

BEFORE THE FAIR WORK COMMISSION

S157 –VARIATION OF MODERN AWARDS TO ACHIEVE THE MODERN AWARDS OBJECTIVE

MATTER NO. AM2020/18

APPLICANTS' OUTLINE OF SUBMISSIONS

28 APRIL 2020

INTRODUCTION

1. This submission is made jointly by the Australian Services Union (**ASU**), the Health Services Union (**HSU**), National Disability Services (**NDS**) and the United Workers' Union (**UWU**) (**collectively 'the Applicants'**) pursuant to the directions issued 28 April 2020.
2. The Applicants have applied for the Social, Community, Home Care and Disability Services Industry Award (**the Award**) to be varied by inserting a new clause X.3 Covid-19 Care Allowances in Schedule X.
3. The clause is necessary to achieve the modern awards objective, in accordance with s 157 of the *Fair Work Act 2009* (*'the Act'*) for the reasons set out below.

The proposed variation

4. The proposed clause is set out below:

X.3 Covid-19 Care Allowance

- (a) This clause applies to social and community services employees undertaking disability services work.*
- (b) Where an employer requires an employee to work with a client who:*
 - (i) is required by government or medical authorities to self-isolate in response to the COVID-19 Pandemic;*
 - (ii) is required on the advice of a medical practitioner to self-isolate in response to the COVID-19 Pandemic;*
 - (iii) the employer reasonably suspects has COVID-19; or*
 - (iv) has COVID-19;*

the employee will be paid an hourly allowance of 0.5% percent of the Standard Rate.

5. The clause provides an allowance for employees of disability services when working with clients who have or might have contracted COVID-19.
6. The value of the allowance is \$4.94 per hour. By way of example, this is equivalent to a 15 percent increase in the hourly rate of pay for a Social and Community Services Employee ('SACS Employee') Level 3.1 under the transitional rates of pay that apply in New South Wales under Equal Remuneration Order.
7. SACS Employees are classified and paid under Schedule B – Classification Definitions – Social and Community Services Employees. Many disability services employees are classified at SACS Employee Level 2. Disability services employees providing more complex care are classified at SACS Employee Level 3. Some disability services employees may be classified at higher classification levels.
8. A Level 3 SACS Employee is the appropriate classification point. It is likely that work with clients who have COVID-19 will be assigned to more senior disability services employees, who may be classified at SACS Employee Level 3. The NSW transitional rates of pay have been chosen as an example because NSW is the most populous state, with the largest disability workforce, and the highest rates of COVID-9 infection.
9. The value of the allowance has been set to compensate for both the additional responsibilities and the additional disability associated with working with clients who have or might have contracted COVID-19. This is addressed in detail below.
10. To date, the incidence of situations where this allowance would apply has been quite small with only a small number of cases of Covid-19 infected NDIS participants known. However, in individual situations where this would apply, the cost to an individual employer of this allowance could be significant, and is not covered by existing NDIS pricing.
11. The parties have been in discussion with the Commonwealth about this matter with a view to securing funding support for such an allowance, on the basis that it will help to meet public health objectives and secure ongoing quality support for people with disability.

THE NATURE OF DISABILITY SUPPORT WORK AND THE NEED FOR THE COVID-19 CARE ALLOWANCE

12. The proposed allowance recognises the fact that people with disabilities who are self-isolating or have contracted Covid-19 may still require support from a disability support

worker during this pandemic, and that this work is more onerous than the work usually performed by disability support workers. The proposed allowance is intended to compensate these employees for the onerous nature of the work.

Demographics of the disability sector workforce

13. The disability support workforce has a high proportion of casual and part-time employees. Data from workforce surveys consistently estimate around 42% of the workforce being casual and around 40% being part-time.
14. Casual employees are able to exercise some choice over which shifts they accept, and part-time employees may lack an economic incentive to take on additional shifts where a client has been required to self-isolate due to potential or known Covid-19 infection, particularly where their usual income is less than the amount available where JobKeeper payments apply. With over 80% of the workforce being in these categories, employers have a concern about workforce supply in the absence of some corrective economic incentive to compensate for the more onerous nature of this work.

