



## New Disability Employment Services from 2018

December 2016

"When you have a disability, knowing that you are not defined by it is the sweetest feeling."

*Anne Wafula Strike*

"Work feeds us – physically, socially and emotionally – and being without work is a disaster for many who cannot find it."

*Barbara Pocock*

"Deprived of meaningful work, men and women lose their reason for existence"

*Fyodor Dostoyevsky*

"Disabilities are not liabilities but true test of abilities."

*Emmanuel Ayeni*

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability.

Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI has been involved in a number of recent inquiries relevant to employment for people with disability. In December 2015 made a submission to the recent Willing to Work Inquiry conducted by the Australian Human Rights Commission, in addition to a joint submission with Australian Lawyers for Human Rights to this same inquiry. We submitted a number of proposals for the Reforming Employment Services initiative of Civil Society Australia. We made a submission to the Senate Education and Employment Standing Committee on the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements. We have also made submissions on welfare reform which address employment issues. We have also been actively involved in campaigning for law and policy reform around the use of the Business Services Wage Assessment Tool (BSWAT) and the existence of Australian Disability Enterprises (ADEs, or 'sheltered workshops'). QAI has also recently put in a submission about proposed changes to the mobility allowance – this is a really important issue as it impacts on the ability of many people with disabilities to actively engage with their community and the fact that not all people with disabilities receive this allowance can be very limiting.

QAI situates the consideration of issues relating to work and employment for people with disability within a human rights framework. This is because the right to work freely, in an area of the person's choice, is a fundamental human right. Work is critical to the enjoyment of other key human rights too – it provides people with a source of identity, valued status, belonging and community, with the ability to associate with others within their chosen field of work, with a source of income – thus protecting against other vulnerabilities, such as inadequate health care and homelessness.

The rights to work and employment, along with industrial rights, are proclaimed in a number of international treaties and conventions, as follows:

- ❖ the right of persons with disabilities to work, on an equal basis with others, including 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 to persons with disabilities, is proclaimed in Article 27 of the CRPD;
- ❖ the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and to just and favourable working conditions, is expressed in Articles 6.1 and 7 of the ICESCR;
- ❖ the rights of women to equality and non-discrimination in work and employment is proclaimed by Article 11 of the CEDAW;
- ❖ the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work and to just and favourable remuneration are protected by Article 5(e)(i) of the CERD.

As the Department of Social Services (DSS) recognises in the Discussion Paper, improving the employment of people with disability has also been identified as a priority in the national Disability Strategy 2010 – 2020.

## **1. Increasing participant choice and control**

The proposal advanced in the discussion paper to increase participant choice and control in the services they need is consistent with the paradigmatic shift that is to be triggered by the introduction of the National Disability Insurance Scheme (NDIS) in Australia. Current indicators predict little overlaps in service delivery between the NDIS and DES System – the Discussion Paper notes that approximately five percent of NDIS participants (upon full roll-out of the scheme) will also be DES participants; this proportion is expected to increase if the NDIS vision of increased social and economic participation is realised.

It is proposed that DES participants should, at least, be more easily able to choose which DES provider to go to and to have greater choice and control about the scope and content of their job plans.

The Discussion Paper notes that additional options being considered include more flexibility in how participants meet with their providers, improving the information available to participants about providers to assist their choice of provider, and establishing a more performance focused Centrelink referral process.

QAI endorses all of these proposals.

QAI recognises the problems with the current system, which include that only one-third of people assisted by DES currently achieve an effective employment outcome. As noted in our submission of July 2015, focus should be placed on training, job suitability and job satisfaction and increased flexibility, with key areas for improvement include increasing choice and control for jobseekers, greater focus on employer-employee compatibility, providing continuing support following job placement, dispelling myths about the employment of people with disability and a holistic approach to service provision.

