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2011 LIV Community Lawyer of the Year Award | 2013 Tim McCoy Award | 2014 HESTA Social Impact Award  
2016 National Disability Award - Excellence in Justice and Rights Protection

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## **A submission in response to the Discussion Paper: The Future of Supported Employment**

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## Who we are

AED Legal Centre (AED) is a specialist Community Legal Centre operating throughout the state of Victoria.

The centre provides information, education, advice, and legal representation to people with disability who experience discrimination in employment or education.

Our main objective is to defend the human rights of people with disability and give them access to the justice system through legal and systemic advocacy.

AED is part of the National Disability Advocacy Program (NDAP) and is mainly funded through the Department of Social Services (DSS).

Our national Wage Justice Campaign is funded by the Reichstein Foundation.

The centre is a member of the Federation of Community Legal Centres of Victoria.

## What we do

*Our experienced and dedicated staff provide the following services:*

- Negotiate workplace solutions between employees with disability and employers
- Educate employees with disability about their employment rights
- Draft complaints of discrimination or applications of unlawful termination of employment
- Legal representation in the state and federal justice system
- NDIS Appeals Program – legal advocacy for NDIS participants who want a review of an NDIA decision by the Administrative Appeals Tribunal (AAT)
- Legal advice to employees who have been offered a payment under the BSWAT Payment Scheme by the Department of Social Services
- Information services to: employers, employees, disability professionals, government, school principals and universities
- The Night of Justice Program - every Wednesday night from 6:30pm. This program is staffed by AED Legal Practitioners who supervise a team of volunteer law students and private legal practitioners.
- The Student Placement Program - a structured legal practise program for law students of Victorian University supervised by AED's Principal Legal Practitioner (Principal).
- Systemic projects that promote the inclusion of employees with disability in employment

AED is an interested party at the 4-yearly Review of the Supported Employment Services Award (2010), being one of the major players in the action which is currently before the Full Bench at the Australian Fair Work Commission (FWC).

For more information please see [www.aed.org.au](http://www.aed.org.au)

AED welcomes the opportunity to make a submission in response to the Discussion Paper: *The Future of Supported Employment*.

## Question 1

*Are there other principles, which should guide the Government's policy direction for supported employment?*

We believe that the Government's policy direction should adhere to international law. Unfortunately, Australian Disability Enterprises (ADEs) are currently not in compliance with article 27 of the *Convention on the Rights of Persons with a Disability (CRPD)*.

Article 27 of the CRPD Work and Employment states in part:

*States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:*

- a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;*
- b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances ...<sup>1</sup>*

It is our contention that the majority of ADEs do not comply with article 27 of the CRPD as they do not provide inclusive work environments. They remain largely segregated workplaces and in essence a form of institutionalisation.

Nor do the majority of ADEs deliver fair and equitable remuneration. As the *Discussion Paper - A Strong Future for Supported Employment* points out on p.12: <sup>2</sup>

- *70-75 per cent of supported employees have an intellectual disability*
- *The average weekly wage for a supported employee is \$121.72*
- *The average hourly rate is \$5.61, with wages ranging from \$1.00 per hour to full award wage (We have clients who are paid less than \$1.00 an hour).*
- *Supported employees must be able to work a minimum of eight hours per week*
- *The average hours worked are 23 per week*
- *The average cost of employment support from the Government per supported employee is \$11,800.*

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<sup>1</sup> United Nations, Convention on the Rights of Persons with Disability, Article 27- Work and employment, (<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-27-work-and-employment.html>) (visited 21.2.2018).

<sup>2</sup> Commonwealth of Australia, Department of Social Services, 2016, *Discussion Paper - A Strong Future for Supported Employment*, (<https://engage.dss.gov.au/the-future-of-supported-employment/a-strong-future-for-supported-employment-discussion-paper/>) (visited 21 February 2018).

The paper states that ADEs act as “a link, helping people with moderate to severe disability gain training and experience to confidently step into open employment”.

In our experience training opportunities for supported employees are very limited and the transition from supported employment to open employment is virtually non-existent.

