



# Queensland Advocacy Incorporated

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

*Systems and Legal Advocacy for vulnerable people with Disability*

## Inquiry into wage theft in Queensland

### Submission by Queensland Advocacy Incorporated

### Education, Employment and Small Business Committee

**30 July 2018**

*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

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**QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.**

**Patron: His Excellency The Honorable Paul de Jersey AC**

## 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 has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and more recently the National Disability Insurance Scheme Appeals Support Program.

QAI has done extensive work on issues around employment and industrial issues for people with disability. We have engaged in systems advocacy for many years against the use of the Business Services Wage Assessment Tool (BSWAT) and Australian Disability Enterprises (ADEs). In July 2015, we made a submission to the review of the National Disability Employment Framework. In December 2015, we made a submission to the Australian Human Rights Commission's *Willing to Work* inquiry. In March 2018, we made a submission on the *Future of Supported Employment* and have been involved in advocacy negotiation with the Department of Social Services around the future of supported employment.

## Summary of QAI's recommendations:

1. People with disability are disproportionately vulnerable and marginalised from and within the labour market in Australia when compared to people without disability. They face high rates of discrimination and can be subject to types of wage theft including payment pursuant to discriminatory productivity-based assessment tools; concentration in 'sheltered workshops'; and designation as a casual worker with the associated lack of industrial entitlements or as a 'volunteer' in a role that should appropriately be re-classified as a paid role.
2. Wage theft has a significant, negative impact on people with disability and their families, as well as the community and the economy.
3. Wage theft is particularly prevalent among people with heightened vulnerability, disempowerment and insecurity, and is part of the systemic discrimination against people with disabilities.
4. The current regulatory framework is not effective at protecting people with disability from wage theft. Significant change is required.
5. Strategies for change should include:
  - a. providing additional, appropriate support for people with disability to enter and remain in open employment;
  - b. introducing affirmative action policies and quotas for the employment of people with disability in state and federal government and in all medium and large companies;
  - c. abolition of all productivity-based wage assessment tools;
  - d. abolition of Australian Disability Enterprises ('sheltered workshops');
  - e. a targeted education campaign to raise awareness of basic industrial and human rights; and
  - f. reform of relevant industrial and anti-discrimination laws to provide further protection for vulnerable workers, including by removing the ability for companies to apply for exemptions to rulings of the Australian Human Rights Commission and thus continuing to engage in practices recognised to be discriminatory.
6. A targeted inquiry should be initiated to consider appropriate law reform in this area.

## Terms of reference

The inquiry's terms of reference call for the committee to conduct an inquiry into and report on:

- a) the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia;

- b) the impact of wage theft on workers, families, law-abiding businesses, the economy and community;
- c) the various forms that wage theft can take, including through unpaid super, the misuse of ABNs and sham contracting arrangements;
- d) the reasons why wage theft is occurring, including whether it has become part of the business model for some organisations;
- e) whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers;
- f) the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers; and
- g) options for ensuring wage theft is eradicated, including consideration of regulatory and other measures either implemented or proposed in other jurisdictions interstate, nationally or internationally and the role of industrial organisations, including unions and employer registered bodies in addressing and preventing wage theft.

## QAI's response to key issues of inquiry:

### Discrimination against people with disability in the workforce

Prior to 2015, wage theft against people with disability was systematically enabled through use of the Business Services Wage Assessment Tool (BSWAT) wage assessment tool in Australian Disability Enterprises (ADEs). BSWAT assessments meant people with disability could be paid solely based on productivity, even if the resulting rate of pay was below the minimum wage for their industry. QAI has long maintained that paying workers with disability in this manner harms their self-esteem, creating an impression they are inherently less valuable than those without disabilities. Workers in the open workforce in Australia are all legislatively guaranteed at least the minimum wage for their industry, irrespective of their productivity. The denial of a guaranteed minimum wage to all people with disability constitutes discrimination on the basis of disability. Since the Federal Court decision in *Nojin and Prior v Commonwealth*<sup>1</sup> found BSWAT discriminatory against people with intellectual disability, the government gradually transitioned ADEs to a variation of the Supported Wage System (SWS) altered specifically for use with persons with disability working at ADEs.

The SWS is an improvement in that it does not automatically justify the use of productivity-based wages for employees with disability, instead requiring the employee to be clearly unable to work at full productive capacity compared to a co-worker without disability. However the SWS still provides for people with disability to be paid a pro-rata percentage of the minimum wage for their industry according to their assessed capacity, even allowing workers who initially received the full award rate to be reduced to pro-rata payment if they underperform.<sup>2</sup> Though the SWS is designed to affect less people, it creates the same potential for harm to a person's sense of self-worth and belonging as the BSWAT by explicitly assessing employees with disability at a certain percentage of their co-worker's competence.

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<sup>1</sup> [2012] FCAFC 192.