Duties of a disability support worker

15. Disability support workers work with clients with physical or mental disabilities across all aspects of their daily living activities. This may involve working in a group home where a number of people with disabilities live together, or in a private home providing respite care where family members are unable to care for the client.
16. The work of a Disability Support Worker includes providing personal care or domestic assistance. A disability support worker may assist clients with preparing meals, feeding clients, including through PEG (percutaneous endoscopic gastrostomy) tubes if required, shopping with clients for groceries, attending appointments with clients, recreational activities, assisting with physical exercise, and attending to personal care needs of clients including toileting and showering.
17. The duties of a Disability Support Worker also extend to building the client's capacities and supporting their life choices. This includes teaching, promoting or maintaining living skills, client advocacy, and promoting or supporting community access and social inclusion.
18. Disability work requires physically close, often one-on-one, contact with clients. Employees working clients who have COVID-19 or who are self-isolating because of the presumption

that they may have contracted the virus, will need to follow a far higher level of protocol and standards around infection control than usual in order to work with these clients¹²³.

19. The use of Personal Protective Equipment ('PPE'), enhanced infection control measures, and the requirements of physical distancing will make much of the disability support role more physically demanding. Physical interactions for the purpose of personal care of clients will be physically more difficult, and there may be personal discomfort associated with the prolonged use of PPE. The witness statement of David Moody refers to the experience of providers in relation to the requirements in the Covid-19 context⁴.
20. In addition to enhanced infection control procedures and the use of PPE, there are also additional tasks involved where a client is required to self-isolate. Disability support employees may be required to help the client to understand and adjust to significant changes in their routine, including explaining the need for self-isolation, why they cannot leave the house, why they cannot see their friends, and why they can no longer attend their regular activities. Disability support workers may need to create new routines and programs for these clients. This can be especially difficult for clients with intellectual disability who do not cope well with changes to routine.
21. In a group home environment, a disability support worker may have to work on educating their client about self-isolation procedure, and ensuring this is followed by their client to ensure that other residents in the group home are not exposed to the virus. This may also involve managing interactions and relationships between multiple clients resident in the same home.
22. Clients with disabilities in self-isolation may also exhibit challenging behaviours and need increased emotional support from their disability support workers. Such behaviour changes, and responses such as frustration or depression in clients often arise from a change or routine, and can be exacerbated in situations such as self-isolation.

¹ <https://www.health.gov.au/sites/default/files/documents/2020/03/coronavirus-covid-19-environmental-cleaning-and-disinfection-principles-for-health-and-residential-care-facilities.pdf>;

² <https://www.health.gov.au/sites/default/files/documents/2020/04/coronavirus-covid-19-guide-for-home-care-providers.pdf>

³ <https://www.health.gov.au/sites/default/files/documents/2020/04/coronavirus-covid-19-guidelines-for-infection-prevention-and-control-in-residential-care-facilities.pdf>

⁴ Witness statement of David Moody, 29 April 2020

23. Client behaviours must be managed without the use of restrictive practices, such as seclusion, chemical, mechanical or physical restraint.^{5 6}

THE MODERN AWARDS OBJECTIVE

24. The Commission must ensure that modern awards, together with the National Employment Standards ('NES'), provide a '*fair and relevant minimum safety net of terms and conditions taking into account the modern awards objectives.*' The Applicants' claim is consistent with this task.

'Fair and relevant'

25. The COVID-19 pandemic is clearly a matter which impacts on the work of Disability Services Employees engaged under the Award. The Award as it stands cannot be said to be '*fair and relevant*' as it provides no recognition of the disutility occasioned by the COVID-19 pandemic for Disability Service Workers. The allowance can be characterised as fair and relevant as it is responsive to a real, foreseeable and distinct change in the work environment created by the COVID-19 pandemic for Disability Service Workers.