Whilst we acknowledge the diversity and quality of ADEs across Australia and particularly the 24 ADEs that have adopted the Supported Wages System, it is our contention that over the years, reforms and regulation have not delivered the desired outcomes in improving the sector and promoting the rights of employees with disability working in ADEs.

## Question 2

*What is a ‘good’ participation outcome for a supported employee and how can good outcomes be measured?*

A good participation outcome for a supported employee is the ability to get access to vocational training pathways enabling transition to a wider variety of employment service models as well as wages that are fair and equitable. This would also include participation in open employment settings.

Government employment policy should encourage the development of new services that create improved employment pathways for people with disability.

## Customised Employment

We are fully supportive of current employment models and supports that encourage and work towards job customisation. The traditional job application and interview process is ineffective for most people with intellectual disability looking to engage with employers. Few people with significant intellectual disability get work through an advertised vacancy approach.

The most successful employer engagement method for jobseekers with intellectual disability in Australia is *job customisation*. A customised job is designed to meet genuine employer need which adds value to a business. This is an employer engagement strategy conducted by a skilful provider seeking to meet business needs or solutions which also meet the strengths and interests of a job candidate.

A customised job is a set of tasks that differ from standard job descriptions and instead are based on tasks found within a workplace. A customised proposal unites the tasks that exist in a workplace and makes them available to be rearranged into a customised job description. It is a process which requires a much deeper level of interaction between providers and employers. This is employer engagement at a local, often personal, level. (Source: Inclusion Australia webpage).

## Social Firms

In light of the concerns about a lack of inclusivity in AEDs we feel that the current supported employment model should not be the only service model nor the only focus in a new expanded supported employment sector.

We are of the view that the Australian Government should make a substantial investment in other models of supported employment such as the Social Firm model or customized employment support services.

The Social Firms Australia website describes the Social Firm model as follows:

*A social firm is a not-for-profit enterprise with a supportive work environment that:*

- Ideally employs between 25% and 50% of employees with disability (not less than 25%)
- Pays all workers at award/ productivity-based rates
- Provides the same work opportunities, rights and obligations to all employees
- Generates the majority of its income through the commercial activity of the business

The purpose of a social firm is to create employment for people who are facing barriers to work as a result of their disability or disadvantage.

Modifications required for employees in need of particular supports are built into the design and operation of the workplace.

AED is supportive of this employment model for the fact that it provides truly inclusive workplaces and delivers award/productivity based wages. It is our contention that Social Firms meet the inclusivity clauses contained in article 27 of the CRPD.

## **A Fair Wage**

This is a vexed issue currently under consideration in the Modern Award Review of the Supported Employment Services Award (SESA) - the industry standard under which employees with disability working in ADEs are paid.

Fair wages for employees should be a central focal point in discussing the future and the rights of employees with disability working in ADEs. Fair wages are not a bonus; they are the right of every employee.

In many cases, ADEs deliver poor wage outcomes and working conditions for employees with disabilities. The average weekly wage for a supported employee is \$121.72.

The average hourly rate is \$5.61, with wages ranging from below \$1.00 per hour to full award wage.

Based on wages alone, many ADEs do not meet the criteria of article 27 (CRPD) as they do not provide employment 'on an equal basis with others' particularly in relation to wages, working conditions and the wage assessment tools employed.

According Discussion Paper *Inclusion for people with disability through sustainable supported employment* released in 2010 supported employees earned a gross average rate of \$ 3.61 per hour and an average wage of \$88 a week (p.15). Clearly, there have not been significant increments over the last 7 years.

AED believes that all employees with disability have a right to a fair day's pay for a fair day's work.

The assessment of wages for employees with disability in ADEs should be fair, valid and reliable but above all it should be non-discriminatory when compared to employees without a disability.

Whilst the Business Services Wage Assessment Tool (BSWAT), was found to have been discriminatory by the Full Bench of the Federal Court in 2012 (and confirmed by a unanimous decision of the High Court) because of its competency-based component, there are some 21 competency-based wage assessment tools in the SESA, the comparative fairness, validity and reliability of these tools remains contentious.

