

Dear DSS

Please find attached 2 law journal articles and 1 Easy Read summary of key ideas in those articles. I am submitting these to the DSS 'Next Steps in Supported Employment: Consultation on the way forward'.

Kind Regards
Linda

Dr Linda Steele (she/her)
Professor, Faculty of Law, University of Technology Sydney

The issues with Australian Disability Enterprises



Easy Read

About this information

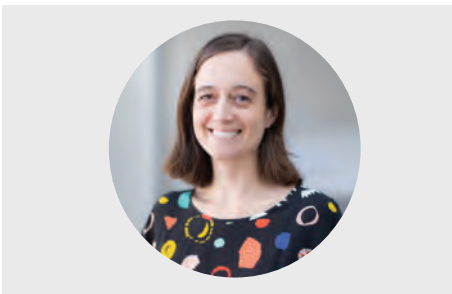


This information is about **Australian Disability Enterprises**.

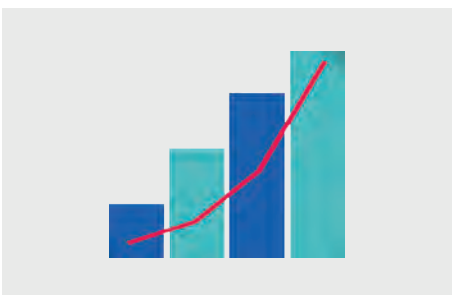


Australian Disability Enterprises are workplaces only for people with disability.

We will say **ADE** for short.



Linda Steele from the University of Technology wrote this information.



Linda did **research** about ADE.



Research means to look into something to find out more about it.

When Linda did the research she

- Looked into what people with disability think about ADE
- Looked into what the **law** says about ADE
- Looked into the **human rights** of people with disability



A **law** means rules everyone must follow.



Human rights are rights that every person has.



This information will talk about

- What the issues with ADE are
- What should happen with ADE.



Some of this information might make you feel sad or angry.



You can read it with someone you trust.



You can also call a support service like

- Lifeline on 13 11 14
- Blueknot on 1300 657 380.

About ADE

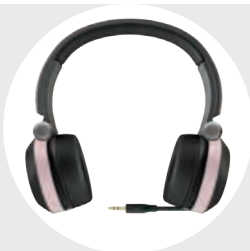
600



There are over 600 ADE in Australia.



People with disability get support to do their work at ADE.



They might do work like

- Pack things for airlines like headphones or snacks
- Sort things like plastic or paper
- Gardening
- Cleaning and laundry.



People with different types of disability work in an ADE.



Most of them have an intellectual disability.



Lots of ADE are run by disability services.



The ADE might get money from the NDIS to support people with disability to do the work.



Most of the time the boss and support staff at the ADE are people that do not have a disability.

The big issues with ADE



We think there are some things that are not good about ADE.



We will talk about what the big issues are.

Your human right to choose your work



Every person has the human right to work.



Every person should also have the human right to choose where they want to work.



Sometimes people with disability do not choose to work at ADE.



Their family or **guardian** might have said they should work in an ADE.



A **guardian** is someone who makes decisions for you.



Sometimes people with intellectual disability feel that ADE is their only choice for work.



People with disability often find it hard to leave ADE.



That is because there is no plan to help them move out of the ADE into **open employment**.



Open employment means workplaces where people with and without disability work together.



Not many people with intellectual disability work in open employment.

What people get paid



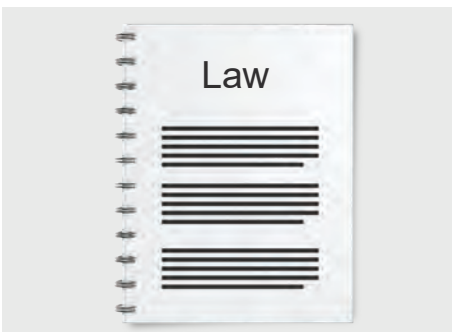
People who work in ADE do not get paid much money.



Most people at ADE get paid less than the **minimum wage**.



Minimum wage means the smallest amount of money a workplace must pay people.



There is a law that says what the minimum wage is in Australia.



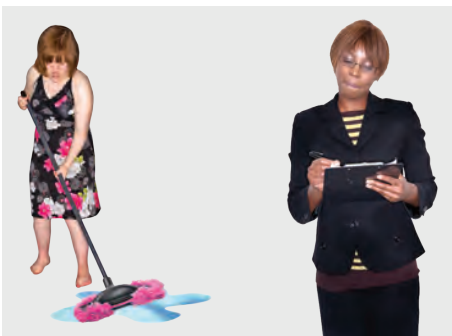
\$23.23

The minimum wage for this year is \$23.23 for every hour.

\$23.23



ADE are allowed to pay people with disability less than the minimum wage.



People with disability are tested to check how well they work.



\$2.91

Some people with disability in ADE only get paid \$2.91 for every hour.



We think people with disability should get paid the minimum wage or more.



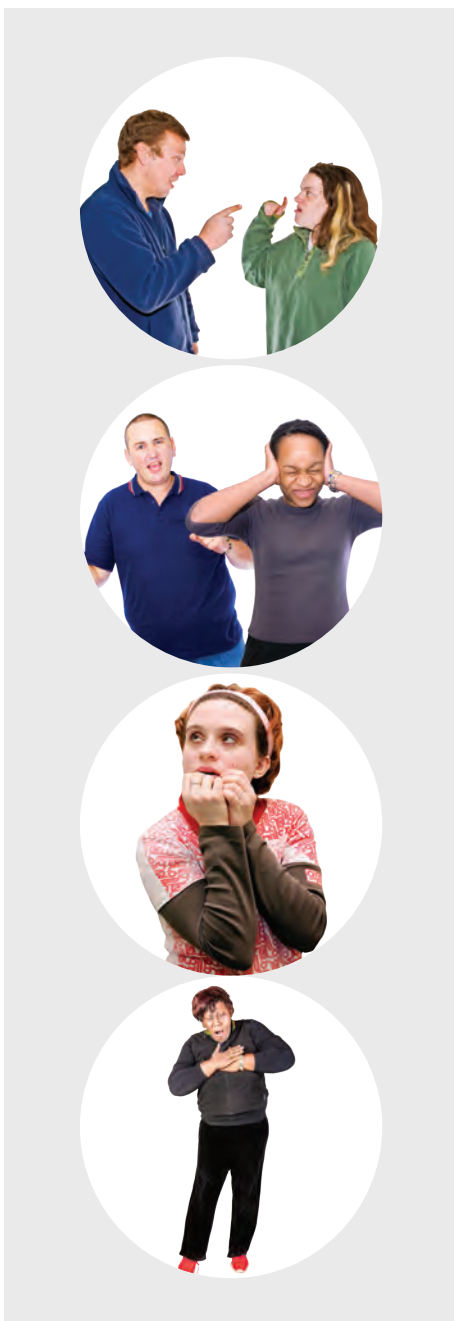
When people with disability at ADE do not get paid a lot of money it is hard for them to

- Live a good life
- Do the things they want to do.

The way people with disability are treated at ADE



Some ADE do not treat people with disability in a good way.



Some people with disability say

- They get hurt at the ADE
- People say mean things to them
- The ADE is not a safe place to work
- The ADE will not help when they speak up if something bad happens.



Sometimes the ADE uses **restrictive practices**.



Restrictive practice means they do not let you move around how you want to.



This might be things like

- The doors or windows are locked
- They give you medication to keep you calm
- Someone ties or holds you down.

ADE do not help make inclusion happen



We think that ADE do not help make **inclusion** happen.



Inclusion means people with disability are part of things like everyone else.



This is because only people with disability work at ADE.



Other people who do not have disability do not work at ADE.



People with disability at ADE do not get paid as much as people without disability.



Inclusion would happen if people with and without disability do things together like

- Work
- Go to and from work
- Learn at school or uni.

ADE is modern slavery



Modern slavery is what we call it when someone is treated in a bad way at work.



This can be that someone makes you do work you do not want to do.



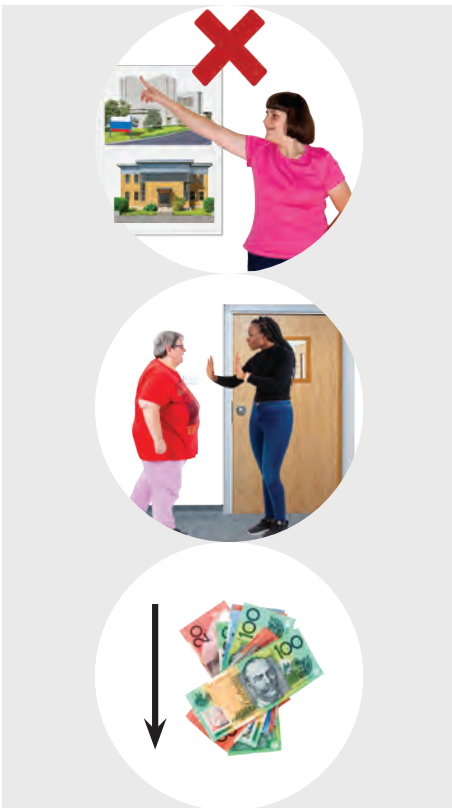
It can be that someone makes you work but does not pay you money for it.



It can be that someone makes you work and does not let you leave the workplace.



We think that ADE are modern slavery.



This is because people with disability

- Do not always get to choose if they work there
- Might not be able to leave when they want to
- Get paid less than the minimum wage.



There is a law that is meant to stop modern slavery from happening.



We think the modern slavery law could help people with disability in ADE.

What we think should happen



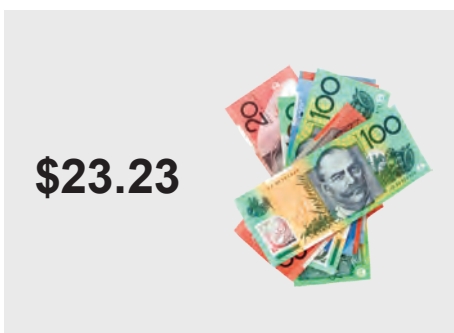
We want people with disability to have more choice about their work.



There need to be more jobs for people with disability in open employment.



We think there should be no more ADE.



Until all ADE close they should at least pay people minimum wages.



People with disability can live better lives if they get paid more money.



Inclusion can only happen if people with and without disability work together at workplaces.



The modern slavery law can help us make change happen.

The law can help us



- Close ADE



- Bring people with and without disability together in workplaces



- Make sure people with disability get paid the minimum wage



- Move people with disability into open employment



- Change how people think about people with disability.

Council for Intellectual Disability made this document Easy Read. **CID** for short. You need to ask CID if you want to use any pictures in this document. You can contact CID at **business@cid.org.au**.

ARTICLE

Ending disability segregated employment: ‘modern slavery’ law and disabled people’s human right to work

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Abstract

Disability segregated employment (also referred to as ‘sheltered workshops’) violates disabled people’s human right to work and employment. This article argues that modern slavery law might serve as one part of a broader strategy to end disability segregated employment, ensure accountability for the injustices within them and ensure equal access to open employment opportunities for disabled people. This is on the basis that disability segregated employment can be understood as a form of labour exploitation under modern slavery law – specifically forced labour and servitude. Modern slavery law is a useful legal tool to unseat deeply entrenched ableist attitudes of disability segregated employment as beneficial and necessary and build corporate/charity, public and government momentum towards the transition away from disability segregated employment, even if this particular area of law cannot itself legally compel the closure of sheltered workshops and an increase in open employment opportunities for disabled people.

Keywords: modern slavery law; critical disability studies; disability employment; forced labour; violence; Australia

1 Introduction

The Committee on the Rights of Persons with Disabilities has recently observed that disabled people experience low rates of employment and lower wages compared to non-disabled people (Committee on the Rights of Persons with Disabilities, 2022, p. 2). Disability segregated employment remains one of the main employment options for disabled people (particularly people with intellectual disability). While historically referred to as ‘sheltered workshops’ (a term which now has a pejorative meaning and is used as an insult), disability segregated employment is presently also referred to in such terms as ‘work centers’ (United States of America), ‘social enterprises’ (United Kingdom) and ‘supported employment’ (Australia). Disability segregated employment involves workplaces that congregate and segregate disabled people (primarily people with intellectual disability). Non-disabled people are absent from these workplaces other than in higher roles as managers, supervisors and support workers. Disability segregated employment workplaces are distinct from ‘open employment’ workplaces, where disabled people and non-disabled people work alongside each other. Disability segregated employment might provide specialised disability support and training, but in a context of repetitive and/or manual tasks, subminimum wages and little options for career progression either within the one workplace or into open employment (Committee on the Rights of Persons with Disabilities, 2022, p. 4).

Viewed through an ableist medicalised and deficit approach to disability, disability segregated employment is viewed by governments, disability service providers and even some families as beneficial and necessary for disabled people (particularly people with intellectual disability) who are considered unproductive, incapable and an economic and social burden (May-Simera, 2018). However, disability segregated employment is criticised by disability rights advocates and disability rights scholars for being discriminatory and exploitative (Harpur, 2019; Malaquias, 2019; National

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Disability Rights Network, 2011; Steele, 2023 forthcoming). Disabled people are discriminated against by receiving lower wages and less or no opportunities for career development and progression, in turn experiencing material impacts on their lifelong economic, health and social outcomes. The closed nature of disability segregated employment settings exposes disabled people to greater risk of violence, and they can experience greater gatekeeping in seeking assistance and redress. Disability segregated employment is exploitative because the organisations that operate these workplaces receive financial benefit from lower disabled labour costs and receipt of government disability funding to purportedly provide training and support their disabled workers. Moreover, members of supply chains and consumers benefit from cheaper goods and services. These dynamics of discrimination and exploitation are facilitated by domestic laws (such as laws that exempt these workplaces from minimum wage laws and from discrimination laws) (Steele, 2023 forthcoming). On the basis of their harmful and unjust impacts, disabled workers in disability segregated employment and disability rights advocates have been arguing for transition away from disability segregated employment and for greater opportunities, resources and legal protections to guarantee open employment of disabled people (Inclusion Australia, 2022a; National Disability Rights Network, 2011).

The human right to work which is articulated specifically in relation to disabled people in Article 27 of the Convention on the Rights of Persons with Disabilities provides a human rights basis for a transition away from disability segregated employment. Article 27(1) provides that disabled people have the right to work on an equal basis to others, including the right to work in open, accessible and inclusive workplaces and equality in wages and exercise of labour rights. Article 27(2) of the Convention on the Rights of Persons with Disabilities requires states parties to ensure disabled people are equally protected from slavery, servitude, and forced labour (i.e. labour exploitation). In its general comment on the right of persons with disabilities to work and employment, the Committee on the Rights of Persons with Disabilities has explicitly stated that disability segregated employment is not a measure that contributes to realisation of the right to work (Committee on the Rights of Persons with Disabilities, 2022, p. 4). The Committee has stated that expeditious transition away from disability segregated employment is required to ensure full national implementation of Article 27 (Committee on the Rights of Persons with Disabilities, 2022, p. 18).

This article aims to contribute to international human rights scholarship and practice on disabled people's right to work by exploring the utility of modern slavery law to the transition away from disability segregated employment. Domestic jurisdictions are increasingly introducing modern slavery law to address labour exploitation. 'Modern slavery' refers to forms of extreme labour exploitation, including slavery, servitude, forced labour, forced marriage, human trafficking and debt bondage. It has its foundations in well-established international human rights norms on slavery and other forms of labour exploitation. Modern slavery law takes two main forms: criminal legislation prohibiting modern slavery and corporate governance legislation requiring larger businesses to report on the risks of modern slavery in their operations and supply chains.

To date, the development and application of modern slavery law has not focused on disability segregated employment. The international literature on disability and modern slavery more broadly acknowledges overrepresentation of disabled people in international human trafficked populations and circumstances faced by disabled people that render them particular targets for trafficking (e.g. their care and support relationships, experiences of poverty and lack of access to legitimate employment opportunities) (Carey and Peterson, 2019; see also Nichols and Heil, 2022). This literature explores particular contexts of modern slavery – notably, sex trafficking, domestic servitude in private home settings and forced labour in informal economies such as agricultural settings (Carey and Peterson, 2019, pp. 473–474). However, the literature does not consider modern slavery in the context of the formal and legal setting of disability segregated employment.

Considering the utility of modern slavery law to the transition away from disability segregated employment is important because the legality of disability segregated employment and its exemption from equality and labour law protections means that other domestic legal options, such as discrimination law and industrial law, are ineffective to shift the current ableist understandings of disability

segregated employment as beneficial and necessary. Moreover, unlike other legal framings of violence that focus more on the physical and psychological harm and disadvantage to victim-survivors, modern slavery law additionally extends to financial gain to perpetrators and members of supply chains through labour exploitation, and the dynamics of marginality and economic incentive driving this exploitation. Now is a timely moment globally to consider the intersection of disability segregated employment and modern slavery law. The Committee on the Rights of Persons with Disabilities has made disability segregated employment a global human rights concern, as exemplified by the Committee's concluding observations in relation to a variety of different countries (Harpur, 2019, pp. 54–80; May-Simera, 2018) and its recent general comment on the right of persons with disabilities to work and employment (Committee on the Rights of Persons with Disabilities, 2022). Numerous overseas jurisdictions, including the United States of America and Europe, are working to transition away from disability segregated employment and associated subminimum wages (Langensiepen 2021; US Commission on Civil Rights, 2020, pp. 178–217). In parallel, modern slavery law is becoming of increasing domestic and international relevance. Internationally, several jurisdictions have introduced modern slavery legislation, such as Australia,¹ the United Kingdom² and California in the USA.³

The article approaches its exploration of modern slavery law and disability segregated employment through the case study of Australia, analysing the practices of disability segregated employment (referred to as 'Australian Disability Enterprises' (ADEs)) in the context of Australian modern slavery law. Methodologically, the article brings together doctrinal analysis of ADEs by reference to Australian modern slavery law, disabled people's lived experiences of ADEs, critical approaches to ADEs drawn from international human rights norms, perspectives of Disabled People's Organisations and other disability advocacy and human rights organisations and insights from critical disability scholarship.

The article argues that modern slavery law can be one part of a broader strategy to end disability segregated employment and ensure equal access to open employment opportunities. This is on the basis that disability segregated employment can be understood as a form of labour exploitation under modern slavery law – specifically forced labour and servitude. As such, modern slavery law can help shift disability segregated employment from its current ableist framing as beneficial and necessary to being framed as harmful and exploitative. This is because applying modern law to disability segregated employment: frames disability segregated employment as violent crimes that are almost universally repudiated by society, presses corporate actors to identify risks in their operations and make these public, highlights supply chain and consumer complicity in labour exploitation of disabled people, and provides an official framework in which to recognise economic exploitation of disabled people through their labour. Thus, modern slavery law is a useful legal tool to unseat deeply entrenched attitudes and build corporate/charity, public and government momentum towards the transition away from disability segregated employment, even if this particular law cannot itself legally compel the closure of sheltered workshops and an increase in open employment opportunities for disabled people. However, the article observes that modern slavery law has not been designed with disabled workers in mind, thus proposing the need for greater research at the intersections of modern slavery law and disability segregated employment to enhance the utility of modern slavery law as a legal tool in realising disabled people's right to equal work.

Part 2 provides an overview of disability segregated employment and international human rights. Part 3 then introduces the legal framework of Australian disability segregated employment. Part 4 shifts to apply to Australian disability segregated employment the Australian legal tests for forced labour and servitude. The article concludes in Part 5 by reflecting on the strengths of modern slavery law and areas of further research to enhance its utility as a legal tool in realising disabled people's right to work.

¹Modern Slavery Act 2018 (Cth).

²Modern Slavery Act 2015 (UK).

³California Transparency in Supply Chains Act of 2010 (SB 657).

2 Human rights and disability segregated employment

The right to work and employment is provided by Article 6 of the 1976 International Covenant on Economic, Social and Cultural Rights and is also protected by the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The right to freedom from slavery and other forms of labour exploitation is provided by Article 8 of the 1976 International Covenant on Civil and Political Rights and various ILO conventions including the 1930 Forced Labour Convention and the 1957 Abolition of Forced Labour Convention. However, historically disability segregated employment has been largely tolerated in international human rights and international labour systems (Fasciglione, 2015, p. 146; Harpur, 2019, pp. 54–80; May-Simera, 2019), and there has been little exploration at the international level of the intersection of disability and labour exploitation (Bantekas, Pennilas and Trömel, 2018, pp. 799–800). This silence reflects a broader context of mainstream international human rights instruments having been interpreted and applied in ways that endorse disabled people's inequality and subject them to lesser enjoyment of human rights (Kayess and French, 2008, pp. 12–17).

The Convention on the Rights of Persons with Disabilities, which entered into force in 2008, explicitly provides for equality for disabled people and universal enjoyment of human rights irrespective of disability (Kayess and French, 2008). The Convention provides that disabled people have the right to work on an equal basis with others in an 'open, inclusive and accessible' work environment, have 'equal opportunities and equal remuneration for work of equal value', and are able to exercise their labour rights on an equal basis to others (Article 27(1)). In its general comment on the right of persons with disabilities to work and employment, the Committee on the Rights of Persons with Disabilities has recognised that the right to work 'is a fundamental right, essential for realizing other human rights, and forms an inseparable and inherent part of human dignity', and 'also contributes to the survival of individuals and to that of their family, and, insofar as work is freely chosen or accepted, to their development and recognition within the community' (Committee on the Rights of Persons with Disabilities, 2022, p. 1). However, the Committee has observed that 'ableism adversely affects the opportunities for many persons with disabilities to have meaningful work and employment', including through underpinning legislation, policies and practices related to disability segregated employment (Committee on the Rights of Persons with Disabilities, 2022, p. 1).

Article 27(2) of the Convention on the Rights of Persons with Disabilities also provides that States Parties will ensure disabled persons are not held in slavery or servitude, and protect them 'on an equal basis with others, from forced or compulsory labour' (Article 27(2)). The Committee on the Rights of Persons with Disabilities emphasises in its general comment on the right of persons with disabilities to work and employment the importance of States Parties paying attention to 'the right of persons with disabilities to choice, consent and freedom from coercion' (Committee on the Rights of Persons with Disabilities, 2022, p. 11). The Committee has explained that consent is not itself a sufficient indication that labour is free from exploitation because of the 'wider context of exploitation or coercion' experienced by disabled people, including by reason of their 'wider social vulnerability, lack of meaningful alternatives and relations of dependency of care that become exploitative' (Committee on the Rights of Persons with Disabilities, 2022, p. 11). Significantly, the Committee 'disables' labour exploitation by re-framing the concept in the reality of disabled people's lives, rather than simply applying existing understandings and archetypes of labour exploitation that have largely developed in the context of gendered and racialised experiences (a point returned to in Parts 4 and 5).

