

# Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Submissions by the  
Australian Government in  
response to Counsel  
Assisting's submissions in  
Public hearing 9:

*Pathways and barriers to open  
employment for people with disability*

19 March 2021

## **PUBLIC HEARING 9 – SUBMISSIONS OF THE AUSTRALIAN GOVERNMENT ON PATHWAYS AND BARRIERS TO OPEN EMPLOYMENT FOR PEOPLE WITH DISABILITY**

### **A. BACKGROUND**

- 1 The Australian Government, represented by the Attorney General's Department (**AGD**), the Department of Social Services (**DSS**), the National Disability Insurance Agency (the **NDIA**), the Department of Education, Skills and Employment (**DESE**), and the Australian Public Service Commission (**APSC**) provides these **Submissions** in response to the submissions of Counsel Assisting the Royal Commission (**Submissions of Counsel Assisting**) dated 5 March 2021 following Public Hearing 9: *Pathways and barriers to open employment for people with disability*.
- 2 In response to a number of the matters raised throughout public hearing 9 and in Counsel Assisting's submission, the Australian Government refers to its Background Paper on Employment, which was first provided to the Royal Commission on 19 October 2020 and revised on 20 November 2020.

### **B. SCOPE OF THE SUBMISSIONS**

- 3 The Australian Government notes that the Submissions of Counsel Assisting are intended to address the main issues and themes emerging from the consideration of the totality of the evidence heard during public hearing 9,<sup>1</sup> and that Counsel Assisting have not asked the Commissioners to make factual findings in relation to the experiences of individual witnesses or members of their families.<sup>2</sup>
- 4 The Australian Government also notes that Counsel Assisting will not seek any adverse findings with respect to the Commonwealth following public hearing 9, notwithstanding the witness statements tendered and oral evidence given throughout the hearing.<sup>3</sup>
- 5 These Submissions reply to the proposed finding and information provided in the Submissions of Counsel Assisting. However, these Submissions are not intended to be an exhaustive account of all relevant employment policies or programs that have been or are being developed by the Australian Government. Rather, they provide an outline to assist the Royal Commission to understand the work of the Australian Government in relation to the matters raised throughout public hearing 9.

### **C. FINDINGS**

- 6 Counsel Assisting submitted that it is open to the Royal Commission to find that there are barriers experienced by people with disability obtaining and retaining employment.<sup>4</sup>

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<sup>1</sup> Submissions of Counsel Assisting, [20].

<sup>2</sup> Submissions of Counsel Assisting, [21].

<sup>3</sup> Letter from OSA to Gilbert + Tobin dated 30 November 2020.

<sup>4</sup> Submissions of Counsel Assisting, [245].

7 In the Submissions of Counsel Assisting, these barriers have been grouped as follows:

- (a) Attitudinal barriers;
- (b) Physical and environmental barriers;
- (c) Organisational barriers; and
- (d) Structural barriers.<sup>5</sup>

#### D. ATTIDUNAL BARRIERS

8 Counsel Assisting submits that people with disability face significant attitudinal barriers in the course of seeking or maintaining employment.<sup>6</sup> Counsel Assisting submitted that these barriers include perceptions from both employers, and society more broadly, that people with disability either do not want to (or are unable to) work, and that employing them would be costly and risky.<sup>7</sup> Further, Counsel Assisting noted evidence received during public hearing 9 that people with disability are discriminated against in the workplace, especially if they disclose their disability, and that this has a negative impact on their mental health.<sup>8</sup>

9 While these matters are largely matters for individual employers, the Australian Government is currently developing the National Disability Employment Strategy (the **Employment Strategy**) to outline priority areas to increase employment outcomes for people with disability which will address some of these issues. One of the priority areas of the Employment Strategy is ‘*changing community attitudes*’, which will focus on shifting people’s perceptions and expectations about the capability of people with disability in the workplace.

10 Further, the Employment Strategy will recognise the importance of building employer demand and capacity for hiring people with disability. The Australian Government acknowledges that employers need to be empowered to recruit people with disability and the Employment Strategy will focus on lifting employer engagement, demand and capability. While it is in its early stage of development, the Employment Strategy will seek to equip employers with information and support to address real and perceived barriers to employing people with disability.

11 The Australian Government provides over \$35 million in annual funding for the JobAccess and Employment Assistance and Other Services programs. The JobAccess website and information and advice service provides information to both employers and people with disability about issues associated with the employment of people with disability, including available support.

12 Further, the Australian Government notes that the *Disability Discrimination Act 1992* (Cth) (the **DDA**) and the and the *Fair Work Act 2009* (Cth) (**Fair Work Act**) protect people with disability

<sup>5</sup> Submissions of Counsel Assisting, [246].

<sup>6</sup> Submissions of Counsel Assisting, [22].

<sup>7</sup> Submissions of Counsel Assisting, [25].

<sup>8</sup> Submissions of Counsel Assisting, [25].

from discrimination on the basis of their disability in the context of their employment, as discussed further at paragraphs 135 to 138 and 139 below.

- 13 With regard to the experiences of witnesses with disclosing their disability and encountering discrimination through the Disability Employment Service (**DES**), the Australian Government notes that DES participants are not required to disclose their disability to their employer. Further, recent reforms to the DES program have allowed participants to change their provider if they feel that the provider is not meeting their needs. This is discussed further below at paragraphs 88 to 91.
- 14 The Submissions of Counsel Assisting refer to the evidence of 'Taylor' with respect to employment in the Australian Public Service (**APS**).<sup>9</sup> The Australian Government notes that it previously provided information to the Royal Commission specifically in relation to the evidence of Taylor, on a confidential basis (to maintain Taylor's desire for confidentiality).<sup>10</sup>

## **E. PHYSICAL AND ENVIRONMENTAL BARRIERS**

- 15 The Submissions of Counsel Assisting referred to both physical and environmental barriers to employment for people with disability.<sup>11</sup>

### ***Physically inaccessible buildings and workplaces***

- 16 Counsel Assisting submitted that a key theme which emerged in the evidence was the importance of physical accessibility of buildings and workplaces for people with disability.<sup>12</sup> Counsel Assisting specifically referred to evidence of Dr Beth McNally.<sup>13</sup>
- 17 The Australian Government acknowledges the importance of accessibility to public buildings and workplaces for people with disability. While access to a particular employer's workplace is primarily a matter for those individual employers, the Australian Government notes that the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (the **Standards**), formulated under s 31(1) of the DDA, aims to ensure that buildings are accessible to people with disability by mandating that new buildings, or parts of buildings, comply with access standards.
- 18 The outcomes from the first review of the Standards were implemented in October 2020. These included technical amendments to align the Standards with the National Construction Code, and the introduction of a requirement to include Accessible Adult Change Facilities in certain classes of buildings. This new requirement will provide people with complex disability needs greater access to public buildings, enhancing quality of life and social participation.