We are particularly concerned that different wage assessment tools produce different wage outcomes for employees doing the same job because an ADE employer can choose from the 21 wage assessment tools under the SESA to set an employee's wage.

This concern could not have been expressed better than by Vice President Hatcher who at the SESA review hearing of 16 February 2018 said:

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*VICE PRESIDENT HATCHER: I struggle to understand how it could be said to be fair if at one enterprise a person doing a type of work with a certain level of incapacity is paid less than an equivalent person at a different enterprise, simply because of the tool that the employer chooses.<sup>3</sup>*

It is our considered opinion and that of many of our clients that competencies are assessed in a very onerous manner, that they distort wage outcomes and are clearly discriminatory. The competency-based wage assessment tools are not transparent with their very design and structure that has been shown to deliver depressed and discriminatory wages

AED's case at the Fair Work Commission (FWC) was for the removal of all competency-based wage assessment tools from the SESA. If successful, the SESA will contain a wage assessment tool that is fair, equitable and non – discriminatory.

### **The Supported Wages System (SWS)**

AED is of the view that the SWS with the agreed modifications should be the only allowable wage assessment tool in the SESA. This will have an impact on the wages of over 20,000 employees with disability working in ADEs. The SWS is a tool that allows employers to pay a productivity-based wage for people with disability.

The productivity of an employee with disability is independently calculated by assessing how long it takes for them to complete a workplace task compared to an agreed standard both of quantity and quality. The comparison is with another employee without disability to complete the same task at the agreed standard. This then informs the wage of the employee with a disability under the SWS.

The SWS is the only wage assessment tool accepted in workplaces outside of ADEs. It is fair because it calculates an employee's wage based simply on productivity. The SWS increases job opportunities for people with disability as it reduces risk that a disabled employee could be less productive for the same wage cost as other employees.

### **Financial viability**

There has been a lot of what we would consider fearmongering over the past five to ten years about the SWS and how - if introduced across ADEs it will result in higher wages seriously undermining ADEs financial viability and resulting in thousands of job losses.

In 2013 a study of ADEs financial viability conducted by Social Ventures Australia highlighted the following:

*ADEs need to ensure that their pricing strategy reflects... the full costs of producing the product or delivering the service...<sup>4</sup>*

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<sup>3</sup> Fair Work Commission, Transcripts 16.2.18

[https://www.fwc.gov.au/documents/documents/transcripts/20180216\\_am2014286.htm](https://www.fwc.gov.au/documents/documents/transcripts/20180216_am2014286.htm) (visited 27.2.18)

<sup>4</sup> Social Ventures Australia, *ADEs Lifting their Commercial Viability*, SVA Quarterly Issue 6, 30 November 2013. <https://www.socialventures.com.au/sva-quarterly/ades-lifting-their-commercial-viability/>. (visited 27 February 2018).

According to the study by Social Ventures Australia ADE's financial losses were in the main generated by poor sales, few customers and under-pricing.

We, as human rights advocates believe that the financial viability of ADEs should not be traded at the expense of fair and equitable wages for supported employees. Fair wages are not a bonus; they are a human right. AED is seeking to have one wage assessment tool – the SWS - which is a productivity-based tool as the only appropriate wages assessment tool to be used by ADEs (subject to some modifications).

It is of concern that there are claims in the media from ADEs that higher wages for employees with disability would lead to job losses and the closure of ADEs.

Prior to the demise of BSWAT, less than ten (10) ADEs used the SWS. There are now approximately 24 ADEs across Australia that use it. There is no evidence to suggest that any of these ADEs are not viable.

It has been claimed that if ADEs had to pay wages that are assessed using SWS, businesses would have to close. Again ADEs have not provided any evidence to support that prophecy. We believe that morally, ethically and as a principle of justice employees with disability should not subsidise businesses that are not viable. In open employment, this would not be condoned!

