

16 December 2016

Department of Social Services
GPO Box 9820
Canberra ACT 2601

Dear Sir/Madam,

Thank you for the opportunity to provide feedback on the *New Disability Employment Services from 2018 Discussion Paper* (the discussion paper).

The role of the Public Advocate was established under the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity. The primary role of the Public Advocate is to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity, particularly their right to maximum participation in decisions affecting their lives.

This response to the discussion paper therefore focusses on jobseekers who have conditions such as intellectual disability, acquired brain injury or mental illness that may impact upon their decision-making capacity during the job seeking process and while they are employed.

Introductory comment

I commend the Department of Social Services (the department) on a comprehensive analysis of the issues facing Disability Employment Services (DES) and jobseekers with disability. I am particularly supportive of the strong orientation in the discussion paper towards affording jobseekers increased choice and control in various aspects of the employment process, such as choosing their DES provider and the services they receive, as well as directing their participation in job readiness activities.

However, I have concerns in relation to the issues of choice and control for jobseekers with impaired capacity when choosing their DES provider, building employer demand for jobseekers with disability, and the drive towards a competitive DES market.

Choosing DES providers

The discussion paper proposes that, where DES participants are unwilling or unable to choose a provider, they will be assigned providers using a default allocation method. While this approach is well-intentioned (e.g. it can expedite the selection process when jobseekers are unwilling to choose a provider), it may be inappropriately used with people who are having difficulty choosing or communicating their choice of a provider because these difficulties are incorrectly interpreted as them lacking capacity for that type of decision.

While jobseekers with impaired capacity may be able to make few, some or most decisions on their own, they may at times require some assistance from others. If they lack capacity to make a decision on their own, but can do so when provided with reasonable supports (such as assistance from departmental staff who can explain the matter requiring a decision in ways they can understand), these adjustments need to be provided so that people with disability can participate actively in decisions that affect their lives.¹

The proposed default allocation method for determining DES providers is also arguably inconsistent with the department's commitment to support choice and control. Further, it risks contravening people's human right to participate in decisions about their lives² and their legal right to the presumption of capacity.³ It also potentially contravenes provisions in the *Guardianship and Administration Act 2000* (Qld) that require adults with impaired capacity be provided with support to participate in decision-making to the maximum degree possible.⁴

Before being allocated a DES provider via default allocation, I suggest that individuals who experience difficulty making or communicating the decision to choose a DES provider should be provided with support, or access to support, to do so. The department should establish processes whereby jobseekers who are unable to choose a provider due to impaired capacity for that type of decision are provided with access to supporters where necessary, or are provided with information and support from DES staff to understand the most appropriate options available to them and participate in the decision-making process.

Building employer demand for employees with disability

Another issue of concern is that of increasing employer engagement in the DES system. One of the critical barriers to the employment of people with disability is a lack of willingness among employers to hire and retain people with disability. The discussion paper acknowledges this problem when it states:

Unless there is sufficient demand for workers with (and without) disability, improvements in services and the job readiness of people with disability can yield only marginal improvements in employment outcomes.⁵

While the discussion paper identifies the critical importance of employer engagement in the system, it could go further in proposing solutions that may significantly increase employer demand for job applicants with disability and improve rates of employment for people with disability generally. For example, the discussion paper outlines passive mechanisms for engaging potential employers such as providing information on the JobAccess website and promoting disability employment awards.⁶ These approaches are based on the presumption that employers value being perceived as an employer of people with disability and are actively seeking to hire people with disability. However,

¹ Ensuring people with impaired decision-making capacity have support to make decisions about programs that affect their lives is a human right. See United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) preamble <<http://www.un.org/disabilities/convention/conventionfull.shtml>>.

² United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) preamble <<http://www.un.org/disabilities/convention/conventionfull.shtml>>.

³ *Guardianship and Administration Act 2000* (Qld) Sch 1, Pt 1, 1.

⁴ *Guardianship and Administration Act 2000* (Qld) Sch 1, Pt 1, 7.

⁵ Australian Government Department of Social Services, *New Disability Employment Services from 2018: Discussion Paper* (2016) 11.