<sup>9</sup> See, for example, Submissions of Counsel Assisting, [34], [36], [47] and [63].

<sup>10</sup> Letters from Gilbert + Tobin to the Royal Commission sent on 22 January 2021.

<sup>11</sup> Submissions of Counsel Assisting, [65].

<sup>12</sup> Submissions of Counsel Assisting, [66].

<sup>13</sup> Submissions of Counsel Assisting, [70]-[72].

- 19 The second review of the Standards is currently underway. The review aims to check if the Standards are achieving their objectives and identify changes to improve them. The second review is expected to be completed in mid-2021.
- 20 The Australian Government also notes that the Australian Public Service Disability Employment Strategy 2020-25 (**APS Strategy**) includes the following *Action 10: 'Audit of existing Australian Government owned and rented premises for their current levels of accessibility.'* The APSC is consulting with the Department of Finance on the conduct of the audit.

### ***Environments that do not support inclusion or accessible means of communication***

- 21 Counsel Assisting submitted that workplace environments often do not support the inclusion of people with psychosocial and cognitive disabilities or provide accessible communication methods to people with disability.<sup>14</sup> The Australian Government notes that the DDA requires employers to make reasonable adjustments for people with disability.

### ***Lack of availability of jobs, particularly for people living outside urban centres***

- 22 Counsel Assisting submitted that there is a lack of available jobs for people with disability, particularly in regional areas.<sup>15</sup>
- 23 The Australian Government notes that as part of reforms to DES in July 2018 (the **2018 DES Reforms**), a risk-adjusted funding model was introduced which ensures that DES providers have appropriate incentives to support all participants, based on data about the difficulty of achieving an outcome for participants with different characteristics, including difficulties throughout the labour-market where they reside. Additional funding is available for more difficult to place cohorts, and less funding is available for those that can be placed more quickly and effectively.

### ***Lack of accessible housing and transport***

- 24 Counsel Assisting submitted that a theme raised by witnesses during public hearing 9 was the importance of stable and accessible housing and transport in obtaining and maintaining meaningful employment.<sup>16</sup> Specifically, Counsel Assisting referred to the evidence of Dr Ben Gauntlett, who emphasised the importance of such issues to people with disability seeking or keeping employment.<sup>17</sup>
- 25 While the Australian Government acknowledges the importance of accessible public transport, it notes that state and territory governments are responsible for public transport and passenger legislation and regulations, and they are also the major providers and/or operators of public transport.
- 26 The *Disability Standards for Accessible Public Transport 2002 (Transport Standards)*, formulated under subsection 31(1) of the DDA, require all of Australia's public transport networks

<sup>14</sup> Submissions of Counsel Assisting, [74], [78].

<sup>15</sup> Submissions of Counsel Assisting, [81].

<sup>16</sup> Submissions of Counsel Assisting, [86].

<sup>17</sup> Submissions of Counsel Assisting, [87].

- and associated infrastructure to be fully accessible by the end of 2022, with the exception of trains and trams (which are required to be fully accessible by the end 2032).
- 27 The Transport Standards are reviewed every 5 years by the Minister for Infrastructure and Transport, in consultation with the Commonwealth Attorney-General. The third review of the Transport Standards is currently being undertaken with a report anticipated to be provided to Australian Government in 2021.
- 28 Further, the Australian Government understands the importance of appropriate accessible accommodation for people with disability. While state and territory governments are primarily responsible for the provision of appropriate housing and regulating the built environment, the Australian Government is working closely with state and territories through the Building Ministers' Meeting (**BMM**) to encourage an increase in the stock of accessible housing to meet the needs of the Australian community. Building Ministers will consider approaches to increase accessible housing when they next convene in April 2021.
- 29 To support their deliberations, Building Ministers directed the Australian Building Codes Board (**ABCB**) to examine the costs and benefits of including minimum accessibility standards for new residential housing within the National Construction Code (**NCC**).
- 30 Following a period of public consultation, including on its Consultation Regulation Impact Statement (**RIS**), the ABCB transmitted its final RIS to Building Ministers on 22 February 2021 for their consideration ahead of the next BMM. The RIS examines the costs and benefits to society of including minimum accessibility standards in the NCC and is one input to Building Ministers' deliberations.

## F. ORGANISATIONAL BARRIERS

- 31 The Submissions of Counsel Assisting referred to organisational barriers faced by people with disability in the workforce.<sup>18</sup>

### *Skills, training and education*

- 32 The Australian Government acknowledges Counsel Assisting's submission that it is difficult for people with disability to access adequate skills training, education and work experience to allow them to gain employment.<sup>19</sup>
- 33 The *Disability Standards for Education 2005* (**Education Standards**) are one mechanism designed to address this, by clarifying the obligation of education and training providers in all educational settings to ensure that students with disability can access and participate in education on the same basis as other students.
- 34 The Education Standards were formulated under the DDA and are reviewed every 5 years by the Minister for Education, in consultation with the Commonwealth Attorney-General. The final report

<sup>18</sup> Submissions of Counsel Assisting, [97].

<sup>19</sup> Submissions of Counsel Assisting, [98], [121].

of the third review of the Education Standards was released on 12 March 2021, and includes 13 recommendations made across four reform areas:

- (a) empowering and supporting students with disability and their families;
- (b) strengthening the knowledge and capability of educators and providers;
- (c) embedding accountability for the standards throughout the education system; and
- (d) building awareness and capability in the early childhood education and care sector.

35 The Australian Government has committed to implementing all recommendations, and will work closely with state and territory governments and education authorities to do so. Changes will be made with help and advice from people with disability and educators. This will include Culturally and Linguistically Diverse people with disability, and Aboriginal and Torres Strait Islander people with disability.

36 The Australian Government is addressing the barriers faced by people with disability in the transition from school to open employment in the following ways:

- (a) Consideration of the recommendations arising from the Education Council's Review of senior secondary pathways into work, further education and training;
- (b) Supporting vocational education and training (**VET**) opportunities for people with disability;
- (c) NDIS funding for participants to engage in work experience;
- (d) Improving data about transitions to employment for people with disability;
- (e) Quality reforms arising from the Heads of Agreement for Skills Reform;
- (f) Supporting access to, and participation in, higher education through the National Disability Coordination Officer (**NDCO**) Program; and
- (g) Other disability employment support programs.

*(a) Consideration of the recommendations arising from the Education Council's Review of senior secondary pathways into work, further education and training*

37 The Council of Australian Governments (**COAG**) Education Council (the **Education Council**), comprised of members from the Commonwealth and each state and territory, aims to assist the improvement of education outcomes for all Australians. The Education Council commissioned a review of senior secondary pathways into work, further education and training in 2019 (**the Senior Secondary Pathways Review**). The final report, *“Looking to the Future: Report of the Review of senior secondary pathways into work, further education and training”* was published by the Education Council on 23 July 2020 (the **Looking to the Future Report**).<sup>20</sup> The reviewers made 20 recommendations, including:

<sup>20</sup> A copy of the Looking to the Future Report is available on the Education Council website at: <https://www.pathwaysreview.edu.au/>.