<sup>2</sup> [http://awardviewer.fwo.gov.au/award/show/MA000103#P544\\_56310](http://awardviewer.fwo.gov.au/award/show/MA000103#P544_56310)

There is also significant potential for financial hardship under the SWS, as people with disability may be paid as little as \$84 a week under the system, which places them well below the poverty line.

As QAI noted in our submission to the Australian Human Rights Commission's Willing to Work inquiry:

*People with disability have complex needs that generally require additional (and often significantly higher) finances to manage, as compared with people who would otherwise be categorised within the same group but who do not have the disability. Work is therefore critical from a financial perspective.*

*Being a worker also has significant, multi-dimensional benefits for the emotional health of people. As the Welfare System Taskforce of the Department of Social Services noted: "Employment is associated with a range of positive outcomes for people and communities. Engaging in work generates financial, health and psychological benefits for the people working and for their families." There are many positive benefits associated with working, with work noted as a source of satisfaction, identity and pride and as an important and socially valued way of contributing to society and personal growth. Many people are highly motivated to engage in meaningful work. This includes many people with disability. Professor Alan Morris' research exploring the attitudes and experiences of people with disability regarding employment documents that most Disability Support Pension recipients under the age of 35 have a strong desire to work, with the inability to work a source of anguish for many. The noted barriers, aside from the severity of the person's disability and the failure by many workplaces to make appropriate physical modifications to the environment to enable proper access by people with disability, were workplace cultural issues such as discrimination and inflexible working hours.<sup>3</sup>*

### **(a) The incidence of wage theft**

Ten thousand people were successful in settling a class action to recover wages they had been underpaid due to discriminatory BSWAT wage assessments, and many more affected parties likely did not join the class due to the government's offer of a one-time payment as compensation for underpayment in exchange for waiving the right to legal action.<sup>4</sup> It is likely all 20,000 people working at ADEs were underpaid due to their assessment under the BSWAT.

### **(b) The impact of wage theft on workers, families, business, the economy and community**

The ability to participate in the labour market as a valued worker and to be paid a fair wage is an essential prerequisite to a reasonable standard of living. 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.

<sup>3</sup> Queensland Advocacy Incorporated. Submission to the Willing to Work Inquiry, Australian Human Rights Commission, 2.

<sup>4</sup> *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523; <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/for-people-with-disability/bswat-payment-scheme/questions-and-answers-bswat-payment-scheme>

Financial certainty for the future, including in retirement (whether from age or ill health) is something that all people should be entitled to.

The marginalisation from and within the workforce of a significant subset of valuable workers (twenty per cent of Australians have a disability) is not beneficial for the economy. It results in increased welfare dependence and reduced income and employment is associated with a range of other adverse outcomes, including in the health and housing sectors, which has broad social implications.

### **(c) The various forms that wage theft can take**

Whilst we recognise that the ambit of this inquiry will cover the many and varied forms wage theft may take, our expertise is in advocating, both individual and systemically, for the most vulnerable people with disability in Queensland. For these people, wage theft can include payment pursuant to the BSWAT, being employed in an ADE, being exploited as a volunteer in circumstances where they could and should have been transitioned to paid employment.

Volunteer work can potentially be an effective means by which people with disability can make a valuable contribution to the workplace, demonstrate their capabilities and simultaneously develop skills that are valuable to the workplace. However, it is vitally important that safeguards are implemented to ensure that people with disability are not exploited, by remaining engaged in a voluntary capacity where their role could, but ultimately does not, lead to paid employment.

Classification as a casual, rather than a permanent worker, can also be a form of wage theft as it can deprive people of industrial entitlements including sick, annual and long service leave. The payment of casual loading is not sufficient to negate the disadvantage associated with this form of employment.

### **(d) The reasons why wage theft is occurring**

In the context of the employment of people with disabilities, QAI submits that wage theft is part of the systemic discrimination against people with disabilities. As explored further below, wage theft is disproportionately prevalent among people with heightened vulnerability and insecurity.

### **(e) Whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers**

As noted above, people with disabilities, along with other vulnerable workers who are at the fringes of the labour market, are particularly vulnerable to wage theft. One result of the employment discrimination that Australians with disability face is that Australia is breaching the human rights and dignities of people with disability by failing to afford them equity and fair working arrangements. This is contrary to the requirements imposed by the Convention on the Rights of Persons with Disabilities and the International Bill of Rights, which demand

protection of the right of all persons to work in a role freely chosen by the person, in fair working conditions, with appropriate remuneration.