In its general comment on the right of persons with disabilities to work and employment, the Committee on the Rights of Persons with Disabilities identifies that 'lack of access to the open labour market and segregation continue to be the greatest challenges for persons with disabilities' (Committee on the Rights of Persons with Disabilities, 2022, p. 4). It singles out disability segregated employment as a key barrier to realising the right to work, stating that it: 'is not to be considered as a measure of progressive realization of the right to work, which is evidenced only by freely chosen or accepted employment in an open and inclusive labour market' (Committee on the Rights of Persons with

Disabilities, 2022, p. 4). The Committee explains that full implementation of Article 27 at the national level requires States Parties to: ‘Expediently phase out segregated employment, including sheltered workshops, by adopting concrete action plans, with resources, timeframes and monitoring mechanisms that ensure the transition from segregated employment to the open labour market’ (Committee on the Rights of Persons with Disabilities, 2022, p. 18). The Committee’s strong and unequivocal position is particularly significant given that disability segregated employment was ‘one of the most heated debates in the negotiation of [Article 27]’ (Bantekas, Pennilas and Trömel, 2018, p. 769).

The Committee on the Rights of Persons with Disabilities offers a range of strategies to enhance open employment of disabled people. These include: ‘job-matching mechanisms that make a bridge between persons with disabilities and employers’, ‘developing specific entry mechanisms into public sector employment’, promoting public sector job opportunities through disability representative organisations of persons, partnerships between mainstream employment agencies and disability rights organisations, ‘affirmative action measures such as quota mechanisms and targets’, and transparent monitoring and reporting of employment of disabled people (Committee on the Rights of Persons with Disabilities, 2022, p. 19).

This article concentrates on one legal tool available in some domestic jurisdictions – modern slavery law – and explores its potential role in the transition away from disability segregated employment and realisation of disabled people’s right to work. This exploration will be through an Australian case study, to which the article now turns.

3 Australian Disability Enterprises

Disability segregated employment – referred to in Australia as ‘Australian Disability Enterprises’ (ADEs) – forms a core aspect of Australian disability employment policy (Department of Social Services, nd). Disabled workers in ADEs generally perform manual labour, such as ‘packaging, assembly, production, recycling, screen-printing, plant nursery, garden maintenance and landscaping, cleaning services, laundry services and food services’ (Department of Social Services, nd) and are paid a percentage of the award wage determined by reference to an assessment of their individual productivity. ADEs are referred to as providing ‘supported employment’ because ADE workers often have disability support workers who assist them in their daily work, and ADEs are seen as a training ground for disabled people to then access open employment. In Australia, there are ‘around 20,000 Australians with varying degrees of disabilities who are not currently able to work without support’ working in approximately 600 ADEs (BuyAbility, nd).

Disabled people (including some who have worked in ADEs) and disabled people’s organisations (disability advocacy organisations led by disabled people) have long drawn attention to injustices arising from ADEs and have advocated for transition away from ADEs and equal wages in the context of broader campaigns for equal access to and treatment in open employment. In the context of the current Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Royal Commission, Inclusion Australia launched its ‘Equal Pay Equal Respect’ campaign. The campaign calls for ‘a fully resourced five-year transition plan for workers in ADEs to move to open and self-employment’ and for the Federal Government to immediately fund the wage gap and increase wages to the minimum wage level (estimated to be a net cost of \$9000AUD per person) (Inclusion Australia, 2022b). These specific concerns around ADEs form part of broader advocacy agendas that extend to ending segregation across employment, housing, education, health and justice systems (e.g. Disabled People’s Organisations Australia, 2020).

In its 2018 periodic review of Australia’s compliance with the Convention on the Rights of Persons with Disabilities, the Committee on the Rights of Persons with Disabilities (2019, para 49(b)) expressed concern about ‘ongoing segregation of persons with disabilities employed through ADEs and the fact that such persons receive a sub-minimum wage’ (Committee on the Rights of Persons with Disabilities, 2019, para. 49(b)). It recommended that Australia ‘provide services to enable persons

with disabilities to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value' (Committee on the Rights of Persons with Disabilities, 2019, para 50).

3.1 Legal framework of ADEs

ADEs owe their legal existence to the Commonwealth Disability Services Act 1986 (Cth),⁴ which provides for government funding of 'supported employment services', defined as services that 'support the paid employment' of disabled persons who are unlikely to obtain employment 'at or above the relevant award wage' and will 'need substantial ongoing support to obtain or retain paid employment' because of 'their disabilities' (s 7). Thus, at a foundational level, ADEs are legally framed as beneficial and necessary.

ADEs are funded through the Australian National Disability Insurance Scheme (National Disability Insurance Agency, 2021a). The National Disability Insurance Scheme aims to support independence and participation of disabled people and to facilitate disabled people exercising choice and control in relation to their supports (National Disability Insurance Scheme Act 2013 (Cth) ss 3(1)(c), (e)).⁵ The National Disability Insurance Scheme provides funding directly to disabled people to use to pay service providers for 'the support they need so their skills and independence improve over time' (National Disability Insurance Agency, 2021b). Some of these supports consist of 'frequent and ongoing supports that assist a person with disability to take part in work' (National Disability Insurance Scheme (Supports for Participants) Rule 2013 (Cth) r 7.17). They can include: 'on-the-job training and intermittent support with daily work tasks', 'direct supervision and/or group-based support to enable meaningful participation at work' and 'supports to manage disability-related behaviour or complex needs at work' (National Disability Insurance Agency, 2021a, p. 5). ADE service providers will generally receive National Disability Insurance Scheme funding in relation to their disabled workers, and this is a significant source of financial benefit associated with employing disabled people on top of the financial benefit derived from the goods and services produced through their low-cost labour. Commonwealth and state/territory-based government procurement policies provide a source of financial benefit to ADE service providers – the competitive advantage in relation to government contracts – which is additional to the government funding for employment supports (Department of Finance, 2020, p. 29 Appendix A, cl 15). Governments that procure goods and services from ADEs also receive financial benefit of lower labour costs.

The Fair Work Act 2009 (Cth)⁶ facilitates payment to disabled ADE workers of wages that are less than the national minimum wage that is legally payable to non-disabled workers. As part of its role in making modern awards (s 132), the Fair Work Commission has made a separate industry award called the Supported Employment Services Award 2020 (Cth)⁷ specifically for disabled workers in ADEs. Pursuant to the Supported Employment Services Award 2020, a disabled employee is paid a percentage of the relevant rate of pay depending on an assessment of their work capacity pursuant to an approved wage assessment tool (cl 18.1). The minimum an individual can be paid is 12.5 percent of the National Minimum Wage (Supported Employment Services Award 2020 Sch D, D.4.1(b)), which (at 1 July 2022) equates to \$2.67AUD per hour or \$101.58AUD per week.

The Fair Work Commission is currently reviewing the Supported Employment Services Award 2020 as part of its legislated role in the periodic review of awards (Fair Work Act 2009 (Cth) Sch 1, cl 26). In 2019, the Fair Work Commission released a preliminary decision⁸ that justifies the unequal and low wages for disabled workers in two key respects, and confirms the broader ableist

⁴Disability Services Act 1986 (Cth).

⁵National Disability Insurance Scheme Act 2013 (Cth).

⁶Fair Work Act 2009 (Cth).

⁷Supported Employment Services Award 2020 (Cth).

⁸4 yearly review of modern awards—Supported Employment Services Award 2010 (AM2014/286) [2019] Fair Work Commission [2019] FWC 8179.

framing of disability segregated employment as beneficial and necessary. One is that the wages in ADEs are interconnected to the perceived financial sustainability and survival of the ADE service providers. This is on the basis that the centrality of ADEs to the social and emotional wellbeing of disabled people *and* their families and carers is more significant than the financial benefits to disabled people of a higher wage in a context where a higher wage would threaten the very existence of ADEs and the benefits they deliver to disabled people, families and carers. This 'logic' runs counter to the assumption in relation to non-disabled workers that financial payment for one's labour is the primary benefit of work (and one element that distinguishes it from slavery). The second is that disabled workers' wages in ADEs can be kept low because these workers also receive the Disability Support Pension. ADEs are interconnected to the social security system with an underlying assumption that those who work in ADEs will always receive the Disability Support Pension and never be able to attain a higher income and standard of living beyond what is possible through the welfare system. This runs counter to the assumption in relation to non-disabled people workers, where social security is an exceptional alternative or safety net to employment.

ADE workers can have decision-making powers related to their employment removed from them through guardianship law. State and territory guardianship laws enable the appointment of a substitute decision-maker in relation to various life domains, such as accommodation, socialising, services and health care. In some Australian states and territories, guardianship law provides that the decision on whether a disabled person works in an ADE can be made by someone other than the disabled person themselves (Guardianship and Management of Property Act 1991 (ACT) ss 7(3)(c), (d); Guardianship and Administration Act 1995 (Tas) s 25(2)(c); Guardianship and Administration Act 1990 (WA) s 45(2)(c)).⁹ Guardians can also decide whether disabled people are subjected to restrictive practices, including in ADEs. Restrictive practices are interventions in disabled people's bodies and lives that result in limitations on their freedom of movement or rights. They include seclusion, chemical, restraint, physical restraint, mechanical restraint and environmental restraint. National Disability Insurance Scheme employment supports can fund use of restrictive practices on the basis their use would fall within the category: 'supports to manage disability-related behaviour or complex needs at work' (National Disability Insurance Agency, 2021a, p. 5).

3.2 Segregation, discrimination, exploitation and violence through ADEs

ADEs operate in a context of Australian disabled people's experiences of oppression, precarity, control and segregation across their lives. As a group, Australian disabled people have low employment (Australian Institute of Health and Welfare, 2020, p. 267) and high levels of poverty (Women with Disabilities Australia, 2020, p. 30). Australian disabled people encounter barriers to accessing open employment, including stereotypes and stigma about disability and unwillingness of employers to provide the accommodations they require (Australian Human Rights Commission, 2016). Australian disabled people are subjected to community exclusion, in part through segregation across a range of systems – employment, education, transport, housing and justice (Disabled People's Organisations Australia, 2020) – and ableist attitudes (People with Disability Australia, 2021). In addition, Australian disabled people experience high levels of violence within closed and segregated settings and in the family home and community (Centre for Research Excellence on Disability and Health, 2021). They can have low levels of awareness of and access to resources to enforce their legal and human rights. These are the broader circumstances in which disabled workers can be subjected to segregation, discrimination, exploitation and violence through ADEs, to which discussion now turns.

ADEs congregate large numbers of disabled people in workplaces where they are separated physically and in terms of their level of authority and wages from non-disabled people who work in management, supervision or support roles. For example, 'George' was quoted in the Inclusion Australia

⁹Guardianship and Management of Property Act 1991 (ACT); Guardianship and Administration Act 1995 (Tas); Guardianship and Administration Act 1990 (WA).

2022 Federal Election platform as explaining the exclusion he experienced in ADEs as compared to open employment: “They got me champagne for my 60th birthday and sang happy birthday to me, it was lovely. That’s what real people at real jobs do. At [the ADE] they never did anything like that. It’s important to do things like that ... “feeling like you belong”.’ (Inclusion Australia, 2022a, p. 8). Disabled workers’ segregation within an ADE might be interconnected with segregation in other domains of their life; they might be transported to work by a minibus operated by the ADE service provider, or the ADE service provider might also provide their group home accommodation.

Moreover, when transitioning from high school to employment, disabled young people might be given few or no options other than to work in an ADE. For example, one parent quoted in the Inclusion Australia 2022 federal election platform stated: ‘At end of school, supported education centre took families around a “career option tour” when they got on a bus and toured ADEs and everyone left traumatized or locked into the pathway. Came home crying, not a positive experience.’ (Inclusion Australia, 2022a, p. 5). Inclusion Australia (2022c, p. 10) refers to this as a ‘polished pathway’. This segregated pathway involves structural coercion (e.g. by education, disability and welfare systems) and individual coercion (e.g. by parents and teachers), as demonstrated by the following experience of a disabled person recounted Inclusion Australia and People with Disability Australia (2022, p. 5):

Some ended up working in the first place where they did work experience, regardless of whether they liked it. Work experience for students at special schools is often in an ADE. ‘My teacher put me in this plant nursery. I pretty much got shoved into this without knowing it at first.’ Mum said “Take the option you’ve got”.’

ADE workers are not provided opportunities to move from the ADE into open employment, such that they remain working for years and decades in an ADE on low pay and only among other disabled people. This lack of progression – and even experiencing regression – is captured in the Inclusion Australia submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability through the story of Ted, a 56-year-old man with an intellectual disability:

[Ted] lives independently, drives a car and has worked at an ADE for many years. A decade ago, a new manager decided to reassess Ted’s work capacity and cut his wages by \$10 an hour.

Ted felt trapped: “The other people were getting normal wages and there’s things that they can’t do that I can do. ... If I did not agree with it, I would have lost my job so it was pretty rough”.

The manager who cut Ted’s pay has since left, but he has continued to work for the reduced wage. “I can never get back up”, he said. (Inclusion Australia, 2022a, p. 23)

The individualised productivity-based wages for ADE workers discriminate against disabled people because these wages place them at a disadvantage to non-disabled people, including non-disabled people working in management, supervision and support roles in ADEs whose wages are not dependent on individual assessment. Moreover, disabled people might not receive career development opportunities to support higher wages over time.

ADEs receive the financial benefit of goods and services produced through low labour costs of disabled ADE workers. Indeed, everyone along the supply chain through to consumers financially benefits from cheaper goods and services produced by disabled workers in ADEs (Malaquias, 2019). In contrast, disabled workers in ADEs are not paid sufficiently to support their living and thus must also receive the Disability Support Pension. ADE service providers also receive financial benefit from employing disabled people – as an avenue to National Disability Insurance Scheme funding, competitive advantage in government procurement, competitive advantage in supply chains in being able to offer cheaper goods and services and a marketing point of differentiation to consumers. As Steele has noted, ADEs ‘are extractive of the labour *and* disability of ADE employees with disability’

because ‘they simultaneously use this disability as a basis to deny people with disability appropriate financial compensation for their labour, *and* access funding to provide ‘support’ to people with disability in the ADE workplace’ (Steele, 2023 forthcoming). The injustice of the exploitation inherent to the lower wages in ADEs is captured by the reflections of Nick, a 32-year-old man with intellectual disability quoted in Inclusion Australia’s submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation:

‘The award wages, I think that, you know, it needs to be a big issue around people with disabilities getting proper wages because what they receive now is ridiculous. They don’t get a fair go. ... It’s not right. This is Australia. It’s not fair.’ (Inclusion Australia, 2022a, p. 24)

In ADEs, disabled people may experience unlawful harassment and physical and sexual violence without recourse to effective complaint mechanisms (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020; Women with Disabilities Victoria, 2019, p. 19). Use of restrictive practices constitutes violence in the form of ‘disability-specific lawful violence’. This violence is regulated rather than prohibited by law and use of restrictive practices will not constitute civil or criminal assault when legally authorised (Spivakovsky and Steele, 2022; Steele, 2014; Senate Community Affairs References Committee, 2015).

4 Applying modern slavery law to Australian disability segregated employment

Modern slavery is an umbrella term that refers to forms of extreme labour exploitation, including slavery, slavery-like conditions of servitude, forced labour, deceptive recruiting practices, forced marriage, debt bondage, child labour and human trafficking. Modern slavery constitutes a ‘continuum of labour exploitation, the deterioration of labour standards, and the absence of legal recourse that results in workers being at the mercy of their employers, leaving them no other option than to do as they are told’ (Nolan and Boersma, 2019, p. 15). There have been criticisms of the lack of definitional clarity in law of ‘modern slavery’ (Hsin, 2020; Nolan and Bott, 2018; Vijayarasa and Villarino, 2013) and the risk that the term ‘modern slavery’ dilutes slavery as it was defined in the Slavery Convention.

In Australia, there are two legal arms to modern slavery law: criminal (Criminal Code Act 1995 (Cth) Divisions 270–271) and corporate governance (Modern Slavery Act 2018 (Cth)). The Criminal Code Act 1995 (Cth) criminalises various forms of modern slavery and provides a basis for prosecution and punishment of perpetrators of these offences. The Criminal Code Act 1995 (Cth) contains a series of offences related to various forms of modern slavery, including slavery (s 270.3), servitude (s 270.5), forced labour (s 270.6A), deceptive recruiting for labour or services (s 270.7), forced marriage (s 270.7B) and debt bondage (s 270.7C). Offences related to slavery and sexual servitude were introduced into the Criminal Code Act 1995 (Cth) in 1999 (Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)¹⁰), with other slavery-like offences (e.g. forced labour and servitude) being added in 2013 (Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)) ‘to ensure that the broadest range of exploitative behaviour is captured and criminalised’ (Explanatory Memorandum, 2012).

In relation to the corporate governance arm of modern slavery law, the Modern Slavery Act 2018 (Cth) places obligations on large entities (businesses and charities with annual consolidated revenue of more than \$100 million based or operating in Australia) and the Commonwealth to submit annual reports on risks of modern slavery in their operations and supply chains and to identify actions to address those risks (Modern Slavery Act 2018 (Cth), ss 5, 15, 16). Other entities, such as smaller businesses or charities, can report voluntarily (Modern Slavery Act 2018 (Cth), s 6). The Modern Slavery Act 2018 (Cth) extends to the categories of ‘modern slavery’ as defined by reference to the Criminal Code Act 1995 (Cth) definitions, as well as ‘human trafficking’ and the ‘worst forms of child labour’

¹⁰Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth).

(Modern Slavery Act 2018 (Cth), s 4 ‘modern slavery’). Reports should include a description of the risks of modern slavery in the reporting entity’s operations and supply chain and describe the actions taken by the reporting entity to respond to those risks, including due diligence and remediation processes (Modern Slavery Act 2018 (Cth) s 16(1)(c), (d)). The reports are stored online in the Modern Slavery Statements Register, which is administered by the Australian Border Force, and are freely accessible to the public (Modern Slavery Act 2018 (Cth) s 18).¹¹ The operative provisions concerning modern slavery reporting only commenced on 1 January 2019.

In the Australian context, some disability advocates have argued that ADEs constitute a form of modern slavery and have flagged the implications of the Modern Slavery Act 2018 (Cth) (Connor, 2014; Malaquias, 2019). Yet, there is no indication that ADE service providers are publicly engaging with these concerns. Indeed, some ADE service providers have completed Modern Slavery Statements under the Modern Slavery Act 2018 (Cth) that demonstrate no consideration of the possibility of modern slavery within their ADE workplaces. For example, disability service provider ‘Aruma’, which refers to itself in its Modern Slavery Statement as ‘A trailblazer, a human rights warrior’ (Aruma, 2021, p. 6), does not consider modern slavery in relation to its ADE workers. Instead, it only sees the risk of modern slavery in its employment in relation to the 11 percent of employees who are contract workers or sourced through third-party labour providers (Aruma, 2021, p. 13). In addressing the risks of modern slavery in employment, Aruma states it will ‘ensure that all employees receive at least the minimum award rates of pay applicable to their role’ (Aruma, 2021, p. 17) without considering the exploitation inherent to the ADE system which enables subminimum wages.

The lack of research on disability and modern slavery and the absence of widespread recognition within the ADE sector of modern slavery is not conclusive of the legal framework’s applicability. Indeed, it has been recognised that modern slavery is ‘dynamic’ (Hsin, 2020), ‘frequently linked to the legitimate market for goods and services’ and ‘a pervasive feature of the global economy’ (Nolan and Boersma, 2019, p. 19). Modern slavery’s pervasiveness, implications for supply chains and role in the global economy means it is ‘not an abnormality confined to the fringes of society and the dark corners of the economy, or something that takes place only in impoverished regions and countries, solely perpetuated by shadowy figures – it is connected to all of us’ (Nolan and Boersma, 2019, p. 19). Thus, it is likely to emerge in contexts that reflect normalised and widespread labour practices, including – the author submits – formal and legal employment practices such as disability segregated employment. This part now turns to consider whether ADEs would fit within specific legal categories of modern slavery, specifically forced labour and servitude offences.

4.1 Forced labour

‘Forced labour’ is defined as ‘the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free’ either ‘to cease providing the labour or services’ or ‘to leave the place or area where the victim provides the labour or services’ (Criminal Code Act 1995 (Cth), s 270.6(1)). The individual ‘may be in a condition of forced labour whether or not ... escape from the condition is practically possible for the victim; or the victim has attempted to escape from the condition’ (Criminal Code Act 1995 (Cth), s 270.6(3)). It is a criminal offence punishable by nine years (or up to twelve years where aggravated) to engage in conduct that ‘causes another person to enter into or remain in forced labour’ (Criminal Code Act 1995 (Cth), ss 270.6A(1), 270.8(1)), or conducts a business that ‘involves the forced labour of another person (or persons)’ (Criminal Code Act 1995 (Cth), s 270.6A(2)).

In the Queensland Court of Appeal decision of *R v. Pulini*,¹² Morrison JA articulated four elements to the offence of forced labour. The first is that the defendant is ‘engaged in conduct (meaning did an act or a series of acts)’. The second is that the defendant ‘intended to engage in that conduct’. The third

¹¹‘Online Register for Modern Slavery Statements’, Australian Border Force, <https://modernslaveryregister.gov.au/>.

¹²*R v. Pulini* [2019] QCA 258, [59] Morrison JA, Murso JA and Bradley J agreeing.

is that the defendant's conduct involved coercion, threat or deception that caused the victim to continue to provide their labour or services 'in circumstances where a reasonable person in [the victim's] position would "not consider [themselves] to be free" to stop providing the labour or services, or to leave the place where [they] provided that service'. The fourth is that the defendant 'either knew or were reckless as to whether their conduct caused [the victim] to remain in forced labour'. Reckless means the defendants were 'aware of a substantial risk that their conduct would cause [the victim] to remain in forced labour' and 'having regard to the circumstances known to the relevant defendant, it was an unjustifiable risk to take'.

It is arguable that ADEs constitute forced labour, by reference to the four elements of the offence.

Element 1: Engaged in Conduct

In relation to the first element, the ADE service provider is engaging in conduct through the daily operation of the ADE.

Element 2: Intended to Engage in Conduct

In relation to the second element, the ADE service provider clearly 'intended to engage in that conduct', given that the conduct takes place in the context of operating the ADE, which is a sophisticated enterprise involving government funding and reporting to the Department of Social Services and National Disability Insurance Scheme.