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- (a) that all senior secondary students with disability should have access to work exploration in school and, in collaboration with disability support groups, have an individual post-school transition plan put in place prior to leaving school (recommendation 17); and
  - (b) that the Education Council should establish a national Transition from School Program which, through a range of collaborative demonstration projects, would trial and evaluate new approaches to supporting vulnerable and at-risk students as they prepare to leave school (recommendation 18).
- 38 On 4 September 2020, the Education Council formally considered the findings of the Senior Secondary Pathways Review and agreed to:
- (a) in-principle support for the Senior Secondary Pathways Review and its findings, noting further work is needed to consider appropriate action in response to the recommendations;
  - (b) the proposed approach to respond to the Senior Secondary Pathways Review (identifying local/national responses and the relevant responsible council – the Education Council, Skills Ministers or joint); and
  - (c) prioritise action relating to recommendations on literacy, numeracy and digital literacy, agreement on a common language, a learner profile, career education, and VET.
- 39 The Education Council identified recommendation 17 for a local response. The remaining recommendations were identified for a national response, including recommendation 18, which will be further considered by the Education Council in 2021.
- (b) Supporting VET opportunities for people with disability*
- 40 Australia's national VET system offers high quality training across a range of industries to ensure students have the work-ready skills and qualifications that meet the needs of Australian industry. Most nationally recognised VET qualifications consist of units of competency developed through a process of national consultation with industry and set out in training packages. DESE will continue to work with states and territories on measures to improve the quality of VET delivered to secondary students, which can provide pathways to employment for some students with disability.
- 41 Through the *Enhanced Support for School Leavers* measure, the National Careers Institute (**NCI**) has developed the School Leavers Information Kit (**Information Kit**) and the School Leavers Information Service (**Information Service**). Both are designed to support young people as they leave school, by providing tailored career information to help them to understand their training, education and employment options. The Information Kit includes information for school leavers with disability and/or special education needs. The Information Service can also be accessed using the National Relay Service. The Information Kit can be downloaded from the Your Career website. Additionally, the NCI is engaging with staff from DSS on potential connections between the NCI's work and the Employment Strategy.

*(c) NDIS funding for participants to engage in work experience*

- 42 The Australian Government supports flexible work experience arrangements to meet the needs of students of all abilities. The Applied Principles and Tables of Support (**APTOS**) set out the division of responsibilities between the National Disability Insurance Scheme (**NDIS**) and state and territory education systems. While curriculum-based work experience is the responsibility of state and territory education authorities, the Australian Government acknowledges that it is important to consider disability supports and services for young people that are outside the scope and responsibility of the state and territory education departments or through reasonable adjustment of the host employer. The APTOS outlines that ‘other parties’ remain responsible for ‘skills, capability and other forms of training and transition support, including reasonable adjustment for students with disability, delivered in schools through the Australian curriculum’. The APTOS also outlines other parties’ responsibility to provide skills, capability and other forms of training and transition support, including reasonable adjustments for students with disability, delivered in higher education and VET institutions through their education curriculum (e.g. programs assisting transition between education or training and employment’).
- 43 Positive work experience is a critical first step to developing a young person’s confidence as a future worker. In implementing the NDIS Participant Employment Strategy over the year ahead, the NDIA has identified removing barriers to work experience as a key priority.

*(d) Improving data about transitions to employment for people with disability*

- 44 The Australian Government notes that Higher Education student data has been integrated in the Multi-Agency Data Integration Project hosted by the ABS. National VET data and Total VET Activity (**TVA**) data will also be integrated in the Multi-Agency Data Integration Project by April 2021. This will allow for analysis of outcomes from Tertiary Education, including for populations of interest such as people with disability, controlling for a wide range of other events and circumstances that influence these outcomes.
- 45 Both Higher Education and TVA data sets have a disability indicator, and there are a small number of data items that relate to activities prior to undertaking Higher Education and VET study. This includes the Australian Tertiary Admission Rank (where available), highest year of school completed and previous highest education attainment level. These could be used in conjunction with age (to identify younger students more likely to be school leavers) and other characteristics of students to explore the relationship between education and training activity and completion, student characteristics and some prior education status.
- 46 DESE also funds the annual Graduate Outcomes Survey which provides information on the labour market outcomes and further study activities of Higher Education students who have graduated in the previous year.<sup>21</sup> As the survey is based on Higher Education student data, there is a disability indicator available. The survey has been conducted annually since 2016. A longitudinal component of the survey provides information on graduate outcomes three years following course completion.

<sup>21</sup> The Higher Education Graduate Outcomes Survey is available at <https://www.qilt.edu.au/qilt-surveys/graduate-employment>.

47 In addition, DESE funds the National Centre for Vocational Education Research (**NCVER**) to administer the annual VET Student Outcomes Survey.<sup>22</sup> This survey includes information on improved employment outcomes and further training outcomes for students with disability who have undertaken VET in the previous year. As it draws on the TVA data, there is a disability status indicator available. The survey is not a longitudinal survey, however, has been conducted annually since 2016, and earlier years for government-funded students.

*(e) Quality reforms arising from the Heads of Agreement for Skills Reform*

48 The quality reforms as part of the Heads of Agreement for Skills Reform, made between the Commonwealth and states and territories in July 2020, provide opportunities to strengthen VET outcomes for students with disability. This includes moving the VET sector from a focus on minimum compliance to continuous improvement and best practice. In addition, as part of the reform process, the *Standards for Registered Training Organisations (RTOs) 2015* will be revised to ensure they are effective and fit-for-purpose. A broad consultation process has commenced to support this work.

49 The Australian Government notes that funding and support to assist participants to access VET is provided by the NDIS. Notwithstanding this, the quality reforms as part of the Heads of Agreement for Skills Reform will identify opportunities to strengthen VET outcomes for students with disability.

*(f) Supporting access to, and participation in, higher education through the National Disability Coordination Officer Program*

50 The Australian Government's NDCO Program seeks to identify and address at a systemic level, the key gaps and barriers that prevent people with disability having equitable access to, and participation in, tertiary education and subsequent employment. As part of a national network, NDCOs work at a local level with education professionals, employers, the community and others to:

- (a) facilitate smooth transitions from school, to tertiary education and employment;
- (b) address systemic barriers and gaps in support for people with disabilities in accessing and participating in tertiary education and employment; and
- (c) increase awareness of people with disability about their post-school options and supports so they can participate in education and subsequent employment to the same extent as people without disabilities.