#### **(f) The effectiveness of the current regulatory framework at a State and federal level in dealing with wage theft and supporting affected workers**

Some of the most significant barriers that people with disability face that demonstrate ingrained weaknesses in the present regulatory framework include:

1. attitudinal barriers, including stigma about the nature and effects of their disability, and low expectations of and for them. This is particularly the case for those with intellectual impairment, and this often begins in school, resulting in a high level of illiteracy among students with disabilities. This is then exacerbated by the very support services charged with assisting them into the workplace. People with intellectual/cognitive impairment, especially those people who have communication issues, are underestimated in their capacity to learn the skills and perform the work even if they may require more time to undertake the training;
2. very low rates of pay, which would not be sanctioned if paid to a person without disability;
3. segregation into 'sheltered workshops', rather than employed within the open labour market;
4. facing barriers to access, including workplaces physically designed for people without disability, lack of understanding of their support needs and inflexible workplaces unwilling to make appropriate modifications;
5. being subjected to bureaucratic requirements not imposed on people without disability;
6. disadvantage from the beginning of their lives and throughout their education, which can disempower and marginalise them.

The present regulatory framework has not been effective in protecting people with disability against wage theft and other forms of discrimination and adverse treatment in the workplace. Significant systemic change is required.

#### **(g) Options for ensuring wage theft is eradicated**

QAI notes the need for a significant shift in business cultural and practice to protect vulnerable workers, including people with disability. Australia remains an outlier amongst OECD countries in its unacceptably low rate of employment of people with disability, with an



employment rate of 39.8% for people with a disability compared to 79.4% for people without a disability.<sup>5</sup>

While rates of employment of people with disability remain so disproportionately low in Australia, people with disability will remain disempowered and denied adequate choice. We note that the Willing to Work Inquiry found that the rates of employment of people with disability had remained stagnant over the preceding decade and sadly, since that inquiry, there has been no marked improvement. The systemic issues, and their individual impact on people with disability, are now well documented yet workplace culture has been slow to respond. QAI submits that the government must take initiative and model properly inclusive workplaces that are accessible to workers with different types of access requirements, including people with intellectual or cognitive disability. Further, we submit that all medium and large companies and government should be required to implement and comply with affirmative action policies and quotas.

People with disability may require additional support to develop and maintain a meaningful connection with the labour market in open employment. Providing support to people with an incapacity which recognises the possibility of future participation can potentially foster greater confidence and skills acquisition and contribute to the deconstruction of stereotypes of what people with disabilities can achieve. Legislatively endorsed reduced rates of payment for workers with disability reinforce their perception as less capable, making them less likely to complain about wage theft in fear of losing the only employment they believe they can obtain.

As noted in the OIRC's response, the groups most at risk of wage theft are often the worst positioned to take action against it. The examples of migrant workers, backpackers and international students used in their response share a likely lack of awareness of their employment rights and fear that complaining will lead to termination of their only option for employment. These vulnerabilities apply equally, and can be even more significant, for people with disability, many of whom have multiple vulnerabilities and have experienced a lifetime of disempowerment.

There is a need for a targeted education campaign for groups at risk of wage theft like those identified in the OIRC response and people with disability. Increasing awareness of basic industrial rights, as well as the human rights to equitable and non-discriminatory treatment, should lead to greater reporting of wage theft, increasing the quantity of corrective action taken and allowing a more accurate picture of the incidence of wage theft to take shape.

Additionally, we reiterate our desire for a shift in policy away from supported work arrangements for people with disability and toward increased integration into the open workforce. Supported work arrangements currently offer pay that is significantly low the legislated minimum wage, eliminate opportunities for socialization with members of the open workforce and typically do not develop their skills or capacity in the same way as the open workforce, creating a closed loop of isolation for workers with disability.

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<sup>5</sup> PriceWaterHouse Coopers, Disability Expectations: Investing in a Better Life, a Stronger Australia, 2011.



QAI submits that ADE's should have never been allowed to disintegrate to the segregated and closed systems with unjustifiably poor working conditions that they presently are. ADEs were once training centres that were required to progress people into open employment. However, over time, most became day centres for people who likely never had the opportunity or support to articulate their interests or goals for further education and/or work.

These operations are often in a position to undercut private enterprise competitors for tendered contracts and manage to deliver within the agreed contracted period at rates that create artificial costing and force down labour market prices. This financial incentive can undermine any motivation an ADE may have to help to move people into open employment. QAI recommends that these workshops be compelled to find pathways to open employment for their workers as they become proficient within projected time frames.

QAI submits that all workers, including those with disability, should be remunerated at a rate equal to or higher than the minimum award wage for their industry. In our view the continued operation of ADEs serves only to prevent entry of people with disability into the open workforce where they could earn a full wage and enjoy social interaction with a more diverse range of peers. Our recommendation is that ADEs be abolished, and there is a corresponding shift in policy to enabling the participation of people with disability in the open workforce.

We submit that there is also a need to reform Australia's anti-discrimination laws and industrial laws to provide further protection for vulnerable workers, including by removing the ability for companies to apply for exemptions to rulings by the Australian Human Rights Commission and thus continue to engage in practices that are recognised to be discriminatory. Any reform agenda must pay significant attention to the unique needs and vulnerabilities of marginalised groups including people with disability.

## Conclusion

QAI thanks the Committee for the opportunity to make a submission to this inquiry. We would welcome the opportunity to have further input into these issues as the inquiry progresses.