⁶ Above n 5, 53-54.

many employers do not consider potential employees with disability based on unchallenged fears and perceptions of risk which include:

- apprehension about the cost of associated hiring someone with a disability and managing the associated costs of reasonable adjustment and supervision;⁷
- concern that people with disability may require special treatment;⁸
- lack of awareness about how to deal with workers with disability;⁹
- concern about a loss of productivity;¹⁰
- difficulty in severing the employment relationship if it does not work out;¹¹
- concern about legal liability;¹² and
- apprehension about not getting someone qualified to do the job¹³ or of getting someone who “can’t do the job 100%”.¹⁴

In addition to challenging the negative stereotypes held by employers about jobseekers with disability, any strategy designed to encourage employers to employ people with disability must also recognise that businesses are not charities: they employ jobseekers because it makes good business sense to do so.¹⁵ Those employers yet to discover the social and economic benefits of employing people with disability may need to be provided with motivations beyond short-term financial incentives and subsidies, and recouping the costs of reasonable adjustment.

I am also concerned that these approaches reinforce some of the incorrect fears and perceptions about employing people with disabilities because their approach seems to be a confirmation that people with disabilities are a burden for employers for which they should be compensated.

Examples of drivers that have resulted in increased employment for people with disability include:

- a compelling business case demonstrating that employing people with disability can benefit businesses (e.g. a business selling disability products, such as wheelchairs, is able to promote itself as an employer of people with disability);
- complying with quotas or requirements in government contracts (e.g. tenders are awarded to organisations that employ a specified percentage of people from marginalised groups, such as people with disability);
- corporate social responsibility (e.g. where employers strive to be seen ‘doing the right thing’);
- an organisational moral imperative (e.g. employing war veterans with disability after a major conflict);

⁷ Bob Peck and Lynn Trew Kirkbride, ‘Why Businesses Don’t Employ People with Disabilities’ 16(2) *Journal of Vocational Rehabilitation* (2001) 71-75; H Stephen Kaye, Lita H Jans and Erica C Jones, ‘Why Don’t Employers Hire and Retain Workers with Disabilities?’ 21(4) *Journal of Occupational Rehabilitation* (2011) 526-536.

⁸ H Stephen Kaye, Lita H Jans and Erica C Jones, ‘Why Don’t Employers Hire and Retain Workers with Disabilities?’ 21(4) *Journal of Occupational Rehabilitation* (2011) 526-536.

⁹ Above n 8.

¹⁰ Bob Peck and Lynn Trew Kirkbride, ‘Why Businesses Don’t Employ People with Disabilities’ 16(2) *Journal of Vocational Rehabilitation* (2001) 71-75.

¹¹ Above n 10; above n 8.

¹² Above n 8.

¹³ Above n 10; above n 8.

¹⁴ Above n 8.

¹⁵ Above n 10.

- capitalising on personal experience (e.g. where senior executives have personal experience/knowledge of disability and take leadership on the issue of employing people with disability); and
- addressing anticipated workforce shortages.¹⁶

Addressing negative perceptions and providing incentives for employers are, however, not enough to drive significant increase in the demand for employees with disability. Leadership from within government and the private sector is also needed.

Leadership from government is needed to develop a proactive and effective approach to growing the pool of prospective employers of people with disability.¹⁷ While the *National Disability Strategy 2010-2020* (the NDS) outlines government's commitment to achieving economic independence for people with disability,¹⁸ it does not outline sufficiently robust or comprehensive approaches to growing demand for jobseekers with disability. Further, the *National Disability Strategy Progress Report to the Council of Australian Governments 2014*¹⁹ (the progress report) shows there has been little tangible progress in this regard since the release of the NDS. The progress report also provided little evidence of government's achievements in setting the standard as a major employer of people with disability. Apart from limited inclusions such as providing subsidies to employers for employing people with disability, providing financial assistance to assist organisations with workplace modifications, and providing information to employers through the JobAccess advisory service, I suggest that government's policy and program platform is not sufficient to significantly increase the number of employers willing to employ people with disability.

Government engagement with potential employers of people with disability therefore represents a substantial policy gap. It will take concerted effort from government to bridge this gap, and develop courageous and creative approaches to creating a full range of employment options for people with disability. In addition to the initiatives raised on pages 3 and 4 of this submission, some possibilities for beginning this work include:

- establishing compulsory minimum employment targets for government agencies and contracting agencies in relation to people with disability;
- encouraging a social responsibility mindset among Australia's largest employers, and offering tax breaks for big businesses on the condition that they achieve a specified minimum target of employees with disability;
- capitalising on employers' desire for positive publicity and establishing a Disability Equality Index (DEI)²⁰ similar to that which exists in the United States of America. The DEI ranks employers on their inclusion of people with disability in their workplaces, except that an Australian DEI should also measure the proportion of people with disability who are employed in the workplace;

¹⁶ hrdaily, *Employ People With Disability For Your Benefit, Not Theirs* (22 May 2013) <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=2612>.