*(g) Other disability employment support programs*

51 Through JobAccess, a number of programs can be accessed to support the employment of people with disability, this includes:

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<sup>22</sup> The VET Student Outcomes Survey is available at: <https://www.ncver.edu.au/research-and-statistics/collections/student-outcomes>.

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- (a) the National Disability Recruitment Coordinator program;
  - (b) disability awareness training, assistance with workplace modifications and equipment, and Auslan interpreting services are available for employees with disability and employers through the Employment Assistance Fund; and
  - (c) tailored advice through the JobAccess information and advice service.
- 52 The JobAccess Services, including the National Disability Recruitment Coordinator program, were reviewed in 2019. Findings from this report included that users valued the services, but that more could be done to raise the awareness of JobAccess and improve programs to increase employment outcomes for people with disability.
- 53 The Department is working with its contracted provider of the JobAccess service to expand promotional activities in 2021 to increase employer awareness of JobAccess and other disability employment support programs.
- 54 More information about programs to support economic participation for people with disability can be found in the Australian Government's Background paper on Employment.

#### ***Poorly trained, inefficient job service providers***

- 55 Counsel Assisting submitted that certain DES providers had failed to adequately assist participants to find jobs that match their qualifications and interests.<sup>23</sup>
- 56 The Australian Government notes that DES provides individualised employment services based on each participant's circumstances and is able to connect participants with appropriate supports and other services.
- 57 DES participants are able to change providers for any reason, including where they are not receiving an expected level of service. More skilled and qualified job seekers may consider they are better able to manage their own job search efforts and may not want the involvement of an employment service. Please see paragraphs 88 to 91 below for more information about choice and control.

#### ***Regulation of providers***

- 58 The DES Grant Agreement allows for performance assessments and sanctions for non-compliance by DES providers.<sup>24</sup> It also outlines a range of financial sanctions and other actions DSS may take for non-compliance or poor service delivery. Further, the DES Grant Agreement allows DSS to terminate a DES service at any time. In particular, the DES Grant Agreement notes that providers may be in scope for remedial action including termination of service, where their performance is in the two lowest performance bands under the DES Star Ratings. The DES

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<sup>23</sup> Submissions of Counsel Assisting, [128], [129], [131].

<sup>24</sup> DES Grant Agreement 2020, section 5Q, available at: <https://www.dss.gov.au/freedom-of-information-operational-information-disability-employment-and-carers-group/des-grant-agreement>.

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- Star Rating refers to the relative measure of performance of the Provider for Program Services, assessed by the DSS at its absolute discretion.<sup>25</sup>
- 59 As set out in the DES Grant Agreement, DES provider performance is assessed against three Key Performance Indicators, for Efficiency, Effectiveness and Quality. The performance of each DES service for Efficiency and Effectiveness, relative to other similar DES services, is assessed regularly under the DES Star Ratings. Star Ratings are published to assist job seekers in deciding which DES provider to choose. The DSS can also undertake formal performance assessments during the grant period.
- 60 DSS is proposing to undertake the first formal performance assessment since the current grant commenced with the 2018 DES Reforms in 2021. DSS can undertake further formal performance assessments if required. Providers receive ongoing performance feedback through DES Star Ratings which are published quarterly, and performance discussions with Departmental officers.
- 61 Further, DES providers are funded on the longevity of placements. Providers receive outcome fees and are rewarded through Star Ratings when job seekers complete 13, 26 and 52 weeks of employment. Providers can continue to support, and claim fees, for participants requiring support beyond 52 weeks. Providers therefore need to ensure jobs are appropriate for the job seeker. Providers are encouraged to consider job seekers' strengths and interests when looking for work, but appropriate jobs do not necessarily align with job seekers' employment preferences.
- 62 If a person loses their job before they complete 26 weeks of employment, the provider resumes support to help the participant find and retain alternative employment. If after 26 weeks, the person's employment ceases, the person's continuing need and eligibility for DES must be retested before they can return to DES.
- 63 Providers of jobactive (previously known as Job Network) are required to have a Service Guarantee which defines the minimum level of service that a job seeker is to receive, including the nature and frequency of services to ensure that job seekers receive quality, personalised assistance. jobactive providers are financially rewarded when they achieve sustainable employment outcomes for job seekers and this incentivises the jobactive provider to place job seekers into jobs that match the job seeker's skills and experiences.
- 64 Mainstream government employment services are being transformed to deliver better services to job seekers and employers. The new model is being trialled in two regions from 1 July 2019 before being rolled out nationally from July 2022.

### ***Employers failing to support people with disability***

- 65 Counsel Assisting submitted that employers often lack the knowledge and resources to appropriately support people with disability in the workplace.<sup>26</sup> Counsel Assisting also submitted

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<sup>25</sup> DES Grant Agreement 2020, Annexure A, Definitions, available at: <https://www.dss.gov.au/freedom-of-information-operational-information-disability-employment-and-carers-group/des-grant-agreement>.

<sup>26</sup> Submissions of Counsel Assisting, [149].

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- that employers often fail to allow people with disability to work flexibly or afford them adjustments and that people with disability were not offered significant opportunities for career progression.<sup>27</sup>
- 66 As an employer, the Australian Government notes that the APS has a target of 7% employment of people with disability in the APS by 2025. The APSC also encourages government agencies to consider their own employment targets.
- 67 The APS Strategy outlines a number of actions and outcomes to be achieved under the APS Strategy with a focus on attracting, recruiting and retaining more people with disability and creating inclusive and accessible workplace cultures and environments.
- 68 As at 30 June 2020, there is 4% representation of people with disability in the APS (as per APS Employee Data), this is an increase from 3.8% at 31 December 2019. Employees with disability may not choose to share their disability status, so the figure is likely to be higher. For this reason the APS Strategy (action 14) seeks support a culture in the APS where the benefits of sharing disability status are understood supported by psychosocial safety for employees with disability.
- 69 The APSC has established a regime of regular reporting against the priorities in APS diversity strategies. The reporting will inform formal evaluations of the plans to be undertaken at their mid and end points. Further work on the type and collection of data is taking place early in 2021 in consultation with agencies across the Commonwealth, supported by an external evaluation expert. Regular reports will be provided to the COO Committee to inform progress and success of implementation activities.<sup>28</sup>

## G. STRUCTURAL BARRIERS

- 70 The Submissions of Counsel Assisting referred to structural barriers faced by people with disability in the workforce.<sup>29</sup>

### *Lack of access to adequate income*

- 71 Counsel Assisting submitted that a person's ability to meet basic living standards, look for work and maintain employment is greatly influenced by their access to income.<sup>30</sup>
- 72 The Australian Government acknowledges the importance of a person's ability to maintain an income sufficient to support basic living standards.
- 73 The Fair Work Commission (**FWC**) is responsible for making, reviewing and varying modern awards, including the *Supported Employment Services Award 2020 (the Award)*, which is used in some Australian Disability Enterprises (**ADEs**).