Furthermore, a key problem with the new scheme is that it is proposed that Australian Disability Enterprises (or ADEs) will be incorporated within the NDIS. QAI does not support ADEs and considers that ADEs have not been beneficial for people with disability – they have sanctioned their oppression, exploited their vulnerability and eroded their dignity. They have helped to create a perspective that people with disability should not be employed in open employment but rather require special, separate employment for which they are need only be paid a small fraction of the minimum wage. Some people living in areas where the ADE is the only service available to them (or was at the time they became service users) are using the ADE as a day service only. ADE's were once used as training services to move people into open employment and that is what they should be doing. However, as more people with more complex support needs began to use ADE's they have remained in limbo rather than being offered employment or even support or financial kick-start for start-up small businesses. The only parties that truly benefit from ADEs are the owners who profit from the slave labour performed by the workers at ADEs.

The use of wage subsidies within open employment also adversely impacts on the value and status of people 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.

All workers, including workers with disability, should be paid at a rate equal or greater to the minimum award wage for the particular industry in which the worker is engaged. The supported wage system 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.

While some employers have demonstrated that they are more likely respond to incentives to employ a person with a disability and will not independently do this, reduced wages are not the answer. The imposition of mandatory quotas is far more appropriate.

In 2012, the Full Federal Court of Australia held that using the BSWAT assessment tool to determine reduced rates of pay for persons with an intellectual or cognitive disability constituted unlawful discrimination in breach of the federal laws.<sup>1</sup> Yet the Commonwealth 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 yet this 'transitional arrangement' has recently been extended by the Federal Court.

QAI acknowledges that some people whose support needs are very high and complex have utilised sheltered workshops as 'pseudo day services' in lieu of appropriate support packages to explore other activities in life. However, the practice of labelling such services as 'supported employment' is a falsehood and if necessary to the wellbeing of the service users, should be funded as a day service only. The people who have been engaged in these services for extended periods should have individualised funding that is targeting their goals articulated in their NDIS plans, be recognised for their long service to the workplace and receive entitlements that reflect their contribution.

In giving people with disability greater choice and control over their employment, there should be a related shift to focus on the abilities, rather than disabilities, of the person, and recognition of the importance of appropriate support in increasing a person's abilities.

**The new employment framework should:**

- Focus on ability, rather than disability, and recognise the potential for many more people with disability to engage in meaningful, valued work.
- Give people with disability greater choice and control over all decisions relating to their employment, and ensure they are appropriately supported to exercise these rights. This includes decisions about finding and transferring between providers.
- Place **no** restrictions on:
  - the ability of participants to choose a provider (ie participants should be free to choose a provider outside their ESA), to ensure that people in rural, regional and remote localities are not disadvantaged;
  - the ability of participants to transfer between different providers;
  - the requirements for engaging with the service provider (ie there should be no requirements for face-to-face meetings and no minimum number of contacts required). Rather, the providers should be responsive to the needs of each person they provide services for.
- Participants should be fully informed, including about where they can go to obtain assistance in gaining employment; what services are available from various providers; the funding attached to the participant; provider performance in achieving employment

<sup>1</sup> *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

outcomes; any ratings or comments pertaining to the provider's service delivery; the balance of individualised funding and processes and principles for accessing it; eligibility information; full job search and employment information; information on barriers to employment a person may face; information on how to make a complaint about a provider.

- Employers should be fully informed about the benefits of employing workers with disability.
- Participants should have full control over their individualised funding.
- Completely abolish Australian Disability Enterprises (ADEs) and reinstate inclusive and well-resourced training programs within TAFE and other recognised tertiary educational opportunities.

## 2. Driving greater competition and contestability in the delivery of the DES

The Discussion paper proposes that DES provider success should be contingent on two objectives: attracting and retaining participants; and achieving employment outcomes. QAI supports these objectives, but we consider a third core objective should be added: demonstrated ability to assist the most vulnerable people with more significant physical or intellectual disability to attain and retain appropriate employment.