¹⁷ Council of Australian Governments, *National Disability Strategy Summary Document* (2011) 6-7.

¹⁸ Council of Australian Governments, *2010-2010 National Disability Strategy* (2011) 42-43.

¹⁹ Australian Government Department of Social Services, *Progress Report to the Council of Australian Governments* (2014) <<https://www.dss.gov.au/disability-and-carers/programmes-services/government-international/progress-report-to-the-council-of-australian-governments-2014>>.

²⁰ American Association of People with Disabilities and USBLN Business Leadership Network, *Disability Equality Index* <<https://www.disabilityequalityindex.org/>>.

- extending funding for pilot employment schemes that are demonstrating exceptional outcomes for people with disability (such as National Disability Services' Ticket to Work Program²¹); and
- developing partnerships with the National Disability Insurance Agency (notably the Information, Linkages and Capacity Building service arm of the National Disability Insurance Scheme) to explore and promote employment opportunities for people with disability.

Powerful examples of leadership are also needed from the private sector. There is a need for well publicised forums that showcase employers that have achieved positive business growth using a strategic and evidence-informed approach to the employment of people with disability. Establishing exemplars of disability employment inclusion could be used to complement the awards scheme outlined in the discussion paper.²² Exemplars may include organisations that adopt disability-friendly technology and work practices that optimise participation by people with disability (such as Walgreens in the United States of America²³ and ANZ in Australia²⁴).

In summary, promoting the benefits of hiring people with disability without enacting proactive strategies that mitigate entrenched apprehensions about hiring people with disability, offering incentives to employers, and providing strong leadership in the disability employment sector are unlikely to contribute substantially to improving employment targets. This aspect of DES performance – engaging, educating and motivating employers – warrants considerably more investment from the department than is currently outlined in the discussion paper.

The drive towards a competitive DES market

I am concerned about the emphasis in the discussion paper on an increasingly competitive market among DES providers. Neo-liberalist economic philosophies espousing the value of a free and competitive marketplace have met with increasing criticism in recent years, and yet they continue to be embedded at the core of Australia's social services system. In contrast, the human service sector in Australia has a proud history of sharing knowledge and resources, and of collaborating with other services to deliver the best possible outcomes for all customers.

Shifting this collaborative orientation to one of competition is not likely to deliver better outcomes within a resource-limited sector assisting many hard-to-place jobseekers to obtain employment in a relatively small market of disability-friendly employers.

Further, while encouraging service providers to operate more efficiently with limited resources is always desirable, it may occasionally be necessary to invest much more than may seem reasonable in a particular case to establish a person with disability in a position. In a competitive and efficient market, such over-investment may be considered by some to not be a sound financial decision. From a human rights perspective, however, this approach is desirable. Government needs to consider the potential problems with a competitive market, particularly as it relates to human service provision. It must seek to find a balance between operating efficiently and competitively, and doing what is necessary and ethical to deliver meaningful employment outcomes for people with disability.

²¹ Ticket to Work, *Employment Opportunities for Young People with Disability* <<http://www.tickettowork.org.au/>>.

²² Above n 5, 54.

²³ Walgreens, *Disability Inclusion: One Idea, Big Opportunity* (2016) <https://www.walgreens.com/topic/sr/sr_disability_inclusion_detail.jsp>.

²⁴ Australian Government Department of Employment, *An Employers' Perspective on Disability – ANZ* <<https://employment.gov.au/videos/employer-s-perspective-disability-anz>>.

Concluding comments

I support the department's increased focus on supporting choice and control for jobseekers with disability in the DES. However, I have concerns about the degree to which jobseekers with impaired decision-making capacity will be provided with opportunities and support to exercise their autonomy during the jobseeking process. I suggest that the department introduce mechanisms that promote supported decision-making for jobseekers with impaired capacity in situations where they are risk of having decisions made for them inappropriately. In addition to promoting the benefits of hiring people with disability, government must take a strong and proactive approach to addressing stereotypes and misconceptions about employees with disability, provide an evidence-based business case for hiring people with disability, and develop creative and courageous strategies for growing leadership in the disability employment market. I also caution government against too strongly encouraging market competition between DES providers or run the risk of undermining one of the great strengths of the Australian human service sector – collaboration.

Thank you again for the opportunity to provide feedback about proposed changes to the DES. Should the opportunity arise, I would be pleased to be part of further discussions in relation to these changes or any of the matters raised in this submission.

Yours sincerely



Mary Burgess

Public Advocate

Office of the Public Advocate (Queensland)