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<sup>27</sup> Submissions of Counsel Assisting, [158], [168].

<sup>28</sup> Further information about the COO Committee is available at: <https://www.pmc.gov.au/government/chief-operating-officers-coo-committee>.

<sup>29</sup> Submissions of Counsel Assisting, [175].

<sup>30</sup> Submissions of Counsel Assisting, [177].

- 74 The FWC is currently reviewing the Award as part of its standard four yearly review process. On 3 December 2019, the FWC released a preliminary decision on the review of the Award. The proposed changes are to set a minimum wage of \$3.50 an hour, increase superannuation contributions and help ensure that wages are assessed fairly through a revised wage assessment tool.
- 75 As part of the decision, the FWC requested the Australian Government fund a trial, to determine both the practicality of the new classification structure and the cost impact of the new wage assessment structure on ADEs, before it is implemented. The trial was scheduled to begin on 1 May 2020, however due to the impacts of the COVID-19 pandemic, including ADE closures, supported employee vulnerability, travel restrictions and social distancing, the trial commencement date was changed and will commence on 22 March 2021 and end on 18 June 2021. A trial evaluation report will be published on the FWC website in late 2021 which will inform the FWC's final decision on the review of the Award.

#### ***Structural issues in the operation of the DES program***

- 76 Counsel Assisting submitted that the structure or design of the DES program may create barriers to satisfactory employment for people with disability.<sup>31</sup> The issues identified with the DES program include the system of payments to DES providers and the increasing generalisation of DES providers.

#### *Payments to DES providers*

- 77 The Australian Government provides compensation to DES providers via a combination of fee-for-service and fee-for-outcomes, including:
- (a) Quarterly service fees to cover the cost of ongoing advice, support, and liaison, and oversight of DES participant compliance with mutual obligations;
  - (b) Education outcome fees, paid at 13 and 26 weeks of an eligible participant's study for a single qualification course at Certificate III level or above;
  - (c) Employment outcome fees, paid at 4, 13, 26 and 52 weeks of employment, when individuals remain in employment (including where an individual has worked in more than one job during this time); and
  - (d) Ongoing support fees to cover the cost of support for participants in the workplace. Ongoing support is provided at one of three levels (flexible, moderate or high) with varying fee schedules.
- 78 DES employment outcome expectations for each participant are based on an independent assessment of the participant's capacity, in an Employment Services Assessment.

#### *Outcome payments for education outcomes*

<sup>31</sup> Submissions of Counsel Assisting, [183].

- 79 DES providers are also compensated by way of fees for education and employment outcomes. These fees are designed to incentivise DES providers to deliver suitable supports to achieve appropriate placements for participants, as DES providers are funded on the longevity of placements.
- 80 Employment outcome fees are paid to DES providers where a participant achieves milestones of sustained employment up to 52 weeks, including where the employment is across different positions. The DES program caters for participants with a variety of disabilities and experiences. Some supports and services may be more or less relevant for particular cohorts. DES allows learning in a variety of ways, including participants who complete education on a part-time basis while working.
- 81 DSS has also recently changed some of the requirements for education placements under DES, including taking out education outcomes from the Star Ratings calculations and requiring providers to seek departmental approval prior to placing a participant into a related education entity. These changes were introduced to ensure the focus of the DES program remains on achieving employment outcomes for participants. Please see above paragraph 58 for more information about DES Star Ratings.

#### *Generalist DES providers*

- 82 Counsel Assisting submitted that DES providers are becoming less specialised and more generalist in their approach to finding employment as the proportion of participants with intellectual disability has fallen.<sup>32</sup> The Australian Government notes that since DES is a market-driven program, the majority of DES providers are generalist providers to accommodate the volume and type of DES participants within their particular area.<sup>33</sup>
- 83 DES providers offering a generalist service are required to support all disability types, while a specialist service can target a particular disability cohort (i.e. psychosocial, intellectual disability) or participant characteristic (i.e. indigenous Australians).

#### *Delivery of appropriate DES program to individual participants / Marketised-outcome based service models in the DES system*

- 84 Counsel Assisting submitted that DES providers do not have the resources to assist people with disability to obtain employment and were not delivering appropriate services to participants.<sup>34</sup> Providers have service delivery obligations under the DES Grant Agreement and DSS has a rigorous program to monitor provider performance and compliance with service delivery obligations. Please see paragraphs 58 to 64 above for more information about the regulation of DES providers.

<sup>32</sup> Submissions of Counsel Assisting, [185].

<sup>33</sup> The Australian Government notes the percentage of non-specialist providers identified in the Australian National Audit Office's (ANAO) Management of Agreements for Disability Services Report is 95 per cent, rather than 99 per cent as identified in Ms McAlpine's statement. See Australian National Audit Office, 'Management of Agreements for Disability Employment Services', 24 June 2020, <https://www.anao.gov.au/work/performance-audit/management-contracts-disability-employment-services>, [1.11].

<sup>34</sup> Submissions of Counsel Assisting, [186].

- 85 Counsel Assisting submitted that DES providers prioritise those unemployed individuals who are most job ready.<sup>35</sup> The Australian Government submits that this issue has been addressed by legislative reform. As mentioned above at paragraph 23, risk-adjusted funding was introduced as part of the 2018 DES Reforms to ensure providers have appropriate incentives to support all participants, based on data about the difficulty of achieving an outcome for participants with different characteristics.
- 86 Additional funding is available for more difficult to place cohorts, and less funding is available for those that can be placed more quickly and effectively. The risk-adjusted funding model is updated periodically to ensure changes in success rates for different cohorts are reflected in associated funding.
- 87 Further, DES recognises the importance of sustainable employment. DES program requirements minimise churning by restricting outcome payments for recurring employment. The Australian Government is developing the Employment Strategy, referred to above at paragraphs 9 and 10. A key focus of the Employment Strategy is to create a system that emphasises the strengths of people with disability in the workplace, rather than their limitations. The Employment Strategy will seek to make meaningful changes to the systems that jobseekers with disability interact with during their employment journey, with a view to increasing the number of people with disability in long-term, meaningful employment.