Element 3: Coercion, Threat or Deception

Element 3 consists of two parts. The first part of Element 3 can be satisfied on the basis that ADE service providers engage in conduct involving coercion and deception. Coercion is defined in the Criminal Code Act 1995 (Cth) as including coercion through 'force', 'duress', 'detention', 'psychological oppression', 'abuse of power' and 'taking advantage of a person's vulnerability' (s 270.1A 'coercion'). The Explanatory Memorandum (2012) to the Bill adding this definition of coercion into the legislation states that it 'is intended to be a non-exhaustive list capturing both physical and non-physical coercive conduct, including the more subtle means by which offenders obtain a victim's compliance'. Recalling the approach to labour exploitation taken by the Committee on the Rights of Persons with Disabilities which focuses on 'choice, consent and freedom from coercion' (Committee on the Rights of Persons with Disabilities, 2022, p. 11) (discussed in Part 2), it is argued that the definition of coercion in s 270.1A must be read through a disability lens, mindful of the ways in which coercion specifically manifests in disabled people's lives. ADE service providers engage in coercion that is 'taking advantage of a person's vulnerability' insofar as they target disabled school leavers and unemployed disabled people and are legislatively set up (as per Part 2.1) to provide employment for disabled people who are considered unable to find open employment. Coercion might also take the form of others making employment decisions on a disabled worker's behalf (e.g. informal decision-making by parents or formal substitute decision-making by guardians). Moreover, in those instances where individuals are subject to restrictive practices or other National Disability Insurance Scheme funded 'supports to manage disability-related behaviour or complex needs at work', ADE service providers might also engage in coercion through 'detention' or 'force'.

To 'deceive' is to 'mislead as to fact (including the intention of any person) or as to law, by words or other conduct' (Criminal Code Act 1995 (Cth), ss 270.1A 'deceive', 270.1 'deceive'). ADE service providers might engage in deception through two of the core claims: that they facilitate community participation (when they instead involve segregation) and that they facilitate skills development and provide a pathway to open employment (when disabled ADE workers are rarely provided with opportunities to move into open employment). The centrality of non-physical coercion and deception to ADEs is reflective of a recognised broader phenomenon of modern slavery in Australia as not always involving 'abduction, violence or physical restraint' but instead at times involves 'subtle, non-physical means to obtain a victim's compliance, such as ... taking advantage of a person's vulnerability' (Explanatory Memorandum, 2012). The coercion, threats or deception can 'occur at any stage during

the commission of the offence' (Explanatory Memorandum, 2012) and thus need not be present throughout the entire time of an individual's employment in an ADE. Structural coercion might also operate through rules concerning access to supports and employment, which can limit the opportunity for disabled people to leave an ADE – for example, it might be difficult for a disabled ADE worker to easily move their National Disability Insurance Scheme supports to another workplace, and a disabled ADE worker might be told by their employer that they are prohibited from applying for open employment unless they resign from their ADE job or that they might lose their Disability Support Pension if they seek open employment (Connor, 2014).

The second part of Element 3 of the forced labour offence can be satisfied because the coercion or deception causes disabled people to continue providing their labour or services 'in circumstances where a reasonable person in [the victim's] position would "not consider [themselves] to be free" to stop providing the labour or services, or to leave the place where [they] provided that service'.¹³ This is an objective test of a person in the position of the victim, which includes the personal circumstances (Criminal Code Act 1995 (Cth), s 270.10(1)(2)(c)) and 'situational and personal' vulnerabilities of the victim.¹⁴ *Pulini* – a case involving the first convictions under the forced labour provisions of the Criminal Code Act 1995 (Cth) – provides an example of the application of the reasonable person test. In *Pulini*, the victim, 'RM', travelled from Fiji to work as a domestic servant in the defendants' home on the basis she would be able to access a longer-term visa once she arrived. When she arrived, she had her passport confiscated, was forced to work long hours every day as a domestic servant and was paid between \$150AUD and \$250AUD per fortnight. For eight years, the victim worked for the Pulinis but only had a valid tourist visa for the first three months, after which time she became an unlawful non-citizen.¹⁵

In delivering the judgment for the Court of Appeal, Morrison JA made clear that coercion is to be considered in the broader context of the victim's personal circumstances and the legal, financial and other dynamics of the situation in which the alleged forced labour is taking place. Appeal Judge Morrison held that the defendants had taken advantage of the victim's vulnerability, and this would cause a reasonable person in the same position as the victim to consider themselves not free (*R v. Pulini* [72] Morrison JA). Appeal Judge Morrison identified 'both situational (her unlawful status, continued deception and absence of a visa) and personal vulnerabilities (her fears of the authorities and the Pulinis, poor financial resources and personal vulnerability)'.¹⁶ Their personal vulnerabilities would potentially include a relatively low level of knowledge of their workplace, legal and human rights and poor access to resources to enforce these rights, low socio-economic status and social isolation.

On face value, the lynchpin of RM's circumstances in *Pulini* – unlawful migration status – is not present in relation to ADEs. However, RM's migration status in *Pulini* can be extrapolated and parallels drawn with disability as the lynchpin in ADEs. Both reflect a situation of extreme social exclusion giving rise to employment and socio-economic vulnerability, which is exploited by others. Associated with RM's unlawful migration status was *her desire to be in Australia*. Arguably a similar situation is apparent in ADEs, which exploit disabled people's desire to participate in and belong in the community and be part of the workforce.

Element 4: Knowledge Conduct Caused Victim to Remain in Force Labour

Last, the fourth element of the offence of forced labour is met because ADE service providers operating know their conduct causes disabled people to remain in forced labour, because the conduct pertaining to Element 1 is legal and core to the definition and operation of ADEs. ADEs actively advocate to retain wage assessment systems that keep disabled people in low paid and unskilled work because

¹³*Pulini*, [59] Morrison JA.

¹⁴*Pulini*, [72] Morrison JA.

¹⁵*Pulini* [1]–[9] Morrison JA.

¹⁶*Pulini* [73] Morrison JA.

this is core to their financial sustainability, as demonstrated by the recent Fair Work Commission process discussed in Part 3.1.

4.2 Servitude

'Servitude' is defined in the Criminal Code Act 1995 (Cth) as the victim being subjected to the condition of forced labour as well significant deprivation 'of personal freedom in respect of aspects of his or her life other than the provision of the labour or services' (s 270.4(1)). It is a criminal offence punishable by fifteen years to engage in conduct that 'causes a person to enter into or remain in servitude' (s 270.5(1) or to conduct a business that 'involves the servitude of another person (or persons)' (s 270.5(2)). The Explanatory Memorandum for the amending legislation introducing servitude into the Criminal Code Act 1995 (Cth) explains that: 'Servitude falls short of ownership but the domination over the victim is such as to effectively deny her or his freedom in some fundamental respects' (Explanatory Memorandum, 1999, pp. 44–45).

ADEs might also be seen as a form of servitude on any one of four bases. One is where a disabled person's ADE work is interconnected to their accommodation, other supports, or transport. Second, irrespective if there is the same service provider across life domains or not, disabled people might be subject to levels of restrictions by reason of the role of families and services in shaping their day-to-day life. Here there are some parallels to the Queensland District Court decision of *Huang* (the first prosecution and conviction under the servitude offence of 270.5(1)). The Court found that the offence of servitude was made out, where, additional to being forced to work for no pay for 15 hours a day, seven days a week, the victims were also 'detained in housing', with '[w]orkers advised of strict rules around their work as well as eating, showering and sleeping' (Anti-Slavery Australia, 2017). Group homes or family homes can also involve significant control over disabled people, including strict regimes designed around staff routines and organisational resource priorities or designed around behaviour support plans, forced medication or use of restrictive practices. Third, disabled ADE workers might be subjected to guardianship orders that formally control decisions across various domains of their lives. Fourth, they might be subject to restrictive practices beyond the ADE, e.g. at their residence.

Thus, it is arguable that ADEs can fit within the modern slavery legal categories of forced labour and servitude.

4.3 Conclusion: modern slavery law as one legal tool in a larger toolkit

The legal framing through modern slavery law of disability segregated employment as labour exploitation makes it a useful tool in the transition away from disability segregated employment and realisation of disabled people's right to work. This is for two reasons.

First, modern slavery law reframes disability segregated employment as violent crimes that are almost universally repudiated by society. Modern slavery law presses corporate actors to identify risks in their operations and make these public. Modern slavery law might elicit momentum for corporate and community action on labour exploitation of disabled people. Briefly returning to the Australian case study in Part 4, the focus on accountability of supply chains in the Modern Slavery Act 2018 (Cth) mandatory reporting regime (Redmond, 2020, p. 9) makes apparent relations of accountability that go beyond the acute perpetrator–victim criminal law relationship in the Criminal Code Act 1995 (Cth). However, there are general criticisms of the lack of enforceability and compliance with the Modern Slavery Act 2018 (Cth) (Fellows and Chong, 2020; Nolan and Frishling, 2019, pp. 115–117; Nolan and Boersma, 2019, pp. 147–149), the focus on reporting rather than ongoing human rights due diligence (Nolan and Frishling, 2019, pp. 104, 114–115; Vijayarasa, 2019) and challenges in compliance on the ground (McGaughey, 2021). Thus, it is important not to overreach on the strategic potential of the corporate accountability within modern slavery law itself (a point returned to at the end of this Part). Instead, much will depend on what political use disability rights advocates make of the legal framing as a tool for changing current attitudes about the necessity and benefits of ADEs, this being a significant barrier to the political and legal will to transition away from them.

Second, modern slavery law provides an official framework in which to recognise economic exploitation of disabled people through their labour. The focus on exploitation in modern slavery law broadens attention from only on the harm and disadvantage to disabled people, to extend to the financial benefit to operators of disability segregated employment, members of supply chains, governments procuring goods and services, and consumers. Modern slavery law has the ability to surface economic exploitation of disabled people through their labour. It can also highlight the profitability of segregation, discrimination, exploitation and violence against disabled people which was outlined in Part 3.2. This move through modern slavery law from only considering harm to also considering who gains and benefits from this harm is novel in the context of political and legal discussion of violence against disabled people that focuses almost exclusively on harm (perhaps attributable to ableist assumptions of disabled people as economic burdens rather than economic opportunities). The economic focus in modern slavery law, in turn, enlarges the scope of what could be redressed beyond compensating harm or loss to disabled people through disability segregated employment to restitutionary style reparations for financial gain to the operators of disability segregated employment and others (Degeling and Barker, 2015, pp. 406–407). This conceptualisation of redress has broader relevance in terms of redress for economic gain in other contexts of for violence, abuse, neglect and exploitation of disabled people, such as the financial benefit to disability service providers through use of restrictive practices and neglectful service provision. That said, as has been noted in the Australian context, modern slavery law itself does not provide for redress, with proposals to include redress not yet proving successful (Redmond, 2020, p. 22; see also Burn et al., 2016, p. 14; Farbenblum and Berg, 2017).

Therefore, modern slavery law is best understood as *one* legal tool that can contribute to the transition away from disability segregated employment, in what is necessarily a larger toolbox containing other legal, political, economic and cultural tools. This is for two reasons. One reason is that modern slavery law is limited in its capacity to deliver the structural change necessary to support the kinds of strategies for open employment identified by the Committee on the Rights of Persons with Disabilities (see Part 2 above). As has been noted more broadly, modern slavery law focuses specifically on the acute acts giving rise to labour exploitation rather than the broader structural drivers of oppression. This criticism has been made in the specific context of UK modern slavery law, which has overlooked the broader ‘hostile environment’ towards migrants, which contributes to precarity, violence and exploitation (Hodkinson et al, 2021; Kenway, 2021). In a similar vein, it might be argued that modern slavery law could not itself address the broader structural conditions facing disabled workers that were outlined at the start of Part 3.2. In particular, modern slavery law cannot address and redress structural segregation and legal violence through disability segregated employment, just as modern slavery law cannot address the violence of national borders and structural labour market segmentation and precarity of and discrimination against migrants. Relatedly, and as has been argued in the context of migrant labour, modern slavery law does not focus on empowering workers, either in the context of their workplaces or in their lives more broadly. It is directed towards protecting people from serious physical harm rather than preventing or addressing labour exploitation, including through realisation of human rights and labour empowerment (Berg, 2016, ch. 8). It has also has been argued that a human rights-centred response to modern slavery ‘is missing in Australia, where the legal and policy landscape on slavery is heavily criminal justice focussed’ (Hohmann, 2022, p. 2). Considering these criticisms in the context of ADEs, it is doubtful that modern slavery law can support the empowerment of disabled people, including through greater awareness of and realisation of their labour rights and broader legal and human rights and shifting to positive attitudes towards disabled people.

The second reason is that modern slavery law has limited power to compel those engaged in modern slavery to change their practices. Australian scholars – even those generally in support of modern slavery law – have criticised the limits of the Modern Slavery Act 2018 (Cth). It has soft reporting (and even voluntary reporting for smaller businesses and charities), takes a self-regulatory rather than legal accountability approach and does not provide for penalties for non-compliance with reporting or modern slavery practices themselves. As Nolan and Frishling (2019, p. 113) observed, ‘The Australian Modern

Slavery Act (and similar laws on which it is based), render firms accountable, not for adverse human rights impacts, but for the procedural failure to report on their response to such impacts’.

On this basis, modern slavery law is not the fix-all solution to ADEs. It alone will not facilitate disabled people’s transition to open and full wage employment and improved access to high quality and meaningful work. What it can do, as discussed above, is provide an opportunity for organisational recognition and public awareness of modern slavery in relation to disabled people (see similarly the argument for disability-specific human rights due diligence processes for corporations (Stein and Bantekas, 2021, p. 490)). This recognition and awareness could provide a starting point for individual disability service providers and the Australian government to critically reassess ADEs and disability employment policy through the lens of labour exploitation, thus contributing towards realising disabled people’s right to work.

5 ‘Disabling’ modern slavery law: areas for further research

As well as demonstrating the potential utility of modern slavery law as one legal tool in the transition away from disability segregated employment, the doctrinal analysis in Part 4 has also indicated that modern slavery law has not been designed with disabled workers in mind. As a consequence, in this part the article draws on the Australian case study to propose the need for greater research at the intersections of modern slavery law and disability segregated employment in order to enhance the utility of modern slavery law to realising disabled people’s right to work. Specifically, further research is necessary to ‘disable’ the modern slavery legal framework and discourse. This framework and discourse is currently primarily focused on racialised, gendered, sexualised and socio-economic dynamics of labour exploitation, and generally only exploitative labour produced through coercion which rises to the level of criminality.

The nascent judgments on the modern slavery provisions of the Criminal Code Act 1995 (Cth) are primarily racialised (as relating to migrant workers from the Global South),¹⁷ gendered (as relating to women subjected to sexual slavery, sexual servitude and domestic servitude)¹⁸ and sexualised (e.g. sexual slavery and sexual servitude).¹⁹ Moreover, the evolution of modern slavery law itself reflects the focus on these dynamics. For example, Australian modern slavery offences initially introduced into the Criminal Code Act 1995 (Cth) in 1999 were related to slavery and sexual servitude (Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth));²⁰ e.g. Cullen and McSherry, 2009), with a focus on concerns about sexual exploitation of migrant women from the Global South. The introduction of other slavery-like offences (e.g. forced labour and servitude) in 2013 (Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth))²¹ broadened the focus beyond sexual exploitation but retained a concern with the exploitation of migrants from the Global South. The introduction of the Modern Slavery Act 2018 (Cth) continues the focus in the Criminal Code Act 1995 (Cth) on the exploitation of people from the Global South through its focus on supply chains located in the Global South. That this most recent stage of the evolution of Australian modern slavery law does not consider disability is reflected in the parliamentary report supporting the introduction of the Modern Slavery Act 2018 (Cth) (Joint Standing Committee on Foreign Affairs, 2017). Moreover, the Modern Slavery Act 2018 (Cth) itself relies on the Commonwealth’s external affairs legislative power under paragraph 51(xxix) of the Constitution to give effect to a variety of human rights and labour international agreements, including two specific treaties on marginalised populations (the Convention on the Elimination of all Forms of Discrimination Against Women and Convention on the Rights of Children). However, there is no mention of the Convention on the Rights of Persons with Disabilities (Modern Slavery Act 2018

¹⁷Huang; *DPP v. Shaik* [2020] VCC 909; *Pulini*.

¹⁸*Pulini*; *R v. Wei Tang* (2008) 237 CLR 1.

¹⁹*Tang*.

²⁰Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth).

²¹Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth).

(Cth) s 7(2)), even though the Convention on the Rights of Persons with Disabilities entered into force a decade prior to the Modern Slavery Act 2018 (Cth) and makes *explicit* reference to slavery, servitude and slavery (Art 27.2, as discussed in Part 2 above). Moreover, the role of the Australian Border Force in the administration of the Modern Slavery Act 2018 (Cth) – maintaining the Modern Slavery Statement Register and supporting the statutory review of the Modern Slavery Act 2018 (Cth) – suggests that modern slavery is officially understood as associated with migration and transnational trade.

These factors mean labour exploitation in modern slavery law might be framed in ways that shape certain slavery stereotypes that become problematic when they then exclude individuals whose narratives do not fit (Vijayarasa, 2016, pp. 34–39), including disabled individuals in legally sanctioned Australian employment. The absence of disability in the design and interpretation of Australian modern slavery law might render this law itself a site of normative violence (Varman et al., 2021) against disabled people insofar as within this legal framework, disabled people's experiences of segregation, discrimination, exploitation and violence are not recognisable, and their lives are in turn deemed ungrievable (Varman et al., 2021, p. 661).

The absence of disability in the doctrine and discourse of modern slavery law underscores the need for research to examine how the legal, political *and* epistemological dynamics of modern slavery (Fudge, 2018) contribute to exclusion of disability not merely at the level of modern slavery law's design, interpretation and operation but at the level of what is thought comprehensible and knowable in law and society more broadly as labour exploitation.

Research to 'disable' modern slavery law can draw on the general comment on the right of persons with disabilities to work and employment. In this general comment the Committee on the Rights of Persons with Disabilities brings labour exploitation back to core concepts of 'choice, consent and freedom from coercion' situated in the 'wider context of exploitation or coercion' experienced by disabled people (Committee on the Rights of Persons with Disabilities, 2022, p. 11), thus pushing labour exploitation beyond existing racialised, gendered and sexualised understandings and archetypes. Research to 'disable' modern slavery can also draw on the scholarship on disability and the history of slavery – disability was central to enslavement of racialised populations (Barclay, 2021; Hunt-Kennedy, 2020) – and scholarship on the history of labour exploitation in disability institutions (Beckwith, 2016). On a theoretical level, research to 'disable' modern slavery can draw on critical disability scholarship on the political economy of disability which has explored the positioning of disabled people as economic burdens on others at the same time that disabled people's support needs becomes commodified and disability services are extractive of their disability. Such research can contribute to the epistemological and political foundation for realising the right to work and ultimately greater accountability and justice for disabled people. (Ben-Moshe and Stewart, 2017; Erevelles, 2011).

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LAW AND DISABILITY 'SUPPORTED' EMPLOYMENT IN AUSTRALIA: THE CASE FOR ENDING SEGREGATION, DISCRIMINATION, EXPLOITATION AND VIOLENCE AGAINST PEOPLE WITH DISABILITY AT WORK

LINDA STEELE*

This article argues for transition away from Australian Disability Enterprises ('ADEs') on the basis that they further segregation, discrimination, exploitation and violence against people with disability. ADEs (previously 'sheltered workshops') overwhelmingly impact people with intellectual and cognitive disability. In ADEs, employees with disability receive less than award wages. They work in segregated settings where they are separate from and in unequal relationships with employees without disability. While sometimes framed as an opportunity for skills development, ADE employees with disability are unlikely to move into open employment. Currently, a variety of laws across diverse domains, including disability services law, industrial relations law and guardianship law, provide legal basis for ADEs as necessary and beneficial to people with disability and organisations that operate ADEs receiving financial benefit from the unequal treatment of ADE employees with disability. Legal institutions with authority to help dismantle ADEs — the Commonwealth legislature, the Fair Work Commission ('FWC') and Federal Court — have further entrenched ADEs in law by dismissing claims that they are harmful to people with disability. Ultimately, the article provides a basis for the need for law reform to transition away from ADEs in a broader context of enhancing dignity, equality and self-determination of people with disability.

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I INTRODUCTION

In *Forgotten and Found: My Life Story*, Kim Walker — an Australian disability rights activist with intellectual disability — writes of her experiences working in sheltered workshops in the 1980s:

[W]e packed chickens. ... One person put the tray on to the conveyor belt, one person put down the blotter (that was me), another person put a chicken on top of the blotter, then someone else packed the chicken into a box.

We had to stand up all day in the cold. We took our lunch with us — we could order it, but it cost too much to do that.

I did this for more than two years. Most of the people working there had an intellectual disability, and some had mental health problems. I got paid \$8 or \$9 a week on top of my pension — for full-time work. I didn't know anything about rights back then.¹

Although we might assign Walker's experiences to late 20th century disability history, sheltered workshops continue to operate in Australia legally. Sheltered workshops have been renamed ADEs. ADE employees with disability receive individual productivity-based wages below award and minimum wages, are congregated in segregated workplaces, are unlikely to move into open employment, and can be subjected to restrictive practices that reduce their freedom of movement and rights within the workplace. At the same time, the organisations that operate ADEs receive financial benefits through lower labour costs, receiving National Disability Insurance Scheme ('NDIS') funding, and having a competitive advantage in government procurement.

ADEs are entrenched in the Australian legal system and the NDIS funding system, and are a key dimension of Australian government disability employment strategy. Over the past three decades, various laws across diverse domains and jurisdictions have justified ADEs as necessary and beneficial to people with disability. Legal institutions with authority to question and help dismantle ADEs have further entrenched ADEs in law by dismissing claims that they are harmful to people with disability. The current legal context means many of the harms of ADEs are lawful and incapable of redress.

The aim of the article is to contend for an approach to disability employment in law and society that furthers dignity, equality and self-determination of people with disability. It argues for a transition away from ADEs on the basis that they are intrinsically harmful and also facilitate violent, neglectful and exploitative behaviours towards people with disability (particularly people with intellectual disability or cognitive disability). Through a socio-legal analysis of ADEs, it demonstrates that the official legal and service framing of ADEs reflects a medicalised and deficit understanding of people with disability, which is the basis for an approach to employment of people with disability that justifies unequal treatment through discourses of inclusion and support of people with disability

¹ Kim Walker, *Forgotten and Found: My Life Story* (NSW Council for Intellectual Disability, 2015) 29–30.

deemed incapable (by reason of their disability) of working in open employment. The article contrasts the official legal and service framing of ADEs with an approach to employment of people with disability which identifies social, legal and cultural barriers to people with disability being able to equally participate in the labour market and community more broadly. In this latter approach, ADEs are themselves a barrier (rather than part of the solution) because rather than providing accommodations and supports to facilitate equality in the workplace, they take an approach to workplace culture, pay and supports that sustains inequality. On the basis of this latter approach, transition away from ADEs is possible because expectations and obligations are on governments and workplaces to address barriers to employment and make accommodations to support employment of people with disability in a broader context of ending segregation of people with disability and realising their dignity, equality and self-determination. While the article refers to 'ADE employees with disability', it is important to note that ADEs overwhelmingly employ people with intellectual or cognitive disability. Indeed, disabled writer and activist El Gibbs has noted that '[a]t every single stage of their lives, people with an intellectual disability and their families face very significant barriers to getting a job outside of a sheltered workshop'.² Thus, the discussion that follows is particularly relevant to understanding and addressing the specific exclusion of people with an intellectual or cognitive disability from the mainstream workforce.