As the recently released 'Willing to Work' Report of the Australian Human Rights Commission documents, Australians with disability are employed at significantly lower rates than Australians without disability,<sup>2</sup> with a high proportion of Australians with disability reporting an experience(s) of discrimination or unfair treatment within the work sphere because of their disability.<sup>3</sup> However, it should be noted that these figures may be skewed by the exclusion of the numbers of people with disability on the Disability Support Pension who are deemed 'unemployable', and the unemployment rates of people with disability may actually be higher. Many people with disability who have significant disabilities are not even contemplated amongst the pool of potential employees for open employment. People with very high or complex support needs are not even considered in the employment sphere because most employers and government bureaucrats cannot conceive that they could potentially work in open employment. This extends even to voluntary, unpaid work. Yet with appropriate support and the removal of some barriers to enter the labour market, many of these people have a lot to contribute to the workforce.

DES providers who demonstrate fidelity to a client base with the most significant disabilities and work to further their employment aspirations deserve recognition and support.

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<sup>2</sup> Only 27% of people with disability are employed full-time, compared to 53.8% of people without disability, in Australia. The rates of unemployment are also inequitable – 10% of Australians with disability, as compared with 5.3% of Australians without disability, are presently unemployed: Australian Human Rights Commission. *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*. 2016, 16.

<sup>3</sup> In the 12 months preceding release of the report, 8.6% of Australians with disability reported that they had experienced discrimination or unfair treatment because of their disability. Discriminatory treatment is particularly prevalent among young people, with over 20% of those within the 15-24 years age category reporting discriminatory treatment: Australian Human Rights Commission. *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*. 2016, 16.

People with disability should expect to get the same quality of service delivery no matter where they live. DES should be compelled to operate with best practice measures and move beyond the standard generic employment service response.

There is a need for a change in terminology. Categorising phrases such as 'unable to work' are limiting and unhelpful and do not reflect the holistic approach that must be taken to the issue of employment for people with disability, which must also factor in the availability, and impact, of appropriate support.

DES should always promote and enliven the potential of people with disability as employees and approach their employment with the vision of the person's potential uppermost in mind, supporting them to attain that potential via education, training and supports. DES should never suggest to employers that a person with disability will only work to this or that capacity as an end statement and should never suggest to a prospective employer that they could pay the person under the BSWAT regime. Qualifying and quantifying a person's capacity to perform a job should always include a forecast of the person's potential once they have been given said opportunities via training, educational and/or additional supports. It is highly inappropriate for DES to be in the position of 'selling' the employment prospects of people with disability by suggesting that they should be paid anything less than the basic wage.

It is proposed that greater market flexibility could be achieved by the introduction of a DES Provider Panel, which prospective DES providers would be required to join. While QAI supports the implementation of minimum criteria to ensure the delivery of quality services, this proposal could have the effect of narrowing the market and restricting participant choice and ultimately resulting in suboptimal employment outcomes for people with disability.

**The new employment framework should:**

- Prioritise diversity amongst service providers, to ensure participants have the greatest possible choice and autonomy.
- Publicise relevant information to help participants make informed choices about providers.
- Provide incentives for providers to engage with rural, regional and remote areas, to ensure there is a healthy and competitive market for service delivery in these areas. This could be done by providing bursaries for the establishment of new services in areas where there is a need, or by supporting existing services to provide outreach services.
- Focus on reducing bureaucratic requirements.

### **3. Aligning incentives to support better outcomes**

QAI supports incentive payments which correlate to outcome. At present, as DSS recognises in the Discussion Paper, the structure generally rewards the placement of people with milder disabilities over the placement of people with more significant disabilities and higher support needs, as payment is on a placement basis, irrespective of the time and work required to secure the placement. The introduction of risk-adjusted outcome fees and new outcome payments will help to neutralise this dynamic, lessening or removing financial incentives for providers to focus on those job seekers who are easier to place while putting less effort into more disadvantaged participants who are harder to place.

QAI supports the proposal to take a longer-term view of outcomes, to ensure the continuing viability of a placement.