#### *Choice and control*

- 88 Under the 2018 DES Reforms, DES participants are able to exercise choice and control if they are not satisfied with their provider.<sup>36</sup> Since the 2018 DES Reforms were introduced, DES participants can transfer to another provider for any reason, including where they are not receiving an expected level of service, as referred to above at paragraph 57. This reform recognises that DES provides individualised employment services based on each participant's circumstances, and DES participants are best served when they are able to connect with appropriate supports and other services.
- 89 To facilitate a participant to choose or transfer to an appropriate DES provider, the DSS publishes Star Ratings as an indicator of DES providers' relative performance. For more information about the DES Star Ratings, please see paragraphs 58 to 59 above. DES outcome payments are paid where a participant sustains suitable employment of up to 52 weeks. This employment can be across different positions, so providers have an incentive to help participants find alternative employment where required.
- 90 Further, the Australian Government, through the DSS, recognised concerns about participant capacity and willingness to exercise choice at the time of reforms to DES and provided additional information, including through the Job Access service. DES Participants receive information about DES upon commencement. Information about available DES providers is published on the

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<sup>35</sup> Submissions of Counsel Assisting, [187].

<sup>36</sup> For more information about the 2018 DES Reforms, please see: <https://www.dss.gov.au/disability-and-carers/programs-services/disability-employment-services/2018-des-reform-transition>.

Job Access and jobactive websites and participants are supported through the National Customer Service Line or Complaints Resolution and Referral Service.

- 91 Additional changes to DES from 1 July 2018 to support participant choice have resulted in a significant rise in the number of participant transfers. However, the Australian Government notes that while the DSS can make available mechanisms for participant choice and control, including for participants with mutual obligation requirements, the DSS cannot require participants to exercise choice and control.

### ***Integration and simplification of government programs***

- 92 The DSS is working with the NDIA to ensure supports available under DES and the NDIS are well integrated. In particular, the NDIA and DSS are examining the participant experience of preparing for work, finding a job, keeping a job and career development to understand how NDIS supports and the DES program can best support participants to find and keep a job, and improve outcomes for NDIS participants.
- 93 Since the introduction of the 2018 DES Reforms, eligible NDIS participants have been able to concurrently undertake a DES program. The period of concurrency allowed is six months. DES eligibility requirements include that a person be able to work at least eight hours per week on average, including with the support of a provider. A person who is unable to work at least eight hours per week on average is not eligible for DES support under current settings. If the person is an NDIS participant, they could receive NDIS employment supports even if their work capacity is less than eight hours a week.
- 94 The person must be at least of working age and, unless an Eligible School Leaver, not be undertaking secondary schooling. School students in their last year of schooling may be eligible to commence DES under the Eligible School Leaver intake, which does not require an assessment of the student's capacity for work.
- 95 The Australian Government considers it is worth noting that the NDIS is not intended to support or service all people with disabilities, including the broader DES cohort. The NDIS was established with a clear understanding through the *NDIS (Supports for Participants) Rules 2013* that ordinary living costs or supports that are more appropriately provided through general service systems (including reasonable adjustment) – which may in some cases include education and are not specifically linked to the need for disability related supports – would not be funded. Further, whether skills programs or study offerings provide subsidies or incentives for people with a disability would be a matter for that provider or program.

### ***Potential reduction to Disability Support Pension (DSP)***

- 96 Counsel Assisting submitted that reductions to the amount of DSP received by people with disability may be made following periods of employment and that government policies in relation to the DSP may create disincentives for people to seek employment.<sup>37</sup>

<sup>37</sup> Submissions of Counsel Assisting, [200].

- 97 Arrangements currently built into the DSP eligibility criteria seek to encourage and support people to re-enter and remain in the workforce. Once granted, all DSP recipients are able to engage in paid employment for less than 30 hours a week and still receive a part pension, subject to income testing.
- 98 The income test is designed to encourage people to supplement their pension with other income, if they are able to. A DSP recipient can receive an amount of income before their pension starts to be reduced. The pension income test free area from 1 July 2020 is \$178 a fortnight for singles and \$316 a fortnight for a couple combined. It is adjusted in July each year for increases in the cost of living. For each dollar of income over the income test free area, the pension is reduced by 50 cents (the taper rate). This gradual reduction of income support as a person earns more ensures that recipients are always better off if they or their partner earn additional income than relying solely on DSP. Due to indexation of the rate of DSP from 20 March 2021, this means that a part rate DSP is payable up to an assessable income of \$2,083.40 a fortnight for a single pensioner or \$3,188.40 a fortnight for a pensioner couple. These figures may be higher if Rent Assistance is also paid.
- 99 The Australian Government also notes that providing targeted assistance through a means test is consistent with the basic principle that individuals should be required to draw on their own resources before calling upon taxpayer funded support.

#### *DSP suspension*

- 100 People who have high earnings from employment, or those who work 30 hours or more a week at the minimum pay standard, can have their DSP suspended (that is, held open) for up to two years. This means that if the person is unable to manage with the job or needs to reduce their hours of work because of their disability, they can return to DSP without having to make a new claim. In addition, when having their payment suspended after returning to work, they retain access to the Pensioner Concession Card for 12 months.

#### *DSP (Blind) eligibility*

- 101 Counsel Assisting submitted that certain ADEs have been incorrect in their understanding of entitlements of recipients of the permanently blind category of the DSP.<sup>38</sup>
- 102 People claiming DSP who are aged 16 or over (but under Age Pension qualification age), who are assessed as being permanently blind under social security law, are automatically eligible for DSP (Blind) subject to meeting all other eligibility requirements.
- 103 DSP (Blind) recipients are not affected by the pension income test and assets test, unless they claim Rent Assistance or their partner wishes to claim an income tested payment in their own right, for example, a Carer Payment. In this case, the DSP recipient and their partner must disclose their income and assets to Services Australia (Centrelink) so that a calculation can be

<sup>38</sup> Submissions of Counsel Assisting, [203].

made to determine whether they will be eligible for Rent Assistance or if their partner's payments will be affected.

#### *Centrelink income reporting*

104 The Australian Government notes that the *Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020* (Cth) came into effect on 7 December 2020 to simplify the process of income reporting.

105 The changes will reduce reporting errors and improve accuracy, meaning recipients are less likely to be under or overpaid from misreporting employment income. The changes will also pave the way for pre-filling of employment income using Single Touch Payroll (**STP**) information, supporting easier reporting arrangements for income support recipients.

106 The Australian Government notes that under the social security income test, regular gifts to social security pension recipients (including DSP recipients) from immediate family members, have not been counted for social security income test purposes under longstanding legislative provisions. This exemption is provided for under Section 8(8) of the *Social Security Act 1991* (Cth). To provide consistency of the social security income test treatment of gifts from immediate family members, the *Social Services Legislation Amendment (Simplifying Student Payments) Act 2017* (Cth), exempted periodical payments made by immediate family members for the purpose of the income test for benefit payments as well as pensions.

#### *DSP and DES*

107 Many DSP recipients are voluntary participants in DES and can choose to not participate. However, providers may not decline to provide services to an eligible volunteer who is participating in the program. Most DES funding is provided when a participant is supported to sustain suitable employment, so providers have financial incentive to deliver suitable supports for appropriate placements.