Now is a timely moment to consider ADEs in the context of segregation, discrimination, exploitation and violence. The recently completed Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission') explored how to 'protect ... people with disability from ... violence, abuse, neglect and exploitation' and how 'to promote a more inclusive society that supports the independence of people with disability';³ its remit extended to the specific context of ADEs.⁴ Moreover, the United Nations ('UN') *Convention on the Rights of Persons with Disabilities* ('CRPD')⁵ provides for rights to equality and non-discrimination, community inclusion, freedom from violence and exploitation and work on an equal basis to others (including in an open work environment and for equal pay for work of equal value).⁶ In its latest periodic review of Australia's compliance with the CRPD, the

2 El Gibbs, 'What's on the Disability Agenda for the New Government', *Patreon* (Blog Post, 7 August 2022) ('Disability Agenda'). See also 'Disability Employment on the Agenda', *El Gibbs* (Blog Post, 21 August 2022) <<http://elgibbs.com.au/disability-employment-on-the-agenda/>>.

3 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Commonwealth Letters Patent* (4 April 2019).

4 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Employment* (Issues Paper, 12 May 2020) 4 ('Disability Royal Commission Employment Issues Paper').

5 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

6 Ibid arts 5, 16, 19, 27. The UN CRPD Committee have published a general comment on its interpretation of art 27 concerning the right of persons with disability to work and employment: Committee on the Rights of Persons with Disabilities, *General Comment No 8 (2022) on the*

Committee on the Rights of Persons with Disabilities ('UN CRPD Committee') expressed concern about 'ongoing segregation of persons with disabilities employed through Australian Disability Enterprises and the fact that such persons receive a sub-minimum wage'.⁷ It recommended that Australia review ADEs to ensure they 'provide services to enable persons with disabilities to transition from sheltered employment into open, inclusive and accessible employment, ensuring equal remuneration for work of equal value'.⁸

This article makes its argument by bringing together doctrinal analysis of ADEs, critical approaches to ADEs drawn from international human rights norms, perspectives of Disabled People's Organisations ('DPOs') and other disability advocacy and human rights organisations and insights from critical disability scholarship. Core to this approach is prioritising the voices and experiences of people with disability. Part II provides an overview of the Australian law and policy on ADEs. Part III discusses exploitation, discrimination, segregation, violence and coercion of people with disability in ADEs, with reference to the law and policy framework set out in Part II. While this part is principally concerned with establishing the case for transition away from ADEs, it concludes by offering some preliminary guidance on what role law might have in such transition. The article finishes in Part IV by identifying key areas for further action and research to advance work on a broader strategy to end ADEs and ensure accountability for the injustices within them.

II LAW AND POLICY OF ADES

In Australia, there are around 600 ADEs, in which approximately 20,000 people with disability work.⁹ Generally, ADE employees with disability engage in various physical labour roles, including food services, cleaning, laundry, landscaping,

Right of Persons with Disabilities to Work and Employment, UN Doc CRPD/C/GC/8 (7 October 2022).

- 7 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) 13 [49(b)] ('*CRPD Concluding Observations on Australia*').
- 8 Ibid 13 [50(b)]. A 2012 report of the Office of the United Nations High Commissioner for Human Rights noted that 'one of the core challenges lies in negative attitudes, stigma and stereotypes of persons with disabilities being in some way "unsuitable" to participation in working life, on an equal basis with others', which then 'translates into continued marginalization and discrimination of persons with disabilities in the area of work and employment': Human Rights Council, *Thematic Study on the Work and Employment of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/25 (17 December 2012) 17 [67]. It concluded that it 'is imperative that States parties move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market' and also encourage more employment of people with disability: at 17 [68].
- 9 'What Is Supported Employment?', *BuyAbility* (Web Page) <<https://buyability.org.au/supported-employment/>>.

packaging, assembly, production and recycling.¹⁰ ADEs are 'supported employment services'¹¹ that are part of Commonwealth law directed towards enhancing integration and participation of people with disability in the community¹² and are funded through the NDIS.¹³

ADEs are described by BuyAbility, the peak body for organisations operating ADEs (an initiative of the National Disability Services, funded by the Department of Social Services), as 'Social Enterprises' that 'employ people with disability in a supported working environment'.¹⁴ BuyAbility describes the benefits of ADEs to ADE employees with disability as providing '[m]eaningful work', which 'means people with disability can lead a normal life, make friends and find professional fulfilment knowing they are contributing to the community'.¹⁵

This part introduces the law and policy framework of ADEs in Australia,¹⁶ outlining the existence and funding of ADEs, wages within ADEs, and substitute decision-making and use of restrictive practices within ADEs. It establishes both the legal basis of ADEs and law's role in narrating and legitimating a view of ADEs that aligns with the perspective of the organisations operating ADEs: ADEs as being necessary and beneficial to people with disability and the broader community.

A Legal Basis for the Existence and Funding of ADEs

ADEs are entrenched in the Australian legal system and NDIS funding system. This section provides a historical overview of the legal and policy development of Commonwealth law that forms the legal basis for the existence, operation and funding of ADEs. Discussion focuses on the *Disability Services Act 1986* (Cth) ('*DSA 1986*') and the NDIS legislative framework.

10 'Supported Employment', *Department of Social Services* (Web Page, 11 April 2022) <<https://web.archive.org/web/20221018164837/https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability/supported-employment>>.

11 *Disability Services Act 1986* (Cth) s 7 (definition of 'supported employment services') ('*DSA 1986*').

12 *Ibid* s 3.

13 *Supports in Employment Provider Handbook* (January 2021) 3 ('*Supports in Employment Provider*').

14 'What Is Supported Employment' (n 9).

15 'BuyAbility Impact Tool', *BuyAbility* (Web Page) <<https://buyability.org.au/buyability-impact-tool/>>.

16 For a legal overview of 'sheltered workshops' more generally: see Paul David Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (Cambridge University Press, 2020) ch 4.

1 Disability Services Act 1986 (Cth)

The legislative origins of ADEs can be traced back to the mid-1980s.¹⁷ In 1985, the Commonwealth government's *New Directions: Report of the Handicapped Programs Review* ('*Handicapped Programs Review Report*') recommended integration of disability employment programs and improved wages and conditions within sheltered workshops.¹⁸ Following the review, the *DSA 1986* was introduced. This Act reflects key recommendations of the *Handicapped Programs Review Report* to provide a framework for funding disability services and requirements for disability services to be focused on integration of people with disability. The objects of the *DSA 1986* (largely unchanged for the past 36 years) include assisting people with disability to receive services to participate in the community.¹⁹ The objects also extend to promoting services provided to people with disability that assist with community integration, independence and employment, which promote a positive image of people with disability and enhance their self-esteem.²⁰

However, rather than reflecting the position of the *Handicapped Programs Review Report* that sheltered workshops were 'anachronisms to be phased out',²¹ sheltered workshops were instead legislated into the *DSA 1986* as 'supported employment services'. The Act defines supported employment services as services that support paid employment of persons with disability who are unlikely to obtain employment 'at or above the relevant award wage' and will 'need substantial ongoing support to obtain or retain paid employment' because of 'their disabilities'.²² This meaning of sheltered workshops as 'supported' employment for people with disability unable to find other employment because of their disability is significant. It allowed the *DSA 1986* to position ADEs as being directed towards supporting community integration and positive outcomes for people with disability.

2 National Disability Insurance Scheme Act 2013 (Cth)

Originally, under the *DSA 1986*, ADE service providers were funded through 'block funding' — they received direct funding for an agreed number of supported employment places.²³ Immediately prior to the NDIS, ADEs were funded through the Disability Employment Assistance Program ('DEAP'). However, with the

17 *DSA 1986* (n 11).

18 *New Directions: Report of the Handicapped Programs Review* (Report, 1985) 38–40 <<https://apo.org.au/sites/default/files/resource-files/1985-05/apo-nid54671.pdf>>, cited in 'Agents of Our Own Destiny: Activism and the Road to the Disability Royal Commission' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, November 2021) 8 ('Agents of Our Own Destiny').

19 *DSA 1986* (n 11) s 3(1)(b).

20 *Ibid* s 3(1)(c). As introduced, see s 3 of the original version of the Act, which is of a similar nature.

21 *Agents of Our Own Destiny* (n 18) 12.

22 *DSA 1986* (n 11) s 7 (definition of 'supported employment services').

23 Luke Buckmaster and Shannon Clark, 'The National Disability Insurance Scheme: A Quick Guide' (Research Paper Series 2018–19, Parliamentary Library, 8 May 2019) 1.

introduction of the NDIS, ADEs are transitioning to an individualised model of funding where ADEs are funded for the employment supports they provide through individuals' NDIS participant plans. DEAP ceased operating on 31 March 2021 and in April 2022 the majority of ADE employees with disability had transitioned to the NDIS funding.²⁴ Under the new funding model, people with disability choose the service provider to support them in their employment. This might be the ADE service provider, or it could be other service providers that are brought into the workplace to provide specific supports or that provide offsite supports. The Australian government described this shift as giving 'participants greater choice and control over how they spend their supported employment funding'.²⁵ This policy change has effectively uncapped the number of ADE places and, thus, will 'potentially increase the number of people with disability in ADEs'.²⁶

Employment supports funded by the NDIS include 'frequent and ongoing supports that assist a person with disability to take part in work where the person has work capacity and is unlikely to be able to find or retain work in the open market, including with the assistance of employment services'.²⁷ These supports can include 'on-the-job training and intermittent support with daily work tasks', 'direct supervision and/or group-based support to enable meaningful participation at work' and 'supports to manage disability-related behaviour or complex needs at work'.²⁸ Funding of employment supports for ADE employees with disability principally depends on what could be considered 'reasonable and necessary' for that individual.²⁹

The legislative framework of NDIS funding amplifies the beneficial legal justification of ADEs that was established by the *DSA 1986* by suggesting ADEs are fundamentally about autonomy and inclusion and are not intrinsically abusive, exploitative or otherwise contrary to human rights. For example, the general principles guiding actions under the *National Disability Insurance Scheme Act 2013* (Cth) ('*NDIS Act 2013*') provide that reasonable and necessary supports for people with disability should, inter alia, support independent living and community inclusion, and support community participation.³⁰ The general principles also include that people with disability should be supported in their economic and social participation, and that they have equal rights to 'physical, social, emotional and intellectual development' and 'respect for their worth and dignity and to live free

24 'Supported Employment' (n 10).

25 *Supported Employment under the NDIS* (Consultation Paper, November 2019) 7. See also *Re 4 Yearly Review of Modern Awards — Supported Employment Services Award 2010* [2019] FWC 8179, [249]–[251] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge) ('*Review of Supported Employment Services Award 2010*').

26 *Disability Royal Commission Employment Issues Paper* (n 4) 4.

27 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) r 7.17(b).

28 *Supports in Employment Provider* (n 13) 5.

29 *National Disability Insurance Scheme Act 2013* (Cth) s 34(1).

30 *Ibid* ss 4(11)(b), (c).

from abuse, neglect and exploitation'.³¹ The objects of the *NDIS Act 2013* include to support social and economic participation of people with disability and enable them to exercise choice and control.³² The objects of this Act extend to giving effect to Australia's obligations under the *CRPD* and other international human rights instruments.³³ The funding of ADEs within the NDIS legislative framework thus positions them as furthering the realisation of disability human rights, supporting community participation, and not as intrinsically harmful nor as facilitating violent, neglectful and exploitative behaviours.

3 Procurement Policies

Commonwealth and state/territory-based government procurement policies provide legal basis for an additional source of financial benefit to ADE service providers — the competitive advantage in relation to government contracts. Therefore, they contribute to the legal construction of ADEs as beneficial to people with disability and the broader community. For example, procurement from a business that 'primarily exists to provide the services of persons with a disability' is exempt from the *Commonwealth Procurement Rules*.³⁴ This means ADEs need not participate in a competitive process in order to provide goods and services to the government. Western Australian government guidance on procurement — which provides similar exemptions to ADEs — rationalises this approach on the basis 'having a job provides more than a wage — it is a doorway to engagement in community life, enhanced feelings of self-worth and the promotion of citizenship'.³⁵ Thus, the advantage to service providers operating ADEs is rationalised on the basis of the assumed benefits to people with disability in working in ADEs.³⁶

The historical legislative review in Part II(A) demonstrates that legal and policy developments seeking to improve conditions for people with disability often

31 Ibid ss 4(1)–(2), (6).

32 Ibid ss 3(1)(c), (e).

33 Ibid ss 3(1)(a), (i).

34 *Commonwealth Procurement Rules 13 June 2023* (Cth) app A, cl 15 <<https://www.finance.gov.au/sites/default/files/2023-06/Commonwealth%20Procurement%20Rules%20-%2013%20June%202023.pdf>>. See also in 2019 when opposition leader Bill Shorten announced Labor would support ADEs through directing Commonwealth contracts to them: Luke Michael, 'Disability Groups Divided over Support for Australian Disability Enterprises', *Pro Bono Australia* (online, 25 January 2019) <<https://probonoaustralia.com.au/news/2019/01/disability-groups-divided-support-australian-disability-enterprises/>>.

35 Department of Finance (Cth), 'Purchase from an Aboriginal Business or Australian Disability Enterprise Guideline', *Government of Western Australia* (Web Page, 1 July 2021) <<https://www.wa.gov.au/government/multi-step-guides/procurement-guidelines/procurement-planning-individual-purchases-guidelines/purchase-aboriginal-business-or-australian-disability-enterprise-guideline>>.

36 Ibid. A 2020 COVID-19 policy announcement by the Victorian Labor government announced expenditure on social housing, and that as part of the economic stimulus, priority would be given to ADEs: Daniel Andrews, Premier of Victoria, 'Victoria's Big Housing Build' (Media Release, Victorian Government, 15 November 2020).

appear well-motivated. For example, the aim of the *DSA 1986* was to improve the social status of people with disability. Yet, as political understandings of disability progress, these purportedly positive developments themselves become the target of criticism. As we are now in a stage of enhanced human rights claims for people with disability by reason of the *CRPD*, disability supported employment models based on earlier conceptualisations of disability are outdated and can be criticised. At the same time, the endurance of ADEs suggests the resilience of this employment model and the conceptualisations of disability underpinning them, not least of all by reason of the capacity for legal and service justifications of their existence to recalibrate, absorb and subvert the disruptive potential of advances in the political status of people with disability, even surviving over a decade into the *CRPD*.

B Wages in ADEs

Federal law facilitates payment to ADE employees with disability wages below the national minimum wage payable to employees without disability.³⁷ This is justified on the basis of the reduced productivity of ADE employees with disability and the importance of keeping wage costs down to ensure the financial sustainability of ADEs by reason of their benefits to people with disability and their families.³⁸ Discussion in this section focuses on the role of the FWC in regulating ADE wages.

1 Industrial Relations Law and the Supported Wage System

The FWC can 'make, vary and revoke modern awards'.³⁹ Along with the National Employment Standards, which provide for employment conditions such as maximum weekly hours and various forms of leave, modern awards provide for the minimum wage for the particular industry or occupation to which they apply.⁴⁰ Modern awards 'provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors'.⁴¹ 'A modern award must not include terms that discriminate against an employee' on the basis of an employee's 'physical or mental disability'.⁴² However, '[a] term of a modern award does not discriminate against an employee merely because it provides for minimum wages for ... all employees with a disability, or a class of employees with a disability'.⁴³

37 For a history of wages in ADEs, see *Nojin v Commonwealth* (2011) 283 ALR 800, 820–9 [40]–[73] (Gray J) ('*Nojin*').

38 *Review of Supported Employment Services Award 2010* (n 25) [367] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

39 *Fair Work Act 2009* (Cth) s 132 ('*FW Act*').

40 *Ibid* ss 59, 132.

41 *Ibid* s 132. See also at s 134.

42 *Ibid* s 153(1).

43 *Ibid* s 153(3)(b).

The *Supported Employment Services Award 2020* (Cth) ('*Supported Employment Services Award*') is a separate industry award for employees in supported employment services. The *Supported Employment Services Award* provides that '[a]n employee with a disability will be paid such percentage of the rate of pay of the relevant grade ... as assessed under an approved wage assessment tool chosen by a supported employment service'.⁴⁴ Wage assessments are reviewed regularly,⁴⁵ and employers must inform employees of their employment rights.⁴⁶ Therefore, ADE employees with a disability have their wages determined based on their individual assessed work capacity, and the wage they receive might fluctuate over time depending on their productivity.

Twenty-two approved wage assessment tools can be used to determine work capacity.⁴⁷ While most of these were developed by specific disability service providers,⁴⁸ the Supported Wage System Tool was developed by the Australian government and is not specific to a particular service provider.⁴⁹ The Supported Wage System Tool only applies to 'an employee with a disability'⁵⁰ who receives the disability support pension ('DSP') and because of their disability is 'unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award'.⁵¹ The Supported Wage System Tool can be used in ADEs *and* in open employment (a point we return to in Part III(D)).⁵² Assessment pursuant to the Supported Wage System Tool is

44 *Supported Employment Services Award 2020* (Cth) cl 18.1 ('*Supported Employment Services Award*').

45 The default is that they be reviewed within three years and 'may be reviewed at the initiative of either the employee with a disability or the supported employment service, once every 6 months and not more than 4 times every 3 years', although a wage assessment tool might specify otherwise: *ibid* cl 18.7.

46 *Ibid* cl 32.

47 *Ibid* cl 18.

48 Examples include the 'Elouera Association Wage Assessment Tool' and the 'Greenacres Association Competency Based Wages System'. For the full list, see *ibid* cl 18.2.

49 The Supported Wage System Tool is detailed in sch D of the *Supported Employment Services Award* (n 44).

50 *Ibid* cl D.1.

51 *Ibid* cl D.3.1.

52 While this article focuses on ADEs, it is important to note that people with disability can be paid reduced wages in open employment through the Supported Wage System or through National Minimum Wage for employees with a disability: 'Minimum Wages', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/minimum-wages>>. See also *FW Act* (n 39) s 284. The disability minimum wage applies to 'a national system employee who is qualified for a disability support pension', or who would be qualified if they met the relevant Australian residency requirements: at s 12 (definition of 'employee with a disability'). In the disability national minimum wage, a disabled person's actual wage can be a percentage of the adult national minimum wage if their work capacity is assessed but cannot be less than \$95 per week: 'Employees with Disability Pay Rates', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/pay-and-wages/minimum-wages/employees-with-disability-pay-rates>>. Moreover, Western Australia, Tasmania, South Australia, Queensland and New South Wales ('NSW') all have industrial

conducted by an approved assessor, in consultation with the employer, employee and, if the employee wishes, a relevant union.⁵³ The rate of pay is adjusted following the review.⁵⁴ The minimum an individual can be paid is 12.5% of the national minimum wage, which equates to \$2.54 per hour or \$96.58 per week.⁵⁵ If an individual is assessed as having productive capacity less than 12.5%, they are paid at 12.5%.⁵⁶ The wage assessment is reviewed periodically.⁵⁷

2 Disability Discrimination Law and Wage Assessment Tools

The wage assessment system in ADEs has been a site of legal contestation. Yet, as is discussed below in this section, ultimately the outcomes of disputes around wage assessment have reiterated the legitimacy of the lower wages to ADE employees with disability based on the benefits of ADEs to people with disability and the need to preserve the financial sustainability of ADEs for the benefit of people with disability, ADEs, family members and the broader community.

In the early 2000s there was some disability discrimination litigation in relation to wage assessment. As part of the Wage Justice Campaign led by the Australian Employees with Disability Legal Centre ('AED Legal Centre') and People with Disability Australia ('PWDA'), in 2008 the AED Legal Centre launched a test case on behalf of two people with intellectual disability — one employed in an ADE (at the time called 'business services') and the other in open employment.⁵⁸ The test case was in the form of a disability discrimination complaint based on their employers' use of a particular wage assessment tool, the Business Services Wage Assessment Tool ('BSWAT'). The BSWAT assessed productivity and competency of people with disability. The competencies assessed (which could be selected from a range of options by agreement of the assessor and the ADE employer) might not have been relevant to the job performed by the employee.⁵⁹ Under the BSWAT,

relations provisions enabling lower rates of pay for people with disability in open employment on application by the employee: Australian Government Solicitor, 'Report on the Key Elements of the Legislative Framework Affecting People with Disability' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020) 241–3 [61]–[74] <<https://apo.org.au/sites/default/files/resource-files/2020-12/apo-nid310247.pdf>> ('AGS Report on the Legislative Framework Affecting People with Disability').

53 *Supported Employment Services Award* (n 44) cl D.5.1.

54 *Ibid* cl D.7.2.

55 As of July 2022, the National Minimum Wage is \$21.38 per hour or \$812.60 per week: Fair Work Ombudsman, 'Minimum Wage Increases Today' (Media Release, 1 July 2022) <<https://www.fairwork.gov.au/newsroom/media-releases/2022-media-releases/july-2022/20220701-annual-wage-review-2022-media-release>>.

56 *Supported Employment Services Award* (n 44) cl D.4.1(b).

57 *Ibid* cl D.7.2.

58 *Nojin* (n 37).

