

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

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*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 to 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, have justified ADEs as necessary and beneficial to people with disability and facilitated the organisations that operate ADEs receiving financial benefit from the unequal treatment of ADE employees with disability. Legal institutions with authority to help dismantle ADEs—Commonwealth legislature, the Fair Work Commission 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.*

**Keywords:** Australian Disability Enterprises, disability, discrimination, industrial relations, intellectual disability, labour exploitation, National Disability Insurance Scheme, segregation

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## I INTRODUCTION

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

we 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.<sup>1</sup>

Although we might assign Walker's experiences to late-twentieth-century disability history, sheltered workshops continue to operate in Australia legally. Sheltered workshops have been renamed 'Australian disability enterprises' (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 funding, and having a competitive advantage in government procurement.

ADEs are entrenched in the Australian legal system and the National Disability Insurance Scheme (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.

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<sup>1</sup> Kim Walker, *Forgotten and Found: My Life Story* (New South Wales Council for Intellectual Disability, 2015) 29–30 <<https://cid.org.au/wp-content/uploads/2015/06/Forgotten-and-Found-Council-for-Intellectual-Disability.pdf>>.

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 the official legal and service framing of ADEs reflects a medicalised and deficit approach to 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 deemed incapable by reason of their disability of working in open employment. The article contrasts this framing of ADEs to 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’.<sup>2</sup> 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 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) is currently exploring

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<sup>2</sup> El Gibbs, ‘What’s on the Disability Agenda for the New Government’, *Patreon*, 7 August 2022 (on file with author)

how to protect people with disability from violence, abuse, neglect and exploitation<sup>3</sup> and how to promote a more inclusive society that supports the independence of people with disability; its remit extends to the specific context of ADEs.<sup>4</sup> Moreover, the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)<sup>5</sup> 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).<sup>6</sup> In its latest periodic review of Australia's compliance with the Committee on the Rights of Persons with Disability (UN CRPD Committee), the 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'.<sup>7</sup> 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'.<sup>8</sup>

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

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<sup>3</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Our Terms of Reference', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* <<https://disability.royalcommission.gov.au/about-royal-commission/our-terms-reference>>.

<sup>4</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Employment* (Issues Paper, 12 May 2020) 11 <<https://disability.royalcommission.gov.au/publications/employment>>.

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

<sup>6</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 5, 19, 16, 27. The UN CRPD Committee is currently developing a general comment on its interpretation of Article 27 concerning the right of persons with disability to work and employment: 'Call for Submissions: Draft General Comment on Article 27 on the Right of Persons with Disabilities to Work and Employment', *The Office of the High Commissioner for Human Rights* <<https://www.ohchr.org/en/calls-for-input/2021/call-submissions-draft-general-comment-article-27-right-persons-disabilities>>.

<sup>7</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia, Adopted by the Committee at Its 511th Meeting (20 September 2019) of the 22nd Session* (CRPD/C/AUS/CO/2-3, United Nations, 15 October 2019) para 40(b).

<sup>8</sup> Ibid 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'. 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: United Nations High Commissioner and for Human Rights, 'Thematic Study on the Work and Employment of Persons with Disabilities' (2012) [67]–[68].

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.<sup>9</sup> Generally, ADE employees with disability engage in various physical labour roles, including food services, cleaning, laundry, landscaping, packaging, assembly, production, and recycling.<sup>10</sup> ADEs are ‘supported employment services’<sup>11</sup> that are part of Commonwealth law directed towards enhancing integration and participation of people with disability in the community<sup>12</sup> and are funded through the NDIS.<sup>13</sup>

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’.<sup>14</sup> BuyAbility describes the benefits of ADEs to ADE employees with disability as providing ‘meaningful work’, which means people with disability can lead a normal life, make friends and find professional fulfilment knowing they are contributing to the community’.<sup>15</sup>

This part introduces the law and policy framework of ADEs in Australia,<sup>16</sup> 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

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<sup>9</sup> BuyAbility, ‘What is Supported Employment?’, *BuyAbility* <<https://buyability.org.au/supported-employment/>>.

<sup>10</sup> Department of Social Services, *Supported Employment* (Australian Government) <<https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability/supported-employment>>.

<sup>11</sup> *Disability Services Act 1986* (Cth) s 7 ‘supported employment services’.

<sup>12</sup> *Disability Services Act 1986* (Cth) s 3.

<sup>13</sup> National Disability Insurance Agency, *Supports in Employment Provider Handbook* (January 2021) <<https://www.ndis.gov.au/media/2919/download?attachment>>.

<sup>14</sup> BuyAbility (n 9).

<sup>15</sup> ‘BuyAbility Impact Tool’, *BuyAbility* <<https://buyability.org.au/buyability-impact-tool/>>.

<sup>16</sup> For a legal overview of ‘sheltered workshops’ more generally, see Paul Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (Cambridge University Press, 2019) ch 4.

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.

#### ***1 Disability Services Act 1986 (Cth)***

The legislative origins of ADEs can be traced back to the mid-1980s. In 1985, the Commonwealth Government's report on the Handicapped Programs Review<sup>17</sup> recommended integration of disability employment programs and improved wages and conditions within sheltered workshops.<sup>18</sup> 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. The objects also extend to promoting services provided to people with disability that assist community integration, independence, and employment opportunities of people with disability, enhance self-esteem of people with disability, and promote a positive image of people with disability.<sup>19</sup>

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<sup>17</sup> Handicapped Programs Review, *New Directions: Report of the Handicapped Programs Review* (Australian Government Publishing Service, 1985) <<https://apo.org.au/sites/default/files/resource-files/1985-05/apo-nid54671.pdf>>.

<sup>18</sup> Ibid 38–40. See also Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Research Report – Agents of Our Own Destiny: Activism and the Road to the Disability Royal Commission* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, November 2021) 8 <<https://disability.royalcommission.gov.au/system/files/2021-11/Research%20Report%20-%20Agents%20of%20our%20own%20destiny%20-%20Activism%20and%20the%20road%20to%20the%20Disability%20Royal%20Commission.docx>>.

<sup>19</sup> *Disability Services Act 1986* (NSW) s 3. As introduced, see s 3 of the original version of the Act, which is of a similar nature.

However, rather than reflecting the position of the Handicapped Programs Review report that sheltered workshops were ‘anachronisms to be phased out’,<sup>20</sup> 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’.<sup>21</sup> 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 Act (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. Immediately prior to the NDIS, ADEs were funded through the Disability Employment Assistance Program (DEAP). However, with the 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.<sup>22</sup> Under the new funding model, people with disability then 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’.<sup>23</sup> This policy change has effectively uncapped the number of

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<sup>20</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, ‘Agents of Our Own Destiny’ (n 18) 12.

<sup>21</sup> *Disability Services Act 1986* (NSW) s 7 (