#### ***Participation requirements and mutual obligations associated with income support***

108 Counsel Assisting submitted that some people with disability receiving income support payments were negatively impacted by the participation and mutual obligation requirements imposed on them.<sup>39</sup> Counsel Assisting noted evidence that participants were required to report on the MyGov platform which was suggested to be inaccessible, and that the failure to meet the obligations may result in loss of DES support or income support payments. Counsel Assisting also referred to evidence that insufficient support was available to participants to assist them in meeting these requirements.

#### *DSP*

109 Generally, most DSP recipients do not have participation requirements. However, DSP recipients aged under 35 years with a work capacity of eight hours or more have compulsory participation requirements. These requirements are in place to assist young people on DSP to engage in

<sup>39</sup> Submissions of Counsel Assisting, [214].

activities to help them build their skills and look for work. These participants are required to have a Participation Plan with a compulsory work-focused activity, which might include active participation in DES, education or training, job search or work experience or rehabilitation activities to overcome barriers to work. We note that difficulties with inappropriate DES placements have been addressed elsewhere in this response.

- 110 There are a number of exemptions, both permanent and temporary, that excuse a DSP recipient from their participation requirements. These include, but are not limited to, for example, being sick, injured, or where a recipient is dealing with a personal crisis. DSP recipients who fail to comply with their participation requirements are given a number of opportunities to re-engage. Continued non-compliance can lead to the cancellation of their payment.
- 111 Further, people applying for DSP who receive 20 points or more across the **Impairment Tables**, referred to below at paragraphs 133 to 134, may be required to participate in a Program of Support (**POS**) to ensure that they have participated in an approved program to try and build their work capacity before being granted DSP.

#### *DES*

- 112 Participation requirements and mutual obligations apply to income support recipients across Australian Government employment services. DES participants are required to enter into a Job Plan with their DES provider. The Job Plan sets out a plan for helping the participant find employment, including support that will be delivered by the provider and activities that the participant will undertake. Job Plans should be reviewed regularly to ensure they remain relevant and current.
- 113 DES support does not cease if a person does not meet their mutual obligation requirements. However, if a participant repeatedly fails to meet their mutual obligation requirements, their income support payments can be cancelled and a preclusion period for re-application would apply.
- 114 Job seekers receiving unemployment payments may report compliance with their mutual obligation requirements through the MyGov platform but are only required to use this platform if they are assessed as capable of doing so. If the employment services provider assesses the participant as not capable of recording their own attendance, the provider will remove this requirement from the participant's Job Plan.
- 115 If a participant cannot record their attendance (e.g. because they have a disability that prevents them from doing so) the provider will record attendance on the participant's behalf. The participant, or in some cases the supervisor of the activity, will need to contact the provider to report their attendance.
- 116 Providers are encouraged to keep working with participants to build capacity for reporting their attendance at requirements. Providers must also ensure that participants capable of recording their own attendance understand the requirement to record their own attendance at activities by

close of business on the day of the requirement. If participants do not do so, compliance may be raised.

### ***Gaps in support for people who do not qualify for the NDIS***

117 Counsel Assisting submitted that there are differing eligibility requirements as between DSP and the NDIS, meaning that there is a cohort of people with an intellectual disability who are eligible for DSP but do not receive NDIS funding and may not have adequate support under either system.<sup>40</sup>

118 The NDIS and DSP have different purposes and, therefore, different eligibility requirements. DSP provides income support for those who cannot support themselves through work due to their disability. The NDIS provides individualised disability supports for people who have a permanent disability that significantly affects the person's ability to take part in everyday activities. The NDIS is not intended to support or service all people with disabilities and a person's funding package through the NDIS does not impact on their DSP payments.

### ***Pathways and transitions from education to open employment***

119 Counsel Assisting submitted that there are insufficient pathways to employment for people with disability.<sup>41</sup> Counsel Assisting noted evidence that several employment pathways were either non-existent or needed further development, including pathways from high school to employment, from special or segregated education and employment to open employment, from School Leaver Employment Supports (**SLES**) to DES and from job to job.<sup>42</sup> It was also noted that there was no support for people with disability who lose their jobs in open employment.<sup>43</sup>

#### *Transition from school to employment*

120 The Australian Government has taken several measures to assist with the transition of people with disability from school to employment, which are discussed in detail above at paragraphs 33 to 54.

121 Further, the Employment Strategy will recognise the importance of providing appropriate and early support to improve the transition of young people with disability from school to open employment. One of the priority areas of the Employment Strategy is '*building employment skills, experience and confidence of young people with disability*'. This priority area will seek to equip young people, parents, carers and school staff with the tools they need to build a successful pathway to open employment for the young person with disability.

122 The Australian Government also notes that the JobAccess website and information and advice service, which has been referred to above at 11 and 51, was established to be a national hub for information on, and access to, disability employment support programs.

<sup>40</sup> Submissions of Counsel Assisting, [220].

<sup>41</sup> Submissions of Counsel Assisting, [221].

<sup>42</sup> Submissions of Counsel Assisting, [221], [225], [227], [230].

<sup>43</sup> Submissions of Counsel Assisting, [230].

*SLES to DES*

- 123 The Australian Government notes that it is seeking to address the challenges relating to the transition between SLES to DES programs by improving continuity of support between the NDIS, including SLES, and the DES program, as part of the NDIS Participant Employment Strategy 2019-2022 (**PES**), specific supports for participants with psychosocial disability and through updates to the Operational Guidelines for Work and Study.<sup>44</sup>
- 124 The PES focuses on participants aged 14 to 25 to support improved aspirations for work and planning a pathway to the workforce.<sup>45</sup> This includes work on a targeted engagement initiative with schools and education departments for students and families to expand their understanding of NDIS supports as a pathway to work. The PES also seeks to drive improved provider practice through market engagement and outlines the NDIA's commitment to publishing clear information about how the NDIS and DES can work better together.<sup>46</sup>
- 125 The PES also involves targeted engagement initiatives with schools and state and territory education departments for students and families to expand their understanding of NDIS supports as a pathway to work – including the relationship between the NDIS, DES and other mainstream employment services and programs.
- 126 The SLES is designed to support NDIS participants to move from school to work by promoting the exploration of all pathways to work, with the right support. The NDIA, as part of the PES, is improving communication and the information available to support informed choice on pathways from school. The NDIA has recently updated the resources and information to support access to and delivery of SLES, including a refreshed handbook.<sup>47</sup> The NDIA has also reinvigorated the SLES Provider Reporting tool, to better understand the supports provided and outcomes of SLES. The NDIA will explore further ways of supporting informed participant choice and evidence-based practice to strengthen pathways to employment for young people, including the use of the DES program.
- 127 Where a participant can access and benefit from the DES program, the SLES provider is expected to support the participant to engage with a DES provider to progress their employment goal. School students in their last year of schooling may be eligible to commence DES under the Eligible School Leaver intake, under arrangements that waive the normal DES eligibility requirements. Information about accessing DES as an Eligible School Leaver is available through the JobAccess website.
- 128 Since the 2018 DES Reforms, eligible NDIS participants are able to concurrently undertake a DES program with SLES.