59 *Review of Supported Employment Services Award 2010* (n 25) [309] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

ADE employees with disability could be paid just \$1.00 per hour.⁶⁰ The plaintiffs argued that this tool resulted in significantly lower capacity assessments and thus lower wages than other assessment tools. The applicants sought a declaration that they were unlawfully discriminated against in contravention of s 15 of the *Disability Discrimination Act 1992* (Cth) (*'DDA 1992'*) because they were required to undergo a BSWAT assessment to receive higher wages.⁶¹ The BSWAT was suggested to be discriminatory on two bases related to its competency aspect: the greater difficulty in meeting the competencies and in undertaking a question-and-answer style assessment.⁶² The application was rejected at first instance.⁶³

On appeal, a majority of the Full Federal Court found that because of the competency aspect, the BSWAT discriminated based on disability, specifically against people with intellectual disability.⁶⁴ This was because the competency aspect of the BSWAT tested knowledge and understanding that was disconnected from the actual physical work performance such that people with intellectual disability had reduced opportunity to 'obtain a higher wage commensurate with their actual work, productivity and applied job skills'.⁶⁵ A majority of the Full Federal Court (Katzmann and Buchanan JJ, Flick J dissenting) held that assessment of the appellants' wages using BSWAT was not reasonable because to be employed in an ADE in the first place, employees with disability would need to have met some level of general competency, such that it was unfair to subsequently assess their competency again through the BSWAT.⁶⁶ The appeal from the decision of Gray J was allowed.⁶⁷ Leave to appeal this decision to the High Court was refused.⁶⁸

Following the Full Federal Court decision that the BSWAT was discriminatory, the Commonwealth government obtained from the Australian Human Rights Commission (*'AHRC'*) a temporary one-year exemption under the *DDA 1992* (shorter than the three-year exemption it requested) to continue to use BSWAT while the Commonwealth and ADEs transitioned to the Supported Wage System or an alternative wage assessment tool.⁶⁹ The exemption was subsequently

60 *Agents of Our Own Destiny* (n 18) 12.

61 *Nojin* (n 37) 803–5 [9]–[14] (Gray J).

62 *Ibid* 802–3 [5] (Gray J).

63 *Ibid* 840–1 [103] (Gray J).

64 *Nojin v Commonwealth* (2012) 208 FCR 1, 47 [142] (Buchanan J).

65 *Ibid* 45 [130] (Buchanan J).

66 *Ibid* 47–8 [144], [146] (Buchanan J).

67 *Ibid* 50 [158]–[159] (Buchanan J).

68 In refusing leave to appeal, Crennan J observed the 'unchallenged expert evidence ... that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score': Transcript of Proceedings, *Commonwealth v Prior* [2013] HCATrans 101, 310–13.

69 Australian Human Rights Commission, *Disability Discrimination Act 1992 (Cth): S 55(1) Notice of Grant of Exemption* (Notice, 29 April 2014) 9–10 [41] <https://humanrights.gov.au/sites/default/files/20140429_Note_of_Exemption_BSWAT111.pdf>.

extended for a further two years⁷⁰ despite opposition by disability advocates on the ground that this would sustain human rights violations against people with disability — the basis of the Court decision establishing the discriminatory nature of the BSWAT.⁷¹

Subsequent to *Nojin v Commonwealth* ('*Nojin*'), Tyson Duval-Comrie — an ADE employee with intellectual disability — brought a representative complaint or class action in relation to the BSWAT.⁷² The class action was necessary because the earlier decision in *Nojin* applied only to the wages of the plaintiffs in that case such that after the Court decision, other ADE employees with disability continued to receive wages that were determined pursuant to the discriminatory BSWAT (absent legislative reform or each ADE employee seeking their own relief in court). During the relevant period for the class action, the BSWAT had been used by over 100 ADEs, and 9,735 people fell within the group.⁷³ It was claimed that the requirement that members of the group undergo a BSWAT wage assessment to obtain a wage increase amounted to indirect disability discrimination pursuant to s 6 of the *DDA 1992* in the course of employment, in contravention of s 15 of the *DDA 1992*.⁷⁴ The argument about discrimination focused on the competency aspect of the BSWAT, in similar terms to *Nojin*.⁷⁵ The loss and damage to the applicant and group members were said to arise from the lower wages they were paid than they would have received if there had not been unlawful discrimination.⁷⁶

Following commencement of the class action, the federal government introduced a Bill for a scheme to pay affected employees a portion of their underpaid wages.⁷⁷ In its original form, the proposed legislation provided payments of 50% of the underpaid wages.⁷⁸ However, before the Bill was passed, the BSWAT class action

70 Australian Human Rights Commission, *Disability Discrimination Act 1992 (Cth): S 55(1) Notice of Grant of Exemption* (Notice, 18 December 2015) <<https://humanrights.gov.au/sites/default/files/Decision%20PDF.pdf>>; Australian Human Rights Commission, *Disability Discrimination Act 1992 (Cth): S 55(1) Notice of Grant of Exemption* (Notice, 22 March 2016) <https://humanrights.gov.au/sites/default/files/Decision%20PDF_1.pdf>.

71 People with Disability Australia, Submission to Australian Human Rights Commission, *Application by the Department of Social Services for an Additional Exemption from the Disability Discrimination Act 1992 to Use the Business Services Wage Assessment Tool in Australian Disability Enterprises* (July 2015) 3 [5].

72 *Duval-Comrie v Commonwealth* [2016] FCA 1523 ('*Duval-Comrie*').

73 Ibid 1 [4] (North J).

74 Ibid 1 [6] (North J).

75 Ibid 2 [9]–[10] (North J).

76 Ibid 2–3 [13] (North J).

77 *Business Services Wage Assessment Tool Payment Scheme Act 2015* (Cth) ('*BSWAT Act*').

78 Australian Lawyers for Human Rights, Submission No 67 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (27 April 2017) 9 ('*Australian Lawyers for Human Rights Submission No 67*'). The legislation was referred to the Senate Community Affairs Legislation Committee. In submissions to that Senate inquiry, the redress scheme was criticised by lawyers and disability

was subsequently settled, with the terms of the Deed of Settlement providing that the Commonwealth would seek to pass amending legislation to increase the redress amount from 50% to 70%, extend the period for claiming under the scheme by 12 months and promote the redress scheme, including by providing information in Easy Read.⁷⁹ The subsequent legislated payment scheme offered individuals 70% of the productivity scored wage (minus that already paid in their actual wage).⁸⁰ Following the litigation and the payment scheme, service providers using the BSWAT were provided with financial support to transition to another wage assessment tool.⁸¹ While the BSWAT litigation addressed one aspect of discrimination specifically pertaining to wage assessment, it did not challenge the legality of the existence and operation of ADEs nor the broader wage system in which the BSWAT had operated.

3 FWC and the Future of Wage Assessment

The FWC recently completed reviewing the Supported Employment Services Award as part of its legislated role of periodically reviewing awards.⁸² In this section, it will be argued that through this legal process, the FWC has consolidated the legitimacy of lower wages to ADE employees with disability not only based on the benefits of ADEs to people with disability, as is clearly stated in the *DSA 1986* and *NDIS Act 2013*, but additionally by reason of the importance of the financial sustainability of ADEs to continue to provide these benefits. In 2019, the FWC released a preliminary decision with proposed changes including a single wage assessment tool that assesses the productivity of employees and the value of

advocates because it provided insufficient redress for discrimination: Australian Lawyers Alliance, Submission No 14 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* (23 July 2014); People with Disability Australia, Submission No 21 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* (July 2014). In its final report, the Committee recommended the Bill be passed: Community Affairs Legislation Committee, Parliament of Australia, *Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* (Report, August 2014) ix <https://www.aph.gov.au/-/media/Committees/Senate/committee/clac_ctte/business_services/report.pdf?la=en&hash=B1B905923711AF190F7765FA65D1BB660898D213>.

79 *Duval-Comrie* (n 72) 4–5 [23]–[25] (North J).

80 *BSWAT Act* (n 77) s 8(3)(a). See also Australian Government, *About the BSWAT Payment Scheme: Information for Legal Advisors* (Handbook, 2016).

81 Jane Prentice, ‘Thousands of People with Intellectual Impairment to Benefit from Settlement of BSWAT Class Action’ (Media Release, Department of Social Services (Cth), 16 December 2016).

82 The periodic review is pursuant to cl 26 of sch 1 to the *FW Act* (n 39). See, eg, *Review of Supported Employment Services Award 2010* (n 25) [2] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

their work, redesign of the pay classification involving introduction of two additional pay grades below the existing seven and a \$3.50 minimum wage.⁸³

In its preliminary decision, the FWC legitimated the unequal pay and work conditions within ADEs as fair and non-discriminatory application of industrial relations law. It expressed support for the necessity and value of ADEs, based on the employment opportunities they provide to people with disability being of 'value to Australian society'; they provide 'support and respite' to carers and family members and provide to people with disability 'companionship, stimulation, independence, learning opportunities and the sense of dignity, achievement and self-worth'.⁸⁴ The FWC emphasised that ADEs are not employers 'in the normal sense' by reason of the additional support services they provide to employees with disability, such as life-skills and vocational training, assistance with transport, and counselling and behavioural support.⁸⁵ Moreover, the FWC expressed the view that the nature of employment in ADEs is 'markedly different' to the general labour market.⁸⁶ An employer will usually hire someone identified as necessary to carry on their business. In contrast, the purpose of ADEs 'is to provide employment opportunities for disabled persons who have restricted work capacity, typically on a not-for-profit basis'.⁸⁷ Thus, they provide job opportunities tailored to the capacity of people with disability, rather than providing job opportunities that will be open to the general public and will require a range of skills and spectrum of capacity. Thus, the FWC was of the view that a person with disability 'does not therefore perform the "whole job" which the relevantly non-disabled person is capable of performing'.⁸⁸

Reflecting the pattern of ADEs being repeatedly justified, rather than questioned, by the legal mechanisms that regulate them, the FWC rejected PWDA's argument that ADEs provide 'segregated employment'.⁸⁹ The FWC suggested that open employment is only 'desirable' but not 'practicable' for people with more 'severe' disability.⁹⁰ Therefore, ADEs are 'the only realistic opportunity for employment they will ever have'.⁹¹ The FWC was driven to ensure that 'the capacity of ADEs to continue to employ disabled persons is not prejudiced'.⁹²

83 *Review of Supported Employment Services Award 2010* (n 25) [372]–[375] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

84 *Ibid* [245] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

85 *Ibid*.

86 *Ibid* [247] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

87 *Ibid* [248] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

88 *Ibid*.

89 *Ibid* [246] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

90 *Ibid*.

91 *Ibid*.

92 *Ibid*.

In its preliminary decision, the FWC has endorsed wage assessment, showing greater sympathy for the economic interests of service providers operating ADEs than ADE employees with disability being treated equally to employees without disability in relation to the determination of wages (eg, not being paid below the national minimum wage and not having individualised productivity-based wages).⁹³ The FWC expressed the preliminary view that a single wage assessment tool is desirable to prevent ADE employees with disability receiving differential pay depending on the tool their employer uses and that some of the current wage assessment tools might have discrimination issues, like the BSWAT.⁹⁴

The FWC did not suggest that the solution was to adopt the Supported Wage System Tool (discussed in Part II(B)(1)), as proposed by AED Legal Centre, because the Supported Wage System Tool only assesses wages on the basis of productivity rather than also considering the value of the work undertaken.⁹⁵ A productivity-only assessment ‘would not be fair or appropriate or achieve the modern awards objective’.⁹⁶ Because, in the FWC’s view, ADEs provide employment roles specific to the skills and capacity of people with disability, ‘the work value of the jobs established for disabled persons in this way, as measured by the level of skill and responsibility involved, will be significantly less’ than a job for a person without disability, which might, for example, include multiple and different sets of tasks.⁹⁷ The Supported Wage System Tool does not recognise the reduced value generated by work done by ADE employees with disability by, for example, benchmarking the value of that role against other possible employment roles. Instead, the tool compares the productivity of employees with disability doing the reduced value role by reference to the benchmark of an employee without disability performing the same reduced value role.⁹⁸ Ultimately, the Supported Wage System Tool ‘is inherently biased towards an inappropriate escalation of pay rates in respect of the performance of work of the lowest value’.⁹⁹

The FWC has expressed concern about the financial impacts of the Supported Wage System Tool on the organisations operating ADEs. The Supported Wage System Tool ‘significantly increases wages costs’ compared to other wage assessment tools.¹⁰⁰ The FWC indicated that the higher costs on ADEs would mean that mandatory use of the Supported Wage System Tool would not be fair to ADE employers or ADE employees with disability.¹⁰¹ Mandatory use of the Supported Wage System Tool would be likely to have a ‘significantly detrimental effect on

93 Ibid [248]–[252] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

94 Ibid [317] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

95 Ibid [357].

96 Ibid [369] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

97 Ibid [348] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

98 Ibid.

99 Ibid [357] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

100 Ibid.

101 Ibid [364] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

the commercial viability of ADEs ... [by reason of] ... loss of commercial contracts' because they could not be as competitive in their pricing, and thus could 'adversely affect their capacity to employ disabled persons' and potentially result in closure of ADEs.¹⁰² The FWC noted that 'the loss of employment which would occur consequent upon the mandatory use of the [Supported Wage System] would be a calamitous outcome', including 'social isolation, boredom, financial detriment, a loss of skills development opportunities and a diminished sense of self-worth amongst disabled persons' and 'a significantly greater burden being placed on their carers and other family members'.¹⁰³ Ultimately (and perhaps counterintuitively to what might be the usual assumption around the role of increased wages in enhancing social inclusion beyond the disability context), the FWC was of the view that increased wages to employees with disability would 'diminish rather than promote the social inclusion of disabled person by reducing their level of workforce participation' because of job loss.¹⁰⁴ Moreover, possible financial benefits of increased wages to ADE employees with disability 'would be diminished by a reduction in their DSP payments'.¹⁰⁵

The FWC dismissed the views expressed by the disability advocacy organisation AED Legal Centre and its allies which argued for closure of all ADEs or use of ADEs only as a transitional pathway to open employment.¹⁰⁶ The FWC referred to AED Legal Centre and its allies collectively as 'those in the AEDLC's camp', while not using this arguably pejorative term to refer collectively to organisations operating ADEs (eg, the 'ADE camp').¹⁰⁷ The FWC concluded that 'any new wage fixation system for disabled employees under the SES must not cause commercial disruption to ADEs by a sudden large escalation in their employment costs' and thus should not result in 'a major across-the-board increase in employees' wages'.¹⁰⁸

The FWC proposed a new wage assessment methodology that 'takes into account the value of the work they perform and their productivity level'.¹⁰⁹ It also recommended redesigning the pay classification to introduce two new classifications below the current Grade 1 (currently \$21.38 per hour) in the Supported Employment Services Award.¹¹⁰ Grade A would be paid at \$7.00 per

102 Ibid [358] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

103 Ibid [359] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

104 Ibid [364] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

105 Ibid.

106 Ibid [360] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

107 Ibid.

108 Ibid [367] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

109 Ibid [369] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

110 Ibid [372] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge). The Award ranges from Grades 1 to 7, with Grade 7 being paid at \$28.11 per hour: *Supported Employment Services Award* (n 44) cl B.1.3.

hour and Grade B at \$14.00 per hour.¹¹¹ Employees with disability could be paid a percentage of these rates, with a minimum hourly rate of \$3.50.¹¹² The new classifications would be used to appropriately pay a ‘job consisting of a single most basic and routine task’ which was currently being classified at Grades 1–3.¹¹³ The FWC noted that ‘no existing ADE employee should suffer a reduction in remuneration as a result of the introduction of the new wages structure which we propose’.¹¹⁴

The proposed changes were subject to submissions and a conference of interested parties¹¹⁵ and subsequently trialled by the Australian government ‘to understand the practicality and cost impact of the FWC’s preliminary determination’.¹¹⁶ The report of the trial was submitted to the FWC on 24 November 2021.¹¹⁷ The proposed determination would not take effect for 14 months to allow ADEs to transition to the new structure.¹¹⁸ The previous federal Liberal government had ‘committed \$67 million to support ADEs to transition to any new wage structures under the Award, following a final decision by the FWC’.¹¹⁹ Following receipt of the report of the trial, the FWC received further submissions from interested parties, prior to making its final determination varying the Award. A final decision was made on 21 December 2022.¹²⁰

To conclude, two aspects of the normative understanding of ADEs are produced through law. First, the legal framework for low wages paid to employees with disability in ADEs is interconnected to the perceived financial sustainability and survival of the organisations operating ADEs because the centrality of ADEs to the social and emotional wellbeing of people with disability *and* their families and carers is more significant than the financial benefits to people with disability of a higher wage. Second, the legal framework for wages paid to employees with

111 *Review of Supported Employment Services Award 2010* (n 25) [372] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

112 *Ibid* [374] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

113 *Ibid* [368] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

114 *Ibid* [375] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

115 *Ibid* [378] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

116 Department of Social Services (Cth), *Fair Work Commission New Wage Assessment Structure Trial Evaluation* (Final Report, 24 November 2021) 19 <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014286-report-dss-241121.pdf>> (*‘FWC New Wage Assessment Structure Trial Evaluation’*). The trial was due to commence in March 2020 and run for three months: *ibid* [379]–[380] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge). However, the trial was delayed due to COVID-19: *Re 4 Yearly Review of Modern Awards — Supported Employment Services Award 2020* [2021] FWCFB 3139, [4] (Hatcher V-P, Deputy President Dean and Commissioner Cambridge).

117 *FWC New Wage Assessment Structure Trial Evaluation* (n 116).

118 *Review of Supported Employment Services Award 2010* (n 25) [379] (Hatcher V-P, Deputy President Booth and Commissioner Cambridge).

119 ‘Supported Employment’ (n 10).

120 *Re 4 Yearly Review of Modern Awards — Supported Employment Services Award 2020* [2022] FWCFB 245.

disability in ADEs is interconnected to the social security system,¹²¹ unlike wages of people without disability, where social security is an alternative or safety net. The wage structures of ADEs are designed to fall within the earnings threshold of the DSP, as reflected in eligibility for payment under the Supported Wage System Tool being restricted to people with disability who are receiving or eligible to receive the DSP (discussed above in Part II(B)(1)). Around 90% of ADE employees with disability also receive the DSP along with their ADE wages.¹²² The Australian government operates an alternative system for ADE employees with disability reporting their income to Centrelink, which involves the ADEs reporting on behalf of these ADE employees.¹²³ This suggests people with disability will continue to receive DSP payment and thus will never be able to attain a higher income and standard of living beyond what is possible through the welfare system.¹²⁴

C Substitute Decision-Making and Restrictive Practices in ADEs

State and territory guardianship laws enable the appointment of a substitute decision-maker in relation to various life domains, such as accommodation, socialising, services and health care.¹²⁵ A guardian can be appointed by the relevant state or territory guardianship tribunal where an individual lacks capacity to make decisions due to their disability. The guardian who is appointed can be a private or public guardian.¹²⁶ A private guardian is an individual with an existing relationship to the person with disability (such as a family member or unpaid carer). Selection of a private guardian involves consideration of their personal compatibility with the person with disability, their willingness to be a guardian, and no conflicts of interest with the person with disability (such as financial conflict). Or, if no such person is available, the public guardian is appointed. The public guardian is a public office role supported by public servants who are the contact point with persons under guardianship.

The guardian makes decisions on behalf of the person with disability. While the guardian should consider the circumstances and perspectives of the person with

121 AGS Report on the Legislative Framework Affecting People with Disability (n 52) 249 n 39.

122 'What are ADEs?', *ADEs Work for Me* (Web Page) <<https://ade.org.au/what-are-ades>>.

123 'Employer Reporting Service', *Services Australia* (Web Page, 5 July 2022) <<https://www.servicesaustralia.gov.au/employer-reporting-service>>.

124 Interestingly, ADE employees were eligible during 2020 for the Australian government's JobKeeper Payment which resulted in a payment higher than they would otherwise have received from their ADE wages and/or the DSP: Australian Government, *Disability Support Pension and JobKeeper: Answers to Questions You Might Have* <https://www.dss.gov.au/sites/default/files/documents/05_2020/dss-disability-support-pension-jobkeeper-payment-easy-read-fact-sheet.pdf>.

125 Claire Spivakovsky and Linda Roslyn Steele, 'Disability Law in a Pandemic: The Temporal Folds of Medico-Legal Violence' (2022) 31(2) *Social and Legal Studies* 175, 178. See also Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) ch 6.

126 See, eg, *Guardianship Act 1987* (NSW) s 17.

disability, the guardian is not required to follow the person's instructions or wishes in making decisions. Thus, the guardian can consent to decisions even if the person with disability opposes them.¹²⁷

Guardianship laws emerged in Australian states and territories following the emergence of disability deinstitutionalisation in the 1980s.¹²⁸ Interestingly, their emergence coincides with the *DSA 1986* and, similar to the *DSA 1986*, guardianship laws have been framed in terms of supporting community integration of people with disability. However, guardianship law is significantly contentious in all areas (not just employment) because it is a form of substitute decision-making that denies to people with disability their equality under the law to exercise their legal capacity.¹²⁹

It is argued that guardianship law legitimates use of coercion and control in ADEs, as we now turn to discuss.

1 Consent to Work in ADEs

Guardianship law can take the decision to work in ADEs out of the hands of people with disability. In some Australian states and territories, the decision on whether a person with disability works in an ADE can be made by someone other than the person with disability themselves, pursuant to guardianship law. In the Australian Capital Territory,¹³⁰ Tasmania¹³¹ and Western Australia,¹³² guardians can be appointed to make decisions in relation to employment. For example, pursuant to s 7 of the *Guardianship and Property Management Act 1991* (ACT), a guardian can be appointed 'to decide whether the person is to be allowed to work' (sub-s (4)(c)) and 'if the person is to be allowed to work — to decide the nature of the work, the place of employment and the employer' (sub-s (4)(d)). People with disability might also have separately appointed a financial manager to administer their finances,¹³³ including any wages received from an ADE.

127 For example, guardians in NSW have a duty in relation to people with disability under guardianship to observe the principle that 'the views of such persons in relation to the exercise of those functions should be taken into consideration': *ibid* s 4(d). However, the legislation makes clear that it is the guardian who makes decisions in substitution for the individual. Section 21C provides that:

A decision made, an action taken and a consent given by a guardian under a guardianship order have effect as if — (a) the decision had been made, the action taken and the consent given by the person under guardianship, and (b) that person had the legal capacity to do so (if the person would have had that legal capacity but for his or her disability).

128 Spivakovsky and Steele (n 125) 178.

129 See, eg, *ibid*.

130 *Guardianship and Management of Property Act 1991* (ACT) ss 7(4)(c), (d).

131 *Guardianship and Administration Act 1995* (Tas) s 25(2)(c).

132 *Guardianship and Administration Act 1990* (WA) s 45(2)(c).

