beth Gaze  
Associate Professor  
Melbourne Law School