**The new employment framework should:**

- Ensure incentive payments correlate to outcome.
- Include strict measures to ensure that providers cannot prioritise service delivery of easier to place participants.
- Introduce a new funding model with 'risk-adjusted' outcome fees. Relevant factors to have regard to in assessing risk include the nature and extent of a person's disability, their age, locality, education, relevant background (ATSI, CALD), work capacity, how their work capacity is impacted by appropriate support, work history (including volunteer work) and any criminal status or record.
- Provide long-term outcome payments.
- Ensure funding is linked to the participant, rather than the provider. This could be achieved by paying the funding directly to the participant, rather than the provider.
- Expand eligibility for the Eligible School Leavers Program to include **all** students with disability, particularly students in Year 12. The costs in doing so would be outweighed by the reduced welfare dependency and other costs to society that flow from our failure to support people with disability.

#### **4. Improving the gateway and assessment process for DES participants**

QAI agrees that the gateway and assessment process for DES participants has been in need of significant overhaul. We agree that there are weaknesses and limitations with the assessment process, and that this assessment process is in need of review. In making any changes in this realm, we emphasise that the focus should be on reducing bureaucratic requirements and red tape to the greatest extent. As we noted in our earlier submission, people with disability are already subjected to greater bureaucratic requirements and assessments than people without disability and this can, in itself, act as a barrier to changing the status quo (ie changing DES service provider or changing jobs) or at points of transition (such as from school to the workplace).

**The new employment framework should:**

- Reduce bureaucratic requirements imposed on people with disability.
- The gateway arrangements can be improved by ensuring all high school students with disability are eligible to be included in the Eligible School Leavers program and put in contact with a DES provider to assist them to enter the workforce.
- Focus on improving the efficiency of current assessment processes.

#### **5. Assistance in the workplace**

QAI agrees there is a need to improve the effectiveness of employee assistance programs. QAI submits there is a need for greater, and more appropriate and individually-tailored, continuing support for people with disability within the workplace.



QAI acknowledges the proactive approach the government has taken in providing employers with statistical information about the benefits of employing a person with a disability (although as noted we consider that further work is required in this regard) and would encourage that this be augmented with promotion of the quality of work that people with disability can perform. QAI submits that there should be a significant awareness-raising campaign directed towards equipping employers with relevant information about employing a person with disability – in particular, the statistics that indicate that many workers with disability are rated with average or above average productivity, do not cost more for workplace modifications, have fewer absences and better retention rates, have fewer claims for worker's compensation and cost less in terms of safety and insurances; and the benefits to a workplace, such as the competitive advantages gained from diversity.

QAI supports the proposal to trial employer-nominated initiatives. We propose that DSS should also support the trialling of initiatives developed by employees and potential employees with disability.

QAI considers that other approaches that could increase the employment participation of people with disability include seed funding for self-employment opportunities for people with disability as well as some cross-government (including local governments and councils) coordinated assistance to promote small businesses owned and operated by people with disability. State government and local government and councils should have affirmative targets for employment of people with disabilities.

**The new employment framework should:**

- Prioritise the provision of ongoing and flexible supports for employees with disability.
- Any ongoing skills assessment should only be conducted at the request of each individual employee, to ensure that workers with disability are not subjected to requirements that are greater than workers without disability.
- Proactively engage with all workers with disability to ensure they have the level and type of supports they require – these supports should be those chosen by the person, so that the support aligns with their actual, rather than expected, needs.
- Provide information to all employers about the types of supports that may assist a worker with disability in the workplace.
- The Job-in-Jeopardy assistance program should be renamed the 'Employee Support Program', and it should be available not only when a person is a risk of losing their job, but at any point where they notify DES that they require additional support.

## Conclusion

Matters pertaining to the employment of people with disability and the people who care for them and support them, are core human rights concerns. Having a secure job, and an adequate and dependable source of income, is a fundamental prerequisite to the enjoyment of basic rights by all adults.

Being a valued part of the workforce also offers protection against other vulnerabilities – it helps to protect people from homelessness and enables them to access adequate health care. We also know that it is a buffer against becoming involved in the criminal justice system. As people with disability often have complex needs that may result in the heightened financial



expense, the ability to earn a decent wage and to have their basic industrial rights protected is particularly important.

QAI congratulates DSS for continuing this important inquiry. In particular, QAI welcomes the recognition by DSS that there is a need for reform in this area and that changing employer attitudes and behaviours is an important part of this reform. We look forward to seeing the outcomes of this review.