133 AGS Report on the Legislative Framework Affecting People with Disability (n 52) 219–20 [55].

2 Consent to Use of Restrictive Practices on ADE Employees

Second, decisions made by guardians can subject people with disability to restrictive practices in ADEs.¹³⁴ Restrictive practices are interventions in the bodies and lives of people with disability that result in limitations on their freedom of movement or rights. They include seclusion (eg, locking someone in a room by themselves), chemical restraint (eg, sedating someone or menstrual suppression), physical restraint (eg, holding someone to prevent their movement), mechanical restraint (eg, tying someone to a chair) and environmental restraint (eg, preventing access to food in fridges and kitchen cupboards).¹³⁵ Restrictive practices are usually justified as being used in response to behaviours of concern to protect the person with disability or others.¹³⁶ At the state and territory level, guardianship law enables appointment of substitute decision-makers to authorise restrictive practices, and additional laws and guidelines regulate the use of restrictive practices in their jurisdictions.¹³⁷ When use of restrictive practices is authorised by a guardian, their use will be lawful irrespective of the lack of consent by the person with disability subjected to them. In turn, their use will sit outside criminal prohibition of assault¹³⁸ and false imprisonment¹³⁹ and will not constitute violence for the purpose of state and territory victims' compensation and support schemes.¹⁴⁰

Use of restrictive practices by ADEs (or other disability service providers delivering support to ADE employees with disability) that are NDIS providers is

- 134 See, eg, reference to their use in Queensland ADEs: 'Queensland Government Advises ADEs on Restrictive Practices', *National Disability Services* (Web Page, 25 October 2018) <<https://www.nds.org.au/news/queensland-government-advises-ades-on-restrictive-practices>> , archived at <<https://web.archive.org/web/20220327134431/https://www.nds.org.au/news/queensland-government-advises-ades-on-restrictive-practices>>. See also Kim Chandler, Ben White and Lindy Willmott, 'What Role for Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492 ('Adult Guardianship in Authorising Restrictive Practices').
- 135 Chandler, White and Willmott, 'Adult Guardianship in Authorising Restrictive Practices' (n 134) 492.
- 136 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Restrictive Practices* (Issues Paper, 26 May 2020) 1 ('*Disability Royal Commission Restrictive Practices Issues Paper*'). For a critique of restrictive practices, see Spivakovsky and Steele (n 125); Dinesh Wadiwel, 'Disability and Torture: Exception, Epistemology and "Black Sites"' (2017) 31(3) *Continuum* 388.
- 137 Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014) 14(2) *QUT Law Review* 90, 91.
- 138 These vary across states and territories. In NSW, for example, see *Crimes Act 1900* (NSW) ss 59, 61.
- 139 These vary across states and territories. For jurisdictions with common law offence of false imprisonment, for example, see *R v Huynh* (2006) 165 A Crim R 586, 601 [83] (Coldrey AJA), discussing *R v Vollmer* [1996] 1 VR 95, 175–88 (Ormiston J); *R v Garrett* (1988) 50 SASR 392, 405 (von Doussa J).
- 140 For example, in NSW, 'victim of crime' is defined as 'a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence': *Victims Rights and Support Act 2013* (NSW) s 5(1).

regulated by NDIS legislation and guidelines which generally require consent from the guardian or other substitute decision-maker under relevant state and territory law.¹⁴¹ As conditions of their registration, registered NDIS providers can only use restrictive practices in the course of delivering NDIS supports ‘in accordance with State and Territory authorisation processes and a behaviour support plan’, and the use must ‘be recorded by the provider and reported to the Commissioner so that the Commissioner can effectively monitor the use of regulated restrictive practices in the NDIS’.¹⁴² The *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) provide that restrictive practices should be used as a last resort, the least restrictive option in the circumstances, used for the shortest time possible, used in response to risk of harm to a person with disability or others and proportionate to the potential negative consequences of that harm.¹⁴³ The legitimisation of use of restrictive practices by a legislative framework purportedly driven by keeping people with disability free from abuse, neglect and exploitation is a significant contradiction in the NDIS.¹⁴⁴ The Disability Royal Commission recently noted that ‘[m]any people with disability, and representative and advocacy organisations and others argue that restrictive practices are not needed and should be eliminated’.¹⁴⁵ This position aligns with the recent recommendation by the UN CRPD Committee that the Australian government ‘[e]stablish a nationally consistent legislative and administrative framework for ... the elimination of restrictive practices ... in all settings, including the home’.¹⁴⁶

Use of restrictive practices falls within the employment supports mentioned in Part II(A) of ‘supports to manage disability-related behaviour or complex needs at work’,¹⁴⁷ and restrictive practices might also be applied outside the ADE (eg, by a disability support worker, family member or group home staff member) but have lasting effects while an individual is working in an ADE (eg, chemical restraint). However, there is little publicly available information about restrictive practices in ADEs. It is difficult to find public information on the nature, intensity and extent of use of restrictive practices in ADEs. For example, the publicly available statistics on unauthorised restrictive practices are not disaggregated to settings.¹⁴⁸ Therefore, it is not clear how many instances of unauthorised restrictive practices are related to ADE settings.

141 *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) r 9.

142 *Ibid* r 7A. See generally at pt 2.

143 *Ibid* rr 21(3)(c)–(f).

144 See generally Claire Spivakovsky, Linda Steele and Dinesh Wadiwel, ‘Restrictive Practices: A Pathway to Elimination’ (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2023) 226.

145 *Disability Royal Commission Restrictive Practices Issues Paper* (n 136) 6.

146 *CRPD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 7) 8 [30(a)].

147 *Supports in Employment Provider* (n 13) 5.

148 NDIS Quality and Safeguards Commission, *Activity Report: 1 January to 31 March 2022* (Report, 6 May 2022) 15–16.

This part has analysed the legal framework of ADEs, highlighting how law (legal doctrine, legal processes, legal institutions and legal actors) supports the ongoing operation of ADEs. Part III now turns to a socio-legal analysis of the lived experiences and impacts of ADEs on people with disability in order to argue for a transition away from ADEs.

III INJUSTICES OF ADES

The official legal and service representation of ADEs discussed in Part II can be contrasted with longstanding work of Australian DPOs and disability rights advocates on equal employment for people with disability. Since the 1980s, Australian disability self-advocates have led campaigns for the rights of workers within sheltered workshops and for the closure of sheltered workshops. Long-term self-advocate Judy Huett became the first Australian with intellectual disability to appear before the UN CRPD Committee in 2013. She told them: 'the Australian Government need to close institutions now and sheltered workshops are not right. People with disabilities who work there don't get enough money for the job that they do'.¹⁴⁹

Recent advocacy of DPOs has focused on increasing employment of people with intellectual disability in open employment and greater awareness of people with intellectual disability and their families about pathways to open employment to reduce the role of ADEs.¹⁵⁰ For example, the 'Everyone Can Work' campaign by Inclusion Australia includes 'stories of real people with intellectual disability who work in open employment', so people with intellectual disability and their families can 'see what's possible'.¹⁵¹ It offers online workshops on open employment for people with intellectual disability and their families.¹⁵² The Wage Justice Australia campaign led by the AED Legal Centre and PWDA advocates for fairer wages and employment conditions for people with disability working in ADEs and more opportunities in open employment.¹⁵³ Wage Justice Australia led successful litigation challenging the discriminatory nature of wages in ADEs (as discussed above in Part II(B)).

149 Judy Huett, 'A Champion of Change on the World Stage' (Speech, Melbourne & Olympic Park Convention Centre, Champions of Change, 5 August 2014) <<https://www.daru.org.au/conference-session/a-champion-of-change-on-the-world-stage>>.

150 See details of various DPOs campaigns at 'Employment', *Inclusion Australia* (Web Page) <<https://www.inclusionaustralia.org.au/topic/employment/>>.

151 'Real Life Stories', *Everyone Can Work: Employment Pathways for People with Intellectual Disability* (Web Page) <<https://www.everyonecanwork.org.au/real-life-stories/>>.

152 'Workshops', *Everyone Can Work: Employment Pathways for People with Intellectual Disability* (Web Page) <<https://www.everyonecanwork.org.au/workshops/>>. See similar campaigns by Council for Intellectual Disability and Victorian Advocacy League for Individuals with Disability: 'More than Just a Job: Make Your Workplace Inclusive', *Council for Intellectual Disability* (Web Page) <<https://cid.org.au/event/more-than-just-a-job/>>; 'Employment Project', *VALID* (Web Page) <<https://www.valid.org.au/resources-and-media/resources/valid-employment-project/>>.

153 'What We Do', *Wage Justice Australia* (Web Page) <<https://www.wagejustice.org.au/>>.

The Disability Royal Commission has provided a new platform for disability rights advocacy on ADEs, and particularly to provide a spotlight on their discriminatory, segregating and exploitative conditions. In April 2022, Inclusion Australia launched its ‘Equal Pay Equal Respect’ campaign, calling for ‘a fully resourced five-year transition plan for workers in ADEs to move to open and self-employment’ and for the federal government to immediately fund the wage gap and increase wages to the minimum wage level (estimated to be a net cost of \$9,000 per person).¹⁵⁴ DPO Australia (a coalition of peak DPOs) led a campaign to end segregation of people with disability across systems, including in the employment context. It argues that ‘in close consultation and active participation of people with disability through their representative organisations’, the Australian government should develop and implement

a national, time bound Disability Employment Strategy aimed at the transition of workers with disability from segregated employment to open, inclusive and accessible forms of employment and that ensures equal remuneration for work of equal value.¹⁵⁵

The work of DPOs and disability advocates on ADEs, which is driven by the leadership, lived experiences and human rights of people with disability (including people with intellectual disability), provides the point of departure for this part’s socio-legal analysis of ADEs. This analysis highlights how the ongoing operation of ADEs — and law’s role in supporting their operation, as outlined in Part II — contribute to segregation, discrimination, exploitation and violence of people with disability. The analysis also illuminates specific ways in which official legal justifications of ADEs discussed in Part II, which are centred on inclusion, support and hope, mask these injustices and render them incapable of redress. While some individuals with disability might have had positive experiences working in ADEs, this part focuses on structural-level effects of ADEs on people with disability. It is on the basis of these injustices that this part then argues for the need to transition away from ADEs and offers some preliminary guidance on what the role of law might be in this transition.

154 Catherine McAlpine, ‘Equal Pay, Equal Respect: Time to End Discriminatory Wages for People with an Intellectual Disability’ (Media Release, Inclusion Australia, 11 April 2022) 1 (emphasis omitted) <<https://www.inclusionaustralia.org.au/wp-content/uploads/2022/04/DRC-ADE-media-statement-11-April-2022.pdf>>. See also Inclusion Australia, *Equal Pay, Equal Respect: Federal Election 2022 Platform* (Report, 2022) 6 (‘*Federal Election 2022 Platform Report*’).

155 *Segregation of People with Disability Is Discrimination and Must End* (Position Paper, September 2020) 12 <https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability_Position-Paper.pdf> (‘*Segregation of People with Disability*’). See also People with Disability Australia, Submission to Department of Social Services (Cth), *New Disability Employment Support Model* (February 2022) 13 <https://pwd.org.au/wp-content/uploads/2022/02/DES.review.PWDA_AC_submission.2022-02.pdf>; Women with Disabilities Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (August 2020) 7 [1.4] <<https://wwda.org.au/wp-content/uploads/2020/08/WWDA-Response-to-Employment-Issues-Paper-Final1.pdf>> (‘*Women with Disabilities Australia Submission*’).

A Segregation and Discrimination

ADEs are intrinsically segregated and also facilitate further segregation and discrimination towards people with disability.

National Disability Services explains that sheltered workshops were established by family members of people with disability during the mid-20th century to provide vocational and training opportunities.¹⁵⁶ This occurred at a time when many people with disability were still living in large-scale residential settings — the epitome of mass segregation and exclusion of people with disability — and were thus an attempt to facilitate some aspects of a 'normal' life for people with disability within their overarching conditions of segregation and exclusion.¹⁵⁷ The closure of large-scale residential settings over the past five decades and the shift to disability policy focused on inclusion, participation, choice and control means this initial reason for sheltered workshops renders them anachronistic as a purported positive improvement on the lives of people with disability.

That said, many people with disability (particularly those with intellectual or cognitive disability) still live lives that are largely separate from people without disability, thus undermining realisation of a more inclusive society for people with disability. For some, this segregation might involve being in 'special' disability schools or disability classes in mainstream schools, then as adults moving into group homes and being transported by disability service minibuses to spend their days in ADEs or in recreational day programs exclusively for people with disability. Within the context of these life transitions, Inclusion Australia refers to the ease with which people with disability can move into, and remain in, ADEs as a 'polished pathway'.¹⁵⁸

156 'A Brief History of Australian Disability Enterprises', *ADEs Work for Me* (Web Page) <<https://ade.org.au/a-brief-history-of-australian-disability-enterprises#:~:text=The%20forerunners%20of%20Australian%20Disability,in%20the%20open%20employment%20market.>>.

157 Ibid.

158 Inclusion Australia, *What Works: Making Disability Employment Services (DES) Work for People with an Intellectual Disability* (Report, December 2021) 10 <https://www.inclusionaustralia.org.au/wp-content/uploads/2022/02/Our-Submissions_2022_02_What-Works-Final-Report-2021.pdf> ('*What Works*'). It should be noted that while the pathway described by Inclusion Australia is particularly relevant to this article, the 'polished pathway' is not the same for all people with disability. Indeed, for some people with disability (such as First Nations people with disability), segregation and exclusion might begin in childhood with being suspended or excluded from school and living in out-of-home care which then progresses to contact with police and juvenile justice as a young person, and then as an adult living between boarding houses, mental health facilities, and prison and exclusion from community disability services. For example, El Gibbs states:

The smooth path between child removal, school suspension and expulsion and juvenile detention to prison is one that is getting smoother and faster for First Nations kids. For disabled settlers, the pathways to institutionalisation are different, but they often aren't to prison. Instead, those pathways go from special school, to a sheltered workshop, to a group home

El Gibbs, 'Disability Agenda' (n 2). See also Scott Avery, *Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability* (First People's Disability Network, 2018); Ruth McCausland and Leanne Dowse, 'From "at Risk" to "a Risk": The Criminalisation

The polished pathway is illustrated by Inclusion Australia through the following diagram:

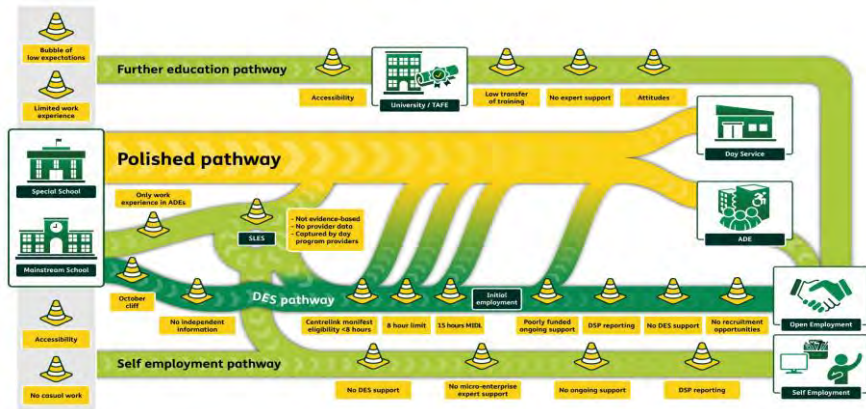


Figure 1: Inclusion Australia, ‘Polished Pathway’.¹⁵⁹

Within this broader context, ADEs can be understood as congregated and segregated workplaces. ADEs as supported employment services are, by definition in the *DSA 1986*, only available to people with disability. In practice, people with disability are highly concentrated in these workplaces but are not treated equally to employees without disability in positions of authority, such as managers, supervisors and support workers (including those enacting restrictive practices and other forms of behaviour management).¹⁶⁰ While organisations that operate ADEs promote them as offering opportunities for inclusion, they are inherently segregating and facilitate exclusionary behaviours, and are experienced by ADE employees with disability as such. For example, an ADE employee quoted in an opinion piece on ADEs by a disability rights activist observed that there were separate lunchrooms for ADE employees with disability and other staff.¹⁶¹ ‘George’ was quoted in the Inclusion Australia 2022 federal election platform as explaining the exclusion he experienced in ADEs as compared to open employment:

of Young People with Cognitive Disability in Residential Care’ (2022) 3(2) *Incarceration* 1; Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) (*‘Disability, Criminal Justice and Law’*).

¹⁵⁹ Inclusion Australia, Submission to Department of Social Services (Cth), *Disability Employment System Reform* (February 2022) 46 (*‘Inclusion Australia DES Reform Submission’*).

¹⁶⁰ Charlotte May-Simera, ‘Reconsidering Sheltered Workshops in Light of the United Nations Convention on the Rights of Persons with Disabilities (2006)’ (2018) 7(1) *Laws* 6:1–17, 2–3.

¹⁶¹ Samantha Connor, ‘The Dignity of Slavery: Or “Why My Shoes Are Cheaper at Kmart”’, *The Stringer: Independent News* (online, 17 October 2014) <<https://thestringer.com.au/the-dignity-of-slavery-or-why-my-shoes-are-cheaper-at-kmart-8857#.VEnKgT8cT5o>>.

They got me champagne for my 60th birthday and sang happy birthday to me, it was lovely. That's what real people at real jobs do. At [the ADE] they never did anything like that. It's important to do things like that ... 'feeling like you belong'.¹⁶²

People with disability experience compounding layers of segregation and are segregated across other systems, including education, transport, housing and justice.¹⁶³ On a daily basis, additional to the segregation ADE employees with disability experience in the ADE workplace, they might also live in segregated residential settings, such as group homes, and spend some of their non-work days at day programs for people with disability or be transported to and from the ADE by a minibus operated by the ADE or their group home service provider.¹⁶⁴ Across their lives, ADE employees with disability might experience segregation through 'pipelines' into ADEs, from segregated education into segregated ADE employment and segregated residential settings. For example, one parent quoted in the Inclusion Australia 2022 federal election platform stated: 'At end of school, supported education centre took families around a "career option tour" where they got on a bus and toured ADEs and everyone left traumatized or locked into the pathway. Came home crying, not a positive experience.'¹⁶⁵

People with disability might also experience segregation due to the lack of paths out of ADEs into open employment. ADEs are promoted by services as providing training and support as a transition into open employment. BuyAbility explains that '[e]mployees are supported to work, develop new skills and participate in their communities. Many find the training provided in BuyAbility Social Enterprises supports them to transition into open employment'.¹⁶⁶ Yet, this transition remains elusive for many. Cain notes: 'Vocational research in the 1970s found that the placement of people with disability in segregated employment settings is almost always a *terminal placement*.'¹⁶⁷ Startlingly, 40 years on, this has not changed, with the AHRC in its 2016 *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability ('Willing to Work')* report on discrimination in employment for people with disability and older people noting that 'in 2014 only 159 ADE employees (0.8%)

162 *Federal Election 2022 Platform Report* (n 154) 8.

163 *Segregation of People with Disability* (n 155) 7; People with Disability Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (July 2021) 10 <https://pwd.org.au/wp-content/uploads/2021/07/27072021-SUB-PWDA_DRC-Inclusion.pdf>.

164 Connor (n 161).

165 *Federal Election 2022 Platform Report* (n 154) 5.

166 'What Is Supported Employment' (n 9).

167 Paul Cain, 'All the Way to the Moon and Back: Ending Discrimination against People with Intellectual Disability in Employment' [2014] (125) *Precedent* 46, 48 (emphasis in original). See also National Disability Rights Network, *Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work* (Report, January 2011) 32 <<https://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>> ('*Segregated and Exploited*').

moved into open employment'.¹⁶⁸ A public hearing of the Disability Royal Commission on ADEs noted that for the 2020–21 financial year, only '295 NDIS participants [1.7%] self-reported as transitioning from an ADE to open employment'.¹⁶⁹ One advocate quoted in an Inclusion Australia submission to the Disability Royal Commission describes ADEs as a 'life sentence'.¹⁷⁰ The terminal nature of ADEs is captured in the Inclusion Australia Disability Royal Commission submission through the story of Ted, a 56-year-old man with an intellectual disability:

[Ted] lives independently, drives a car and has worked at an ADE for many years. A decade ago, a new manager decided to reassess Ted's work capacity and cut his wages by \$10 an hour.

Ted felt trapped: 'The other people were getting normal wages and there's things that they can't do that I can do. ... If I did not agree with it, I would have lost my job so it was pretty rough.'

The manager who cut Ted's pay has since left, but he has continued to work for the reduced wage. 'I can never get back up,' he said.¹⁷¹

Indeed, some people with disability might work for years and even decades in ADEs with no prospects of moving into open employment and receiving equal wages to people without disability. For example, a National Disability Services online campaign to ensure financial sustainability of ADEs in the aftermath of the *Nojin* decision (discussed in Part II(B)(2) above) contains the bios of various campaign 'supporters', including Sheryl who had worked in an ADE since 1985 and Ann who had worked in an ADE since 1970.¹⁷²

The lack of access to justice for discrimination and the human rights violations in ADEs are an added dynamic contributing to the impossibility of escaping the conditions in ADEs. For example, the public hearing of the Disability Royal Commission on ADEs heard that ADE employees with disability are not provided

168 Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (Report, 2 May 2016) 242 ('*Willing to Work*'), citing Department of Social Services (Cth), *National Disability Employment Framework* (Discussion Paper, November 2015) 12 <https://engage.dss.gov.au/wp-content/uploads/2015/11/disability_employment_framework_discussion_paper_-_final.pdf>.

169 Transcript of Proceedings, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Public Hearing 22, Chair Sackville, Commissioner Galbally and Commissioner Mason, 11 April 2022) 10 ('*Disability Royal Commission Public Hearing 22 Day One*'). See also *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 373 <<https://disability.royalcommission.gov.au/system/files/2020-10/Interim%20Report.pdf>> ('*Disability Royal Commission Interim Report*').

170 Inclusion Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) 27 ('Inclusion Australia Disability Royal Commission Submission').

171 Ibid 23.

172 'Our Supporters', *ADEs Work for Me* (Web Page) <<https://ade.org.au/our-story>>.

training in their human rights, and that there are problems with internal complaint processes such that people with disability are denied equal access to justice.¹⁷³

What is described in the experiences above reflects what anthropologist Ghassan Hage has referred to in the racialised and migrant context as 'stuckedness' — 'a sense of existential immobility' that has been normalised for certain marginalised populations.¹⁷⁴ Hage proposes that being in a permanent state of waiting — a condition that attaches to disability among other social identity categories — is 'about not-belonging or not being "in-time" with others; being out of step. It is a failure to blend in'.¹⁷⁵ As discussed in Part II(B)(1), long-term and dead-end work in ADEs even seems to be designed into the Supported Wage System, which provides for periodic reviews every three years, thus anticipating some ADE employees with disability will be at ADEs for well over what might be thought a typical training period.