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<sup>44</sup> A copy of the Operational Guidelines for Work and Study is available at <https://ourguidelines.ndis.gov.au/supports-you-can-access-menu/social-and-community-participation/work-and-study-supports>.

<sup>45</sup> A copy of the NDIS Participant Employment Strategy 2019-2022 is available at <https://www.ndis.gov.au/about-us/strategies/participant-employment-strategy>.

<sup>46</sup> Market Engagement is outlined at page 16 of the Participant Employment Strategy available at <https://www.ndis.gov.au/about-us/strategies/participant-employment-strategy>.

<sup>47</sup> A copy of the School Leaver Employment Support Booklet, December 2020, is available at <https://www.ndis.gov.au/providers/working-provider/school-leaver-employment-supports>.

- 129 The NDIA continues to work with state and education partners in the delivery of SLES and recognises that improved clarity on the supports and services for young people in their vocational pathway would benefit participants, education staff and NDIS providers.
- 130 Further, concurrency arrangements apply to people working in a segregated employment setting, with DES, for a period of up to six months to allow people to continue to work while receiving the assistance of a DES provider to find open employment.
- 131 The Australian Government also notes that in 2020, employment items in the NDIS support catalogue were broadened to include vocational discovery activities and support to enable school students to gain work experience through a part-time job. In 2020, new NDIS pricing for supports in employment were introduced and will enable NDIS participants in ADEs to purchase on-the-job support in employment settings outside ADEs, should they wish to do so.

***Job Capacity Assessments (JCAs) that emphasise impairment and weakness***

- 132 Counsel Assisting submitted that JCAs may not be credible or valid methods of measuring capacity for people with disability and that they may result in low measures of job capacity.<sup>48</sup>
- 133 The Australian Government notes that Job Capacity Assessors are trained to undertake JCAs and have a wide variety of professional backgrounds in health-related fields such as occupational therapy, physiotherapy, psychology, speech pathology, and rehabilitation counselling. The Impairment Tables, which are tables for the assessment of work-related impairment for DSP, are used during the JCA to assess a person's eligibility for DSP.
- 134 The Impairment Tables were reviewed in 2011 to ensure they were up to date with the then current medical and rehabilitation practice. An expert Advisory Committee was commissioned to oversee the review and provide expert advice on revised Impairment Tables. The Advisory Committee included medical, allied health and rehabilitation experts, representatives of disability peak bodies, mental health advocates and relevant Government agencies. The Advisory Committee undertook the review of the Impairment Tables in close consultation with medical and allied health professionals, as well as other disability stakeholders.

***Legal protection for people with disability who experience discrimination in the workplace***

- 135 Counsel Assisting submitted that protections provided under the current legislation against disability discrimination in Australia can be difficult to understand and access.<sup>49</sup> The Australian Government notes, in accordance with the DDA, a DES participant with a disability has a right to the same employment opportunities as a person without a disability.
- 136 The DDA protects people with disability from discrimination on the basis of their disability in the context of their employment. This includes protection from discrimination when getting a job, the terms and conditions of a job, training, promotion, and being dismissed. The DDA also protects people from harassment on the basis of their disability in the context of their employment. If a

<sup>48</sup> Submissions of Counsel Assisting, [233].

<sup>49</sup> Submissions of Counsel Assisting, [235].

- person with a disability can do the main activities, or 'inherent requirements' of a job, then under the DDA they should have an equal opportunity to do that job.
- 137 The Australian Human Rights Commission (**AHRC**) has the ability to investigate and conciliate complaints of disability discrimination under the DDA. Where conciliation fails, an employee has the right to take the matter to the Federal Court or Federal Magistrates' Court. Employers of DES participants are also required to comply with the National Employment Standards as the minimum standards applying to the employment of all employees.
- 138 People with disability can access the Complaints Resolution and Referral Service (**CRRS**), which is an Australian Government initiative. The CRRS is a free service which provides an independent, fair, impartial and nationally accessible complaints resolution and referral service for people with disability who are users of services funded under the *Disability Services Act 1986* (Cth), which includes DES providers, ADEs and advocacy services.
- 139 With regards to intersectional discrimination, the Australian Government acknowledges that where an individual experiences discrimination on a number of grounds this can have a compounding effect. Federal anti-discrimination laws do not allow complainants to bring a complaint of discrimination in relation to multiple attributes. However, there is federal legislation to protect against discrimination on the basis of other attributes, such as the *Racial Discrimination Act 1975* (Cth). Some state and territory legislation allows for complaints to be made in relation to multiple attributes; Victoria, Tasmania, South Australia and the ACT allow a discrimination complaint on the basis of multiple attributes.
- 140 Further, the Australian Government notes that general protections provisions of the Fair Work Act protect employees with a disability from adverse action being taken against them because of their disability (unless the action is permissible under anti-discrimination laws or based on the inherent requirements of the particular position).
- 141 There are a number of avenues available to an employee who believes they have been subject to a general protections contravention. The Fair Work Ombudsman can investigate alleged contraventions of general protections and can initiate legal action for penalties of up to \$13,320 for an individual, or \$66,600 for a corporation. The FWC can also deal with workplace disputes about alleged contraventions of the general protections provisions. If attempts to resolve a dispute at the FWC are unsuccessful, the employee can choose to make an application to either the Federal Circuit Court or Federal Court to deal with the matter. In the event that a person is found by those Courts to have breached the general protections provisions of the Fair Work Act, the Courts have the power to:
- (a) issue a fine (known as a pecuniary penalty);
  - (b) make an order for reinstatement;
  - (c) make an order awarding compensation for loss;
  - (d) grant an injunction or interim injunction; or

- (e) award costs.

#### **H. PROPOSED FURTHER INQUIRIES**

142 The Australian Government acknowledges Counsel Assisting's proposition that further inquiries be made into the following areas with regards to the employment of people with disability:

- (a) the private sector;
- (b) the public sector, including the APS;
- (c) the DES system;
- (d) the Australian Government's overarching strategy to increase employment for people with disability, including the National Disability Strategy and developing the Employment Strategy;
- (e) the operation of relevant laws and institutions intended to protect and safeguard the rights of people with disability in the workplace; and
- (f) the Willing to Work Report and other previous inquiries; and
- (g) supported/segregated employment.<sup>50</sup>

143 The Australian Government appreciates the opportunity to assist the Royal Commission with any of these inquiries.

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<sup>50</sup> Submissions of Counsel Assisting, [253], [255], and [260].