In 2015 the Federal Government committed an additional sum of \$173 million to ADEs to pay for the development and implementation of a new wage assessment tool and to assist ADEs transition to a productivity based tool. It was agreed that the SWS would be modified to accommodate the special circumstances in ADEs and by consent of all parties involved (including the ADEs), the modified SWS would be included in the SESA. Further, the Government agreed that some of the funding would be used to assist ADEs in transitioning the modified SWS. To date, these monies set aside for this purpose have barely been accessed. Further, in addition to that sum, the Government announced an investment of \$17 million on business development to improve the viability of ADEs.

On 25 August 2015 the Hon. Mitch Fifield, MP announced that " The Australian Government is delivering employment certainty for up to 20,000 people with disability by committing more than \$650 million to ADEs jobs over the next three years".

In light of the above, unless there is a drastic change in government policy settings, we do not believe ADEs run a high risk of closing down with job losses to follow

### Question 3

*What do supported employees most value about working in an ADE?*

The vision articulated in the Discussion Paper *Inclusion for people with disability through sustainable supported employment* released in 2010 by the Australian Government<sup>5</sup>, features many of the things that people with disability seek from supported employment:

- 1. People with disability in supported employment want to be employed in a work environment that has inclusive workforces and safe workplaces.*
- 2. People with disability in supported employment want to earn a fair wage through improved wage determination processes and other employee benefits.*

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<sup>5</sup> Commonwealth of Australia, *Inclusion for people with disability through sustainable supported employment*, 2010, Executive Summary.



3. *People with disability in supported employment want choice and flexibility in where they work and in the work they do through a person-centred approach.*
4. *People with disability in supported employment want to benefit from appropriate supports over their life time through timely and seamless access to assistance.*
5. *People with disability in supported employment, the supported employment sector and Government want to be confident that businesses are delivering supported employment through better practice models.*
6. *People with disability in supported employment, the supported employment sector and Government want to be confident that partnerships are formed through genuine respect and innovation to improve the supported employment system into the future.*

Surveys, forums and questionnaires administered to ADEs employees over the past twenty years have all found that employees like ADEs because they can be with their friends and/or play with their friends. This begs the question of whether an employment or industrial setting is necessarily the best or most appropriate setting to “make or play” with friends? Why not enjoy activities such as playing golf or ten pin bowling?

#### **Question 4**

*Why do most supported employees transition back to supported employment from open employment?*

ADEs provide neither the training nor the experience necessary for people with moderate to severe disabilities to successfully transition into open employment.

The Discussion Paper claims that ADEs provide ‘a link, helping people with moderate to severe disability gain training and experience to confidently step into open employment’. It is patently obvious that the evidence points to the opposite.

Clearly the ADE model is such that there is a conflict of interest in allowing the more productive employees to undergo training and skill development so as to be equipped to successfully transition to open employment.

There is also a view that it’s easier to go straight into an open employment job than to make the transition to open employment from a supported employment setting such as an ADE.

#### **Question 5**

*How can more supported employees be provided the opportunity to choose open employment?*

People with disability have the capacity and ability to take part in meaningful work of their choice when provided with the right employment strategies and supports. With the National Disability Insurance Scheme (NDIS) full rollout due to be completed by mid - 2020, people with disability are now seeking transition to appropriate work supports that in our view should incorporate a Customised Employment approach.

It can sometimes be challenging for people with disability to find employment in the open market, and Disability Employment Services and ADEs don’t always provide an appropriate option.

Many people with disabilities who want to work often are missing out because they don’t necessarily tick all of the boxes required to fulfil a traditional job role.

Customised employment exploration and transition services, are designed to support people to discover their own unique skills and talents, and harness those talents to identify and create a job role that is tailored specifically to them.

Customised employment uses strategies that support people to create their own opportunities and 'carve out' a job role that is tailored to their unique skillset and support needs. It seeks to negotiate a match between what the individual has to offer and what the employer or market needs, and provides the support that is necessary for the individual to be successful in their role.

With the roll-out of the NDIS it is important that a range of employment supports are provided. Employment supports should interface with employment service models and approaches and provide the supports that are necessary for the individual.