Segregation and discrimination experienced by people with disability in ADEs occur in a broader context of ableism and oppression. Employment rates are low for people with disability, with fewer than half (48%) of working age (aged 15–64) people with disability employed compared with 80% without disability.¹⁷⁶ Moreover, women with disability experience slightly lower rates of employment (46%) compared to males with disability (50%).¹⁷⁷ Employment rates are even lower for people with intellectual disability: only '14–18% of people with intellectual disability aged 15–64 years were in full or part time employment and 60% were not in the labour market'.¹⁷⁸ People with disability experience higher levels of poverty than people without disability: '[45%] of people with disability in Australia live in poverty. 11.2% ... experience deep and persistent disadvantage, [and] 61% ... cannot afford to cover their basic needs on their current income'.¹⁷⁹ People with disability encounter barriers to accessing and retaining open employment that are enacted by or related to employers. These barriers include stereotypes and stigma about disability, unwillingness of employers to provide the accommodations they require, and a lack of knowledge and skills in how to support

173 Transcript of Proceedings, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Public Hearing 22, Chair Sackville, Commissioner Galbally and Commissioner Mason, 12 April 2022) 99, 108–9 ('*Disability Royal Commission Public Hearing 22 Day Two*').

174 Ghassan Hage (ed), *Waiting* (Melbourne University Press, 2009) 74.

175 Ibid 140.

176 Australian Institute of Health and Welfare, *People with Disability in Australia* (Report, 2020) 267.

177 Ibid.

178 *Federal Election 2022 Platform Report* (n 154) 4.

179 Women with Disabilities Australia Submission (n 155) 30 [5.28], citing Australian Institute of Health and Welfare, *Australia's Welfare 2017* (Report, 27 July 2017) 43 and 'Civil Society Shadow Report', *People with Disability Australia* (Web Page) <<https://pwd.org.au/disability-rights/policy-areas-and-position-statements/human-rights-legislation/civil-society-shadow-report/>>.

people with disability in the workplace.¹⁸⁰ Government programs, policies and federal laws can also be barriers to participation of people with disability in open employment. For example, the actual operation and perceptions of rules around social security and workers compensation law can disincentivise employees from employing people with disability and place people with disability at risk of significant financial disadvantage if their employment falls through.¹⁸¹ The focus on short-term outcomes in the funding framework of Disability Employment Services can incentivise finding any employment role for clients that present as ‘easy wins’ and ‘parking’ those for whom it is difficult to find roles — with individuals in neither category having meaningful support to find the employment roles they actually want.¹⁸² While it is beyond the scope of this article to provide a discrimination law analysis of ADEs, it is important to note that defences in anti-discrimination law to disability discrimination (ie, inability to undertake the inherent requirements of the job, or that the adjustments required are not reasonable because providing them would involve unjustifiable hardship for the employer) might themselves present barriers to people with disability accessing open employment.¹⁸³ These barriers reflect a system that holds people with disability back from realising equal employment, rather than people with disability themselves being unable to move to open employment. As we discuss in Part III(D) below, there is an evidence base for people with intellectual disability working in open employment.

The continuation of segregation is also apparent in the fact that many of the ADE providers are charities that were previously operators of large residential institutions or more recently operated sheltered workshops,¹⁸⁴ and both the injustices of these earlier models of service delivery and how the legacies and traces of these earlier models continue to shape the operation of ADEs remain unacknowledged, unreckoned with and unredressed.

ADE employees with disability also experience discrimination. The segregated nature of ADEs itself constitutes discrimination.¹⁸⁵ This is then compounded by industrial law creating a separate system of minimum wage for ADE employees with disability, which is explicitly described as not discriminatory but enables ADE employees with disability to be paid less than employees without disability and subjected to a method of determining their wages that is not legally capable of application to employees without disability. The fact that the work capacity, competency and value of ADE employees with disability can be assessed is itself discriminatory because it is not possible for employees without disability; it is only possible for people with disability because of the assumption that they are not

180 *Willing to Work* (n 168) 171–87.

181 *Ibid* 239, 254–5.

182 *Ibid* 246.

183 For a discussion of some of the limitations of disability discrimination law in the employment context, see Harpur (n 16) ch 7.

184 May-Simera (n 160) 3.

185 *Ibid* 4.

going to be able to contribute as much as employees without disability. As the AHRC notes, '[n]o other employees in Australia are permitted to be paid below-minimum hourly or weekly wages based on the profitability or viability of their own labour'.¹⁸⁶

The lack of a liveable wage from ADEs contributes to a broader denial of freedom and independence to people with disability, as demonstrated by Ted's reflections of Nick, a 32-year-old man with intellectual disability described in Inclusion Australia's submission to the Disability Royal Commission:

Nick said working outside the confines of an ADE or day program had made him independent: 'It gives me a lot of freedom to do what I need to do.'

The underpayment of people working in ADEs also concerned Nick.

He said:

'The award wages, I think that, you know, it needs to be a big issue around people with disabilities getting proper wages because what they receive now is ridiculous. They don't get a fair go. ... It's not right. This is Australia. It's not fair'.¹⁸⁷

The official justification of ADEs as centring on community inclusion, support and a hopeful (open employment) future for people with disability overlooks and masks ADEs' discriminatory basis in three key ways. One is through the legal construction of people with disability as fundamentally different and incomparable to employees without disability. In the *DSA 1986* and the FWC's preliminary decision, ADE employees with disability are ontologically different to employees without disability because of their assumed inability to ever work in open employment and dependency on welfare payments because of their disability. This assumption is embedded in the legislative foundations of ADEs. The *DSA 1986*, as explained in Part II(A)(1), defines supported employment services as services that 'support the paid employment' of persons with disability who are unlikely to obtain employment 'at or above the relevant award wage' and will 'need substantial ongoing support to obtain or retain paid employment' because of 'their disabilities'.¹⁸⁸ The *Fair Work Act 2009* (Cth) ('*FW Act*') provides that the disability minimum wage applies to 'a national system employee who is qualified for a disability support pension', or who would have qualified if they met the relevant Australian residency requirements.¹⁸⁹ ADE employees with disability are perceived as having an 'innate inability to attain the merit-worthy attributes to be

186 Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (24 September 2020) 29 [116] <<https://disability.royalcommission.gov.au/system/files/exhibit/EXP.0063.0001.0001.pdf>>.

187 Inclusion Australia Disability Royal Commission Submission (n 170) 23–4.

188 *DSA 1986* (n 11) s 7 (definition of 'supported employment services').

189 *FW Act* (n 39) s 12 (definition of 'employee with a disability').

considered as an “equal” in the first place’.¹⁹⁰ The construction of people with disability as fundamentally different to people without disability is a common trope in law that justifies discrimination.¹⁹¹

Second, the construction of people with disability in the *DSA 1986* and the FWC’s preliminary decision reflects the ‘medical model’ of disability — disability as an individual, internal deficit and people with disability as incapable by reason of their disability.¹⁹² This is in contrast to identifying the social, legal and cultural barriers to people with disability being able to equally participate in the economy and community and putting obligations on governments and workplaces to address these barriers and make accommodations to support participation of people with disability. The *DSA 1986* defines ‘supported employment services’ as ‘services to support paid employment of persons with disabilities’ in relation to whom ‘competitive employment at or above the relevant award wage is unlikely’ and ‘who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment’.¹⁹³ This definition constructs ADE employees with disability as inevitably having a work capacity fixed by reason of their disability that situates them outside of the realm of equal paid employment, rather than being individuals whose capacity to work can be enhanced by supports that should be available as of right to enable them to be included in the realm of equal paid employment. Indeed, as noted earlier, a key feature of the Supported Wage System itself and the FWC’s justification of the distinct character of ADE workplaces is that ADE employers must make adjustments to fit a job to the needs of a person with disability. Yet this should be part of the general right to accommodations in the workplace and should not come at the cost of reduced wages. The resignation inherent to the medicalised deficit approach to ADE employees with disability, which is apparent in the *DSA 1986* and in the FWC’s preliminary decision, renders the problem to be addressed the unfixable person with disability rather than the remediable wrongdoing of government and employers’ failures to provide accommodations and failure to provide equal wages and conditions. The Supported Wage System Tool does provide that employers using the Supported Wage System Tool ‘must take reasonable steps to make changes in the workplace to enhance the employee’s capacity to do the job’, including redesigning job duties and working time arrangements.¹⁹⁴ Yet, the lived experiences of people with disability recounted in this Part coupled with the design of ADEs which incentivises retaining employees with lower work capacity in segregated workplaces, runs counter to the possibility of ADEs taking a liberal view to what are reasonable

190 May-Simera (n 160) 5, citing Marcia H Rioux, ‘Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality’ in Marcia H Rioux and Michael Bach (eds), *Disability Is Not Measles: New Research Paradigms in Disability* (Roehrer Institute, 1994) 67.

191 Linda Steele, ‘Court Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability’ (2016) 39(3) *University of New South Wales Law Journal* 1002, 1014.

192 Dan Goodley, *Dis/Ability Studies: Theorising Disablism and Ableism* (Routledge, 2014).

193 *DSA 1986* (n 11) s 7 (definition of ‘supported employment services’).

194 *Supported Employment Services Award* (n 44) cl D.9.

changes. While enhancing community participation was one of the stated aims of the NDIS, the rolling over of the segregated employment model of ADEs into the NDIS system means that the NDIS is perversely supporting discrimination against people with disability in employment, dressed up as furthering human rights and community participation.

Third, discrimination is legitimated as necessary because of exclusion experienced by people with disability. The recent FWC preliminary decision demonstrates how discrimination through wages is justified because ADEs are necessary in the face of scarce open employment opportunities and the broader social exclusion experienced by people with disability. This results in a perverse circularity where experiences of discrimination within the open employment market and society more broadly are used to justify further discrimination in ADEs.¹⁹⁵

In proposing that ADEs are segregating and discriminatory, it is recognised that for some parents of adults with disability, ADEs are considered a form of 'respite' or are seen as the only viable option for people with disability to live a 'normal' life. This can be particularly acute as parents age and worry about their children's future after they die. There are family groups that support ADEs and want them to stay as they are. For example, the Our Voice Family Advocacy group recently campaigned to the FWC against changes to the Supported Wage System Award.¹⁹⁶ However, segregation and discrimination should not be the solution to a gap in supports and community inclusion for people with disability, nor should they be justified by the 'soft bigotry of low expectations' of what people with disability (notably people with intellectual disability) are considered capable of.¹⁹⁷ This is captured by a case study included in the Women with Disabilities Australia's submission to the Disability Royal Commission:

Sally is 38 years old. She has a mild intellectual disability. She resides in a supported accommodation residential facility where she has her own unit. She is very independent. She cooks for herself, does her own washing and ironing, cleans her own unit, landscapes and tends her small garden, uses public transport independently, and is very proficient on her computer. Sally has never had a paid job of any description. Sally badly wants to work in paid employment. Sally doesn't understand why she isn't allowed to have a paid job. But Sally is told by her family and her support staff that she is not capable of having a paid job. Instead, Sally is sent to a day support program 5 days a week where she undertakes craft and other activities. Sally says she is 'bored shitless'.¹⁹⁸

195 Spivakovsky and Steele (n 125) 190.

196 Our Voice Australia, Submission to Fair Work Commission, *Review of the Supported Employment Services Award 2010* (22 July 2022). See also the submission to the FWC by the Activ Action Team concerning the closure of Activ ADE worksites in West Australia: Activ Action Team, Submission to Fair Work Commission, *Supported Employment Services Award 2010: FWC [2019] FWCFCB 8179 AM2014/286* (22 July 2022).

197 *What Works* (n 158) 19.

198 Women with Disabilities Australia Submission (n 155) 58.

B Exploitation

ADEs are intrinsically exploitative by reason of the economic model underpinning their financial sustainability.

ADEs receive the financial benefit of goods and services produced through the labour of ADE employees with disability. The extent of this benefit is increased because of the lower wage costs paid to people with disability in ADEs. ADEs also receive financial benefits related to people with disability requiring support related to their disability, as an avenue to NDIS support funding, as well as competitive advantage in government procurement, and in supply chains in being able to offer cheaper goods and services. ADEs are also framed as ‘social enterprises’ and thus marketed as doing social good for the benefit of people with disability and broader society, thus giving rise to ‘disability-washing’ associated with the ADE model as a marketing point of differentiation to consumers (similar to critiques of ‘greenwashing’, ‘pink-washing’ and ‘blue-washing’).¹⁹⁹ Further, ADEs do not need to ‘compete in the open market to earn income’ and thus, ‘also don’t have to do the things other businesses must do like innovate, adapt, and evolve’.²⁰⁰ People without disability working in ADEs as managers, supervisors and support workers receive financial benefit through access to income to support, supervise or manage ADE employees with disability²⁰¹ without having to have their productivity assessed (noting that the Supported Employment Services Award is by definition only applicable to people with disability). Consumers financially benefit from cheaper goods and services produced by ADEs.²⁰² The financial benefits to others associated with the low wages paid to ADE employees with disability results in exploitation because people with disability who work in ADEs are not paid sufficiently to support themselves. The view of the FWC (discussed in Part II(B)(3) above) that ADE employees with disability don’t need higher wages because they have the DSP ignores the widely held view that the DSP is too low for people with disability to survive and flourish. For example, in a February 2022 report, the Australian Senate Community Affairs References Committee expressed its concern ‘with the overwhelming evidence that the DSP is inadequate and that people relying solely on this payment are too often living in poverty’.²⁰³ The

199 Ccrave, ‘It’s a Trap; How to Beware of Greenwashing, Pinkwashing and Bluewashing’, *Medium* (Web Page, 1 October 2021) <<https://ccrave.medium.com/its-a-trap-how-to-beware-of-greenwashing-pinkwashing-and-bluewashing-b71badebb82b>>.

200 *Segregated and Exploited* (n 167) 9.

201 May-Simera (n 160) 2–3. May-Simera notes ‘recent media reports revealing that the CEOs of sheltered industries and charities receive six-figure salaries, yet continue to exploit their workers in the US and in Ireland by paying sub-minimum wages’: at 3.

202 ‘Ethical Supply Chains, Disability, Sheltered Workshops, Segregation and Exploitation’, *Starting with Julius* (Blog Post, 19 April 2019) <<http://www.startingwithjulius.org.au/ethical-supply-chains-disability-sheltered-workshops-segregation-and-exploitation/>> (‘Ethical Supply Chains’).

203 Senate Community Affairs References Committee, Parliament of Australia, *Purpose, Intent and Adequacy of the Disability Support Pension* (Report, February 2022) 106 [5.58] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024728/toc_pdf/Purpose,intentandadequacyoftheDisabilitySupportPension.pdf;fileType=application%2Fpdf>.

segregated ADE setting contributes to further segregation because the limited, low-wage and unskilled employment choices directly affect 'an individual's capacity to live a full, rich life as an active, tax-paying member of the community'.²⁰⁴

ADEs are extractive of (ie, receive financial benefit from) the labour *and* disability of ADE employees with disability. This is because they simultaneously use this disability as a basis to deny people with disability appropriate financial compensation for their labour, *and* gain access to funding to provide 'support' to people with disability in the ADE workplace. It is questionable why employers should be able to access such funds, rather than be expected to make reasonable adjustments and accommodations as would be the case in open employment. That these funds are a source of additional income for ADEs (rather than simply cost recovery of supports provided) is demonstrated by two revelations that emerged from the Disability Royal Commission public hearing on ADEs. The first is that Australia's largest ADE, Bedford, uses NDIS funds for employment supports to cover capital costs of its ADEs.²⁰⁵ The second is that an ADE employee with disability who had worked in the one ADE for 17 years was providing personal care (such as toileting and mealtime support) to a colleague with disability even though she was not trained in personal care tasks because no one else would assist her colleague, when presumably these tasks should be covered by that colleague's NDIS funds.²⁰⁶

Exploitation of people with disability in ADEs is justified on harmful notions that people with disability are viewed as an economic burden on others and, thus, a cause of financial loss rather than benefit. Indeed, this is reflected in the ongoing concerns expressed by ADE service providers that the wages paid to ADE employees with disability threaten the financial sustainability of ADEs. This point of the threat of ADE employees with disability having higher (let alone equal) wages to the financial sustainability of ADEs is such a persuasive argument that, as discussed in Part II(B) above, it has been the basis for the FWC's preliminary view that it will not make any decisions to globally increase ADE wages that will threaten the financial viability of ADEs, as discussed in Part II(B)(3). In contrast, as per the discussion in Part III on Inclusion Australia's 'Equal Pay Equal Respect' campaign which was run by people with disability and led by people with intellectual disability, Inclusion Australia proposes to solve the issue of financial sustainability through the federal government in the short-term by funding the wage gap needed to increase wages to the minimum wage level (estimated to be a net cost of \$9,000 per person), while the organisations operating ADEs develop strategies to transition away from segregated workplaces.²⁰⁷

Indeed, the structure of the ADE financial model means that there are perverse economic incentives not to upskill the best employees because they will then become more expensive to employ, or they could leave to open employment. Long

204 *Segregated and Exploited* (n 167) 24. See also at 28; *ibid* 106–7.

205 *Disability Royal Commission Public Hearing 22 Day Two* (n 173) 148–52.

206 *Disability Royal Commission Public Hearing 22 Day One* (n 169) 68–9.

207 See above n 154.

term, the existence and sustainability of ADEs depend on the continuation of these circumstances of exploitation. While ADEs promote inclusion and skills development and a hopeful future of open employment, they do not foresee the possibility of ever achieving equality for people with disability as a population because that would render ADEs redundant, and thus ADEs rely on the assumption of their ongoing existence. This is on the basis that ADEs do not provide temporary training and support for people with disability to then automatically move into open employment, but instead function as what Cain referred to in Part III(A) above as ‘terminal placements’.²⁰⁸ The promotion of realising *social inclusion through* ADEs, rather than *social or even financial and legal equality* for ADE employees with disability *in open employment*, reifies inequality and hierarchies in which people with disability are assumed to be necessarily economically disadvantaged. Yet, these are false assumptions. For example, Inclusion Australia’s submission on employment to the Disability Royal Commission included a case study of an ADE being sold to an organisation that wanted to operate the business as an open employment setting. The ADE employees applied for their jobs, and some of them were found to be working at the level of people without disability. Six of the 35 ADE employees who were paid \$7 an hour were assessed as working at 100%.²⁰⁹

The perverse way in which the *disability* of ADE employees with disability both justifies the decreased economic gain to people with disability from their labour, *and* generates economic gain for ADE service providers *and* others, renders ADEs an example of warehousing.²¹⁰ Typically, ‘warehousing’ refers to the large-scale storage of goods for future economic use, such as their sale. In relation to people with disability, warehousing involves congregating many people with disability (at a higher concentration than would occur in the community), as though they are objects being locked away to be stored, and providing care and support that is driven by organisational convenience and efficiency rather than recognition of the humanity of the individuals. Critical disability scholars have observed the positioning of people with disability as surplus and a burden on the economy such that their exclusion from the economy causes other (violent) ways of extracting profit from their bodies.²¹¹ People with disability are often positioned as an economic burden on their families, communities and the nation on the basis that they are incapable of productive labour and have high needs for care and support that are superfluous because any care and support will ultimately be sustaining

208 See above n 167 and accompanying text.

209 Inclusion Australia Disability Royal Commission Submission (n 170) 27.

210 *Segregated and Exploited* (n 167) 8–9.

211 Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minnesota Press, 2020) 141–2, 176; Liat Ben-Moshe and Jean Stewart, ‘Disablement, Prison and Historical Segregation: 15 Years Later’ in Ravi Malhotra (ed), *Disability Politics in a Global Economy: Essays in Honour of Marta Russell* (Routledge, 2017) 87, 87–8, citing Marta Russell and Jean Stewart, ‘Disablement, Prison, and Historical Segregation’ (2001) 53(3) *Monthly Review* 61, 67–8; Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic* (Palgrave Macmillan, 2011) 61, 169; James Graham, ‘Socialism Needs Disability Justice’ (8 February 2023) *Midnight Sun* <<https://www.midnightsunmag.ca/socialism-needs-disability-justice/>>.

bodies and lives that are not contributing productive labour for the benefit of families, communities and the nation. When viewed through the conventional medical lens, the assumption that people with disability are incapable of productive labour is understood as naturally associated with their disability. However, when viewed through the lens of ableism, it becomes apparent that people with disability are structurally excluded from productive labour because they are socially assigned as abnormal, unfit, unproductive, incapable and an economic burden on others. Moreover, being socially assigned as such individualises circumstances of people with disability and removes accountability of the state and employers to support their economic participation (including through access to reasonable accommodations in open employment workplaces, abolition of disability segregated employment and effective processes for enforcing legal guarantees of equality and non-discrimination).²¹²

The socially assigned status of people with disability as excluded from productive labour supports the economic devaluing of their bodies and the emergence of other (violent) ways of achieving economic gain from their dehumanised bodies. Economic gain might instead be realised through underpaid labour (eg. in sheltered employment) or unpaid labour (eg. in domestic/family settings or volunteer social enterprise programs). However, beyond the conventional understanding of economic gain from bodies as associated with labour as 'work', economic gain from the bodies of people with disability can also occur through economic extraction from their disability itself (which is, incidentally, the basis on which they are excluded from productive labour). This mode of extraction can occur through interventions in people with disability's bodies and lives that result in financial gain to others but little or no benefit (or even harm) to people with disability subjected to them. Examples include use in some contexts of medications, medical treatments and surgeries, and, relevant for present purposes, provision of care and support services that amount to warehousing.²¹³

In applying this critical approach to ADEs, it is argued that framing ADE employees with disability as less than full workers (and humans) and a dependent burden to be managed (as is strikingly apparent in the FWC discourse discussed in Part II(B)) simultaneously positions their bodies as sources of economic extraction through paying them lower than minimum wage *and* receiving financial benefits associated with 'supporting' (ie, monetising) their disability. Thus, exploitation at

212 See generally Ben-Moshe (n 211); Ben-Moshe and Stewart (n 211); Erevelles (n 212); Donna Lero, Carolyn Pletsch and Margo Hilbrecht, 'Introduction to the Special Issue on Disability and Work: Toward Re-Conceptualizing the "Burden" of Disability' (2012) 32(3) *Disability Studies Quarterly* <<https://dsq-sds.org/index.php/dsq/article/view/3275/3108>>; Kelly Fritsch, 'Gradations of Debility and Capacity: Biocapitalism and the Neoliberalization of Disability Relations' (2015) 4(2) *Canadian Journal of Disability Studies* 12; El Gibbs, 'The Real Barriers to Work', *Patreon* (Blog Post, 25 June 2023).

213 Mia Mingus, 'Medical Industrial Complex Visual', *Leaving Evidence* (Blog Post, 6 February 2015) <<https://leavingevidence.wordpress.com/2015/02/06/medical-industrial-complex-visual/>>. For the broader conceptual origins of 'Medical-Industrial Complex' as developed by Barbara and John Ehrenreich, see, eg. Barbara Ehrenreich and John Ehrenreich, 'The Medical-Industrial Complex' (1970) 15(11) *New York Review of Books* <<https://www.nybooks.com/articles/1970/12/17/the-medical-industrial-complex/>>.

multiple levels of their labour and disability becomes possible and is masked as inclusive and supportive through the legal framework of ADEs.