26. The COVID-19 care allowance as proposed provides distinct and appropriate compensation for employees carrying out disability services work. It would only apply for a limited period of time and in specific circumstances.

Consideration 134(1)(a)

27. Paragraph s 134 (1)(a) of the Act requires the Commission to take into account '*the relative living standards and the needs of the low paid.*'

28. Some of the employees in this sector earn low wages, with commencement rates for a social and community services employee level 2 (Level 2.1) is \$22.69 per hour. There is currently an equal remuneration order in place covering the minimum weekly wages for social and community services employees and crisis accommodation employees. Some of the employees who will be able to access the COVID-19 care allowance do not fall within the accepted definition of being low paid but can be considered to earn a moderate wage in the context of the high level of responsibility required in their roles. The COVID-19 pandemic has

⁵ <https://www.ndiscommission.gov.au/regulated-restrictive-practices>

⁶ <https://www.ndiscommission.gov.au/sites/default/files/documents/2020-03/fact-sheet-covid-19-behaviour-support-and-restrictive-practices.pdf>

amplified the responsibility of these employees as in many cases vulnerable citizens rely on these workers for their basic needs. Given the wage rates in the sector, it is not appropriate for employees to be expected to work in an environment that involves significant disability without any additional compensation.

Consideration 134(1)(b) – the need to encourage collective bargaining

29. The Applicants' claim would neither encourage nor discourage collective bargaining.

Consideration 134(1)(c)- promotion of social inclusion through increased workforce participation

30. The variation will be apt to promote social inclusion through increased workforce participation. A feature of the allowance is that it seeks to compensate Disability Services Employees for the disutility of having to apply enhanced hygiene protocols and use PPE to do their work.

31. The allowance is also directed to the disincentives that have arisen concerning this group of workers' participation in work. The Federal Government has extended social welfare provision during the COVID-19 pandemic, including the creation of a Jobseeker Allowance and COVID Supplement to support unemployed workers. Social welfare payments to an unemployed worker range between \$1,264.10 and \$1,335.58 depending on their living arrangements and number of dependents. In many cases, the income from working as a part-time or casual Disability Support Worker classified at SACS Employee Level 2 or SACS Employee Level 3 would be comparable to income from social security payments. This may mean working in disability services during the pandemic will be less attractive, given the increased responsibilities and disabilities associated with working with clients who have or might have COVID-19.

Consideration 134(1)(d) – flexible modern work practises and the efficient and productive performance of work

32. The allowance provides an appropriate response to a critical change in the work environment of Disability Service Employees and in this sense can be characterised as providing for flexibility and the promotion of efficient work practises and the productive performance of work. We have sought to make the allowance as simple as possible. The allowance is closely related to the necessity for greater hygiene measures and the use of PPE in the performance of work and is therefore directed to the efficient and productive performance of work.

33. It would be entirely inefficient and non-productive for the Award not to provide some recognition that Disability Service Workers are now required, in some situations, to perform work in the environments noted at X.3 (b) of the draft variation.

Consideration 134(1)(e)- equal remuneration for work of equal or comparable value.

34. Paragraph 134(1)(e) requires the Commission to ensure that modern awards in the provision of a fair and relevant safety net take into account ‘*the principle of equal remuneration for work of equal or comparable value*’.

35. The disability and community sector is overwhelmingly female. The factual findings concerning a gendered undervaluation in *Re Equal Remuneration Case*⁷ are still relevant and reflected in the equal remuneration order that was made under section 302 of the Act.

36. Our proposed COVID-19 allowance concerns a variation to the Award that will form part of the safety-net of fair and relevant terms and conditions which is assessed against the modern awards objective. The fact that the allowances will be paid predominantly to women whose caring work is culturally undervalued due to gender is relevant as a consideration.

Consideration 134(1)(f) –impact on business, productivity, employment costs and regulatory burden.

37. In terms of regulatory burden, the allowance is a proportionate and appropriate response to what is a complex and unresolved public health crisis.

38. In the absence of funding for the allowance, the overall burden on the sector is likely to be small provided levels of infection remain low, however the burden on individual employers may be significant.

39. The joint application has been made in the context of ongoing discussions with the Commonwealth about funding support through the NDIS pricing structure in order to ensure that the allowance is able to operate effectively and deliver the public health outcomes being sought.

Consideration 134(1)(g) – a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap.

40. The work performed by Disability Support Workers can be characterised as having some uniqueness and this is a neutral consideration.

⁷ (2011) 208 IR 345.

Consideration 134(1)(h) – employment growth, inflation and sustainability, performance and competitiveness of the national economy.

41. The allowance is principally a measure in response to a public health crisis and this consideration is relevant as the allowance will assist in the sustainability and performance of important work directed to the care of vulnerable citizens.

CONCLUSION

42. For the reasons set out above, the Commission would be minded to make the variation proposed by the Applicants. The application is urgent. We ask that the Commission make its determination as a matter of urgency, and that the determination take effect as soon as possible.

**Australian Services Union
Health Services Union
National Disability Services
United Workers Union
29 April 2020**

BEFORE THE FAIR WORK COMMISSION

MATTER NO. AM2020/8

S.157 – VARIATION OF MODERN AWARDS TO MEET THE MODERN AWARDS OBJECTIVE

Statement of David Moody

I, David Moody, of Level 6, 369 Royal Parade, Parkville in the State of Victoria say:

1. I am the Chief Executive Officer of National Disability Services (NDS).
2. I commenced with NDS in July 2015 in the role of Victorian State Manager.
3. Before working at NDS I was employed in a number of different roles, including as a private lawyer, practising in workers' compensation and OHS; an executive in the Victorian Public Service and at WorkSafe Victoria; and as Assistant Director, NDIS Secretariat at the Department of Premier and Cabinet, from January 2011 until August 2013.
4. I hold a BA and LLB from Monash University.
5. In my role as CEO of NDS, I provide information, representation and policy advice to government on disability and related issues.
6. I make this statement on the basis of my own knowledge and inquiries, save where otherwise stated. Where I make statements based on information provided to me by others, I believe such information to be true.

About NDS

7. NDS has more than 1,000 members across Australia. Collectively, NDS members operate several thousand services for Australians with all types of disability.
8. NDS is the only organisation that represents the full spectrum of disability service providers. Members range in size from small support groups to large multi-service organisations and are located in every region of Australia.
9. NDS has committees established in each state and territory, as well as nationally, that consider workforce issues and provide informed advice and feedback to the Board to support our policy and advocacy work on those matters.
10. NDS traces its roots back to 1945. It was founded by charitable organisations – many of them founded by the families of people with disability – that recognised the value of national representation. From an initial advisory council, the Australian Council for the Rehabilitation of the Disabled was established which evolved into National Disability Services.

Disability support work in the Covid-19 context

11. I am aware of a range of Government directives relating to the public health aspects of providing disability support in the context of the Covid-19 pandemic.
12. To date, only a small number of participants of the National Disability Insurance Scheme (NDIS) have tested positive for Covid-19.
13. Where participants have tested positive and have continued to require disability support, significant changes to how work is performed has been required.
14. The changes include a need to implement heightened infection control procedures, the use of Personal Protective Equipment, and physical distancing.
15. The use of PPE makes the performance of personal care such as showering, toileting, administration of medication and PEG tubing, and feeding physically more difficult.
16. The changes in procedures can be confronting and upsetting to participants, particularly where they have intellectual disability. This in turn can lead to challenging behaviours outside the normal range of behavioural issues.
17. The advice from NDS members who have had to deal with participants directed to self isolate has been that the changes in work procedures are significant and difficult for the staff who have to implement them.



David Moody

Chief Executive Officer

National Disability Services

29 April 2020