### Question 6

*Why is participant access to concurrent DES and ADE support services so low?*

Eligibility requirements and processes for concurrent DES and ADE support services have changed over the years and this may have caused doubt and uncertainty in the sector. We refer to past requirements where supported employees had to resign their jobs from their ADE before being able to access DES.

### Question 7

*What is the role a supported employer can play in building employee capacity for transition to open employment?*

According to Disability Services Consulting:

*The NDIA has recently identified the existing 'culture of low expectations' of people with disability, their families, planners and the community as a significant barrier for achieving desirable employment outcomes.*

*Early NDIS plans are showing little emphasis on employment, with only 9% of plans including supports in this domain. Current plans don't reflect the employment aspirations of people with disability and there is minimal growth in demand for new employment support services, with the majority of NDIS participants simply receiving supports to continue employment with their current Australian Disability Enterprise (ADE).<sup>6</sup>*

A supported employer should provide staff training to improve attitudes towards supported employees, that may promote a change in the workplace culture where there are prevailing low expectations of supported employees.

Pathways to vocational training and skill development is critical in developing employees' skills for open employment jobs.

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<sup>6</sup> Disability Services Consulting, *Employment and the NDIS*, 15 May 2017, [http://www.disabilityservicesconsulting.com.au/resources/ndis-employment-101#\\_ftn3](http://www.disabilityservicesconsulting.com.au/resources/ndis-employment-101#_ftn3). (visited 21 February 2018).

## Question 8

*What will attract NDIS participants to employment opportunities in the future?*

There are two major barriers that need to be addressed.

1. A cultural barrier, namely the low expectations of people with intellectual disability to work in the open workforce.
2. A lack of skilled transition-to-work and open employment support across Australia.

An increase in employment outcomes will be achieved if individuals and families can choose support based as best practice for people with intellectual disability.

A new employment support system should;

- Build on what is currently achieving good employment outcomes for people with intellectual disability i.e. JobSupport in Sydney;
- Provide individuals, families, and employers with genuine choice informed by published provider outcomes by disability.

The expected 'dovetailing' of Disability Employment Services with the NDIS provides an historic opportunity to achieve substantial savings while delivering improved employment outcomes.

Best practice transition-to-work and open employment support can provide significant savings as alternative programs for people with intellectual disability are more expensive.

A new pathway of employment support should presume that people with intellectual disability have the capacity to work in the open workforce when provided with the right support rather than choose an ADE as the first option.

Transition-to-work support for school leavers with intellectual disability should be based on what works for the individual as part of the NDIS. Further, Open employment supports should be based on what accommodations are necessary to ensure a successful outcome for the NDIS clients with intellectual disability.

These support elements, if based on what is needed, can provide the right support for more people with intellectual disability to choose work and successfully participate in the open workforce.

## Conclusion

We believe that the future of supported employment in a new NDIS environment will depend largely on whether supported employees can participate in a new industrial landscape where they enjoy the same industrial rights as the rest of the Australian labour force.

The argument promoted by some ADEs that they are not the same as other commercial enterprises (a convenient distinction for categorising them as charities) creates unnecessary ambiguities – after all supported employees are paid pro-rata wages under classifications in the SESA and like other Australian workers come under the jurisdiction of the Fair Work Commission.

As a way forward we believe the following is essential:

- Removal of all competency-based wage assessment tools in the Supported Employment Services Award (SESA) as part of the four yearly review currently before the Fair Work Commission;
- The adoption in the SESA of the Supported Wage System as the only fair and equitable wage assessment tool
- Strengthening of government support for ADEs that use the Supported Wage System
- New employment models that offer a greater range of supports enabling people with disability to successfully work in open employment

We are of the view that in a new NDIS environment new models of employment supports should be delivered. We would like to see the Australian Government make a substantial investment in the establishment and development of new service models as well as a wider network of Social Firms Australia-wide.

ADEs should be given incentives to make the transition to a fully inclusive Social Firm model or other inclusive employment support models in compliance with international law.