C Violence and Coercion

ADE employees with disability can experience heightened violence and coercion in ADEs in seven ways.

First, the segregated and closed nature of ADEs can give rise to violence.²¹⁴ For example, Women with Disabilities Victoria states that '[t]he particular workplace characteristics and practices of sheltered workplaces mean that they are sites where women with disabilities are exposed to a higher risk of violence'.²¹⁵ Indeed, institutions per se are violent.²¹⁶ However, this violence is officially justified by the construction of ADEs as vehicles for inclusion and enhancement of wellbeing and self-esteem (as exemplified by the FWC preliminary decision) rather than being perceived as harmful. Moreover, violence can be so normalised in institutional settings such as ADEs that it can be 'detoxified' and simply dealt with as a 'service incident' (if at all).²¹⁷ Moreover, at a more fundamental level, people with disability might not even know what constitutes violence or their rights to access justice and to live free from violence.²¹⁸

Second, ADE employees with disability are subjected to assault, bullying and sexual harassment and have little recourse to support or justice. In its interim report, the Disability Royal Commission noted that people with disability working in ADEs have 'described being physically, verbally and sexually abused by colleagues and managers in the workplace'.²¹⁹ The Disability Royal Commission noted in its issues paper on employment that women with disability working in ADEs are at greater risk of sexual harassment and sexual violence.²²⁰ Women with Disabilities Victoria suggests that the gendered nature of the manual labour primarily performed in ADEs causes gender segregation and male domination in

214 Australian Cross Disability Alliance, Submission No 147 to Senate Community Affairs References Committee, *Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (August 2015) 19 [54], 35–6 [110]–[112] <https://wwda.org.au/wp-content/uploads/2013/12/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf> ('Australian Cross Disability Alliance Submission No 147'); *Segregated and Exploited* (n 167) 7.

215 Women with Disabilities Victoria, Submission No 312 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) 19 ('Women with Disabilities Victoria Submission No 312').

216 Kate Rossiter and Jen Rinaldi, *Institutional Violence and Disability: Punishing Conditions* (Routledge, 2019) 42–3.

217 Australian Cross Disability Alliance Submission No 147 (n 214) 19 [52]–[53].

218 Ibid 19 [54].

219 *Disability Royal Commission Interim Report* (n 169) 29.

220 *Disability Royal Commission Employment Issues Paper* (n 4) 5, citing Women with Disabilities Victoria Submission No 312 (n 215) 11, citing Skye Saunders and Patricia Easta, 'The Nature, Pervasiveness and Manifestations of Sexual Harassment in Rural Australia: Does "Masculinity" of Workplace Make a Difference?' (2013) 40 *Women's Studies International Forum* 121.

these workplaces and strict adherence to masculine and feminine gender roles.²²¹ However, this violence is often dismissed and rendered incapable of redress. The Disability Royal Commission notes that 'in some instances, when these issues have been raised with ADE service providers, they have been ignored or not addressed'.²²² Women with Disabilities Victoria stated that '[b]ecause ADEs are commercial businesses which can remain hidden from the wider community, they are often gate kept work environments'.²²³ Their sheltered nature means 'very limited oversight of the daily workplace practices and instances of harassment, violence and abuse in ADEs'.²²⁴

Third, people with disability experience forms of violence that are legal because they occur through use of restrictive practices. While restrictive practices are framed in terms of behaviour 'support', they are inherently violent in that they are interventions in people with disability's bodies and lives without their consent.²²⁵ The legal regulation of restrictive practices means they constitute a form of 'disability-specific lawful violence'.²²⁶ Use of restrictive practices in an employment setting, with typically zero tolerance of violence in the context of work health and safety laws, is of significant concern and raises additional legal and political dimensions beyond the general criticisms of the use of restrictive practices in non-work settings. Legal regulation and use of restrictive practices is underpinned by assumptions that these coercive interventions are a response to risk of harm to self or others presented by the behaviour of a person with disability. These assumptions will presumably mean that use of restrictive practices will not automatically give rise to a breach of duties under work health and safety laws to prevent violence and aggression in the workplace.²²⁷ However, such an approach is problematic because it relies on a medical model of disability that individualises and pathologises behaviour of people with disability and does not consider the

221 Women with Disabilities Victoria Submission No 312 (n 215) 20.

222 *Disability Royal Commission Interim Report* (n 169) 29.

223 Women with Disabilities Victoria Submission No 312 (n 215) 20.

224 *Ibid.*

225 Spivakovsky and Steele (n 125) 176, citing Claire Spivakovsky, 'Governing Freedom through Risk: Locating the Group Home in the Archipelago of Confinement and Control' (2017) 19(3) *Punishment and Society* 366, 373. See generally Spivakovsky, Steele and Wadiwel (n 144).

226 Spivakovsky and Steele (n 125) 176, citing Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and "Good" Violence' (2014) 23(3) *Griffith Law Review* 467, 473. See also Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 77–9 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/~media/Committees/clac_ctte/Violence_abuse_neglect/report.pdf>.

227 Safe Work Australia, *Preventing Workplace Violence and Aggression: National Guidance Material* (Guide, January 2021) 10–11 <<https://www.safeworkaustralia.gov.au/sites/default/files/2021-01/Guide%20for%20preventing%20workplace%20violence%20and%20aggression%20-%20for%20publishing.docx>>.

impact on behaviour of structural, relational and environmental dynamics. Another is that it fails to consider alternative strategies for workplace safety that are mindful of the safety of people with disability. The assumption that restrictive practices are an acceptable default means that if better approaches are not adopted that respond to structural, relational and environmental dynamics that impact on individual behaviour (eg, stronger regulation of and accountability on service providers for harmful service provision that gives rise to frustration, distress, anger or pain that is then read in individualised terms as ‘challenging behaviour’ or ‘behaviours of concern’) there is a risk that ADEs will dismiss or not even hire people who are perceived to be acting out due to their disability.²²⁸

Fourth, and related to the third point, people with disability can be subjected to coercion through substituted decision-making by guardians and financial managers, including about whether they work in ADEs, what kinds of employment supports they receive, if they are subject to restrictive practices and how they spend their wages. This results in epistemic violence, where people with disability are denied the freedom to articulate their own opinions and experiences.²²⁹ However, this violence is rendered incomprehensible and unredressable because of the legitimating effect of law.

Fifth, people with disability experience coercion in relation to the decision to work in ADEs because of the lack of alternative employment options, particularly with low expectations of family members, schools and service providers, and the scarcity of employers willing to employ people with disability. In its *Willing to Work* report, the AHRC noted concerns around transition from school to employment in terms of information and options available to people with disability.²³⁰ Inclusion Australia quotes William Ward-Boas, ‘a young man who works for the Victorian Advocacy League for Individuals with Disability (VALID)’ and ‘identifies as a man on the autism spectrum with an intellectual disability’:²³¹

I came out of a special school. The only options presented to us were ADEs and Day Services. It was the Yellow Brick Road. It’s not easy to navigate outside of the Yellow Brick Road. It was extremely complex ... before even stepping in through the TAFE doors you were basically exhausted and overwhelmed with what you had to overcome to get to that place that you wanted to get to.²³²

228 This is similar to the pattern seen in education settings where the choice for school students with disability and ‘challenging behaviour’ is often use of restrictive practices or exclusion from school. On use of restrictive practices and exclusion in relation to school students with disability: see Eleanor Jenkin et al, Castan Centre for Human Rights Law, *Improving Educational Outcomes for Children with Disability in Victoria* (Final Report, June 2018) 63–4 <https://researchmgt.monash.edu/ws/portalfiles/portal/257778184/257778112_oa.pdf>.

229 Fleur Beaupert, ‘Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness’ (2018) 7(1) *Laws* 3:1–26, 19.

230 *Willing to Work* (n 168) 203–4.

231 *What Works* (n 158) 5.

232 *Ibid* 11.

Through their campaigns on employment, DPOs, such as Inclusion Australia and Council for Intellectual Disability, have consistently advocated that people with disability want to work in open employment.²³³

Sixth, and related to the fifth point, ADE employees with disability might experience high levels of coercion and denial of autonomy across their lives, including in the normalised practices of service providers or family members. Decisions about what lunch they eat at work, how they travel to work, what they can do after work and if they can socialise outside work with their colleagues might all be decisions made by others explicitly through others asserting their authority or entitlement to make particular decisions, or simply because of how service provision is structured more generally.

Lastly, ADEs can constitute forced labour and servitude. 'Forced labour' is legally defined as 'the condition of a person (the *victim*) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free' either 'to cease providing the labour or services' or 'to leave the place or area where the victim provides the labour or services'.²³⁴ 'Servitude' is legally defined as the condition of forced labour as defined above with additional circumstances of coercion: 'the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services'.²³⁵ The level of control over individuals on a day-to-day basis and in terms of their employment situation could lead to forced labour which is legally authorised by the legal frameworks discussed in Part II. Where an individual is additionally under coercion and control in other aspects of their life (eg, housing), this could also constitute servitude.²³⁶ Concerns about ADEs as forms of modern slavery have previously been raised by disability rights and human rights advocates.²³⁷ The Disability Royal Commission has briefly noted the issue of modern slavery and ADEs. In its public hearing on human rights of people with disability, modern slavery academic Justine Nolan acknowledged the potential for modern slavery to occur in ADEs.²³⁸ In its public hearing on ADEs, the CEO of Bedford (the largest ADE operator in Australia) answered in the negative when asked if he has considered the risk of modern slavery in its ADE operations.²³⁹

233 See above n 150.

234 *Criminal Code Act 1995* (Cth) s 270.6(1).

235 *Ibid* s 270.4(1).

236 Linda Steele, 'Ending Disability Segregated Employment: "Modern Slavery" Law and Disabled People's Human Right to Work' (2023) 19(2) *International Journal of Law in Context* 217, 229.

237 Australian Lawyers for Human Rights Submission No 67 (n 78) 8; 'Ethical Supply Chains' (n 202). See also Catia Malaquias and Jackie Softly, 'Time to Stop Defending the Low Ground: Moving from Segregated to Open Employment', *Starting with Julius* (Blog Post) <<http://www.startingwithjulius.org.au/time-to-stop-defending-the-low-ground-moving-from-segregated-to-open-employment/>>.

238 *Disability Royal Commission Public Hearing 22 Day Two* (n 173) 129.

239 *Ibid* 141.

D Law's Role in Eliminating ADEs

The segregation, discrimination, exploitation and violence that people with disability are subjected to through ADEs provides a basis for arguing for a transition away from ADEs. Part III finishes with a preliminary discussion of the potential role of law in such a transition.

Segregation, discrimination, exploitation and violence are entrenched in and legitimated by law. Thus, transitioning away from ADEs requires legal transformation, including legislative change to the *DSA 1986*, *FW Act*, and the *NDIS Act 2013*. This is on the basis that the ADE model of employment and the ADE wage system are both legislated, and the financial benefits of ADEs to the organisations operating ADEs are designed into the NDIS legislative framework and state and territory procurement policies. Until this occurs, ADEs will continue to be lawful and financially attractive such that any reduction in their use will rely on the goodwill and commitment of the organisations that operate ADEs in a context of conflicting financial incentives to continue to utilise this model and entrenched ableism in legal and service justifications of ADEs.

Attention must also be paid to the legal framework of what will be transitioned *to* in the absence of ADEs. This will require reform of disability discrimination and industrial relations laws to support just, inclusive and accessible employment opportunities and workplaces for people with disability. The task of identifying the full range of laws requiring reform might be aided by drawing on the experiences of jurisdictions that have transitioned away from disability segregated employment,²⁴⁰ in terms of how to develop just, inclusive and accessible labour market and workplaces for people with disability who would previously have worked in ADEs. Campaigns by Inclusion Australia and other DPOs directed towards improving open employment (discussed in the introduction to Part III) provide a wealth of resources informed by the lived experiences of people with disability to guide the transformation of the labour market and individual workplaces. These campaigns highlight that workplaces need to be changed to be more responsive to everyone's strengths, rather than starting from a position of disability as deficit and burden. Moreover, there are decades of research about how to make open and self-employment work for people with intellectual disability and cognitive disability. Such strategies include personalised strengths-based work skills assessment, job customisation and placement, training in a workplace rather than classroom setting, ongoing support in the workplace, workforce development and reduction of system complexity.²⁴¹ There should also be more consideration of

240 See, eg, US Commission on Civil Rights, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities* (Statutory Enforcement Report, September 2020) 1–57 <<https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>>; 'An End to Sheltered Workshops for Person with Disabilities: Vote in the Social Affairs Committee', *Die Grünen/EFA im Europäischen Parlament* (Web Page, 26 January 2021) <<https://www.katrin-langensiepen.eu/de/article/132.an-end-to-sheltered-workshops-for-person-with-disabilities-vote-in-the-social-affairs-committee.html>>.

241 Inclusion Australia DES Reform Submission (n 159) 7; Erin Wilson and Robert Campaign, *Fostering Employment for People with Intellectual Disability: The Evidence to Date* (Report, August 2020) 8–9.

how to reform laws to support individuals with disability to start their own businesses. Recent research on disability entrepreneurship has highlighted these can contribute to the financial independence and self-determination of people with disability.²⁴²

In the short term and until transition is complete, the *FW Act* can be reformed to end the supported wage system and ensure equal wages. The additional costs to organisations operating ADEs can be subsidised by the Australian government, as proposed by Inclusion Australia.²⁴³ Government subsidies are an established practice in industries in transition due to government policies or structural changes. Indeed, the government already provides financial assistance to the organisations operating ADEs, such as in the aftermath of the BSWAT decisions (discussed in Part II(B)(2)), and the commitment to provide financial support to ADEs in response to any change to wage assessment following the FWC decision (discussed in Part II(B)(3)).

In reforming the legal system to facilitate a transition away from ADEs, it is important to be alert to the risk of the inequality and violence of ADEs travelling, largely invisibly, into mainstream/open employment settings in the community.²⁴⁴ For example, even if ADEs are closed or an individual employee transitions into mainstream employment, people with disability might still be subject to the wage system that allows them to be paid less than their colleagues without disability because the Supported Wage System can apply in open employment.²⁴⁵ The

242 Simon Darcy, Jock Collins and Megan Stronach, *Australia's Disability Entrepreneurial Ecosystem: Experiences of People with Disability with Microenterprises, Self-Employment and Entrepreneurship* (Report, March 2020) 13 <<https://www.uts.edu.au/sites/default/files/article/downloads/Australias%20Disability%20Entrepreneurial%20Ecosystem%20Report%201%20240620%20%28Accessible%29.pdf>>; Simon Darcy, Jock Collins and Megan Stronach, *Entrepreneurs with Disability in Australia: Experiences of People with Disability with Microenterprises, Self-Employment and Entrepreneurship* (Report, January 2021) vii <<https://www.uts.edu.au/sites/default/files/article/downloads/Darcy%20Collins%20%26%20Stronach%202021%20Report%202%20Policy%20%26%20Organisational%20Initiatives%20%5BPublic%20Version%5D.pdf>>.

243 McAlpine (n 154) 1, 3.

244 This issue has played out in other domains of the 'deinstitutionalised community', such as use of community treatment orders and guardianship orders to enable the carceral control of people with disability as an alternative to prison: see, eg, Steele, *Disability, Criminal Justice and Law* (n 158) 4.

245 By way of recent example, a hotel in the Blue Mountains, NSW, received publicity for its training program for people with intellectual disability. Media coverage frames the hotel as a 'social enterprise' at the same time as the founder and director of the hotel, Andrea Comastri, is quoted as saying: '[o]ur trainees are paid under the hospitality award and they're paid within the supported wage system, which identifies their productivity level. And we work towards increasing that productivity level to 100 per cent': Sandra Fulloon, 'Young Australians with a Disability are "Front and Centre" at this Unique Hospitality Training Venture', *SBS News* (online, 19 March 2022) <<https://www.sbs.com.au/news/small-business-secrets/article/young-australians-with-a-disability-are-front-and-centre-at-this-unique-hospitality-training-venture/kd49uek4>>. The hotel is part of an international hotel chain that is featured in a documentary: *Chef Antonio's Recipes for Revolution* (Yarra Bank Films, 2021). How employing people with disability under an unequal wage system is revolutionary is questionable given that this system has existed for decades.

interconnection of systems of segregation and coercion, which was highlighted in this part and shown to be underpinned by law, also indicates the need to take heed of DPO Australia's call to end segregation and for any law reform concerning ADEs to be situated in a broader campaign to end segregation across service sectors and legal domains.²⁴⁶ Thus, the role of law in the transition away from ADEs should extend to legislative reform to abolish substitute decision-making and restrictive practices. Law reform should also support disability desegregation of other systems, such as education and housing.

As well as designing systems that do not perpetrate violence and exploitation, it is important to redress past experiences of violence and exploitation in ADEs. Here, insights might be gleaned from programs of state-led redress of labour exploitation,²⁴⁷ and industry-led redress of labour exploitation.²⁴⁸

IV CONCLUSION

This article has shown that people with disability are subjected to discrimination, segregation, exploitation and violence within ADEs, and that the law is complicit in enabling these circumstances to occur and masking the resulting injustices, thus casting these injustices outside accountability and redress. This discussion has shown a core tension — the law justifies ADEs through positive discourses of inclusion, support and hope, while the existence and operation of ADEs causes segregation, discrimination, exploitation and violence that undermines the possibility of ever achieving these aspirations. ADEs provide only the veneer of employment and workplace to people with disability because ADEs offer the physical performance of labour. However, in doing so, they remove the monetary reward and full scope of legal and human rights that attach to people without disability in the workplace, which ultimately 'contributes to their stigmatization as unproductive, worthless citizens', thus further distancing them from realisation of equality.²⁴⁹ Ultimately, through ADEs, people with disability are not merely segregated or excluded but cast outside full community and humanness *through* the particular status accorded to them by ADEs, resulting in a profound normative

246 *Segregation of People with Disability* (n 155) 9–10.

247 See, eg, Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310, 313–14, 316–18; James Gallen and Kate Gleeson, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14(1) *International Journal of Law in Context* 43, 51–3; Frances Simmons, Jennifer Burn, and Fiona McLeod, 'Modern Slavery and Material Justice: The Case for Remedy and Reparation' (2022) 45(1) *University of New South Wales Law Journal* 148, 165–76.

248 See, eg, Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035, 1044–8, 1059–77.

249 May-Simera (n 160) 4, citing Laurent Visier, 'Sheltered Employment for Persons with Disabilities' (1998) 137(3) *International Labour Review* 347 and Steven J Taylor, 'Disabled Workers Deserve Real Choices, Real Jobs', *The Centre for an Accessible Society* (Blod Post, 2 September 2002) <<http://www.accessiblesociety.org/topics/economics-employment/shelteredwksps.html>>.

and ontological violence.²⁵⁰ This casting of people with disability outside full community and humanness not only results in deep harm and loss to people with disability, but simultaneously leads to significant financial benefit to ADE service providers, employees without disability, businesses in supply chains and the broader community.

This analysis of ADEs has highlighted the importance of considering violence, abuse, neglect and exploitation of people with disability in the specific context of labour and workplaces because of the particular issues that arise when people with disability are lawfully subjected to these injustices in the course of providing their labour. These issues provoke questions not only of who is harmed through violence, abuse, neglect and exploitation, but also who benefits and how — questions that could also be asked in other contexts known for warehousing, such as group homes, aged care facilities and day programs. The economic dynamics of violence, abuse, neglect and exploitation of people with disability have been largely tangential in the recent Disability Royal Commission and the wave of disability-related inquiries in the past decade.

The analysis has also highlighted the need to consider use of restrictive practices in ADEs. While restrictive practices are violent in any setting, their use on people with disability in the course of providing labour raises specific issues around forced labour and servitude that require further exploration. Future research could explore such questions as:

- How does use of restrictive practices affect the freedom of ADE employees with disability subjected to them to choose to work or not work and to be free from violence and coercion in their workplace?
- How do violence and harassment policies in ADEs relate to the use of restrictive practices?
- How are ADEs currently trying to eliminate restrictive practices, particularly if behaviour management is one of the key NDIS-funded employment supports available for use in ADEs?

Beyond restrictive practices, there is also the need for more understanding of freedom to work and not work in ADEs, including by reason of the level of supervision and control in ADEs and group homes, and the use of segregated transport. Future research could consider:

- How easy is it for an ADE employee with disability to spontaneously leave work during the workday or not turn up to work (in the same way an employee without disability might decide they need to leave work early, call in sick or take a day's leave)?
- How does the heavily routinised nature of disability service provision affect the freedom of an ADE employee with disability to choose to work or not work on a day-to-day or longer-term basis?

Another area in need of further exploration is the experiences of people with disability in ADEs, including in an intersectional context. For example, Women

250 Rohit Varman et al, 'Normative Violence in Domestic Service: A Study of Exploitation, Status, and Grievability' (2021) 171(4) *Journal of Business Ethics* 645, 649.

with Disabilities Victoria has observed that the closed nature of ADEs means that ‘we know little about the individual experiences of women with disabilities in ADEs specifically, and rarely are ADEs seen from the perspective of their employees’.²⁵¹ There is little publicly available knowledge of what happens in ADEs from the experience of people with disability, and the media reporting of ADEs is largely from the perspective of ADEs, in the feel-good terms of ‘social enterprise’. It is also important to consider the racial and class dynamics of ADEs in the sense that individuals with parents who are privileged and well-resourced advocates might be able to ensure their adult children receive better wage assessments or ultimately move on to open employment. Such research would help explain how economic exploitation and violence in ADEs might differentially impact people with disability and have greater impacts on individuals with disability who are already less privileged.

This analysis has demonstrated how discourses of inclusion, support and hope are weaponised against people with disability to justify practices that undermine what we might think is the intent of such terms. Instead, we must ensure people with disability are treated equally and with dignity and have a sense of belonging. Therefore, a final area of future research — which is perhaps most significant in terms of the ultimate success of any transition away from ADEs — is to explore what has worked in facilitating open employment of people with disability, including in jurisdictions that have already transitioned away from disability segregated employment.

Ultimately, attention to the legal dynamics of disability segregated employment indicates that the necessary transition away from ADEs and unequal wage systems must include legal transformation that dismantles the legal infrastructure across diverse domains, including disability services, disability support funding, guardianship, industrial relations and government procurement that currently apply to ADEs. Moreover, this transformation must take place in a broader context of ending segregation, coercion and violence against people with disability and critiquing how discourses of inclusion, support and hope are underpinned by ableism when mobilised in law to sustain inequality of people with disability. Otherwise, the circumstances of segregation and labour exploitation over 30 years ago recounted by Kim Walker that opened this article will continue to evolve and survive.

251 Women with Disabilities Victoria Submission No 312 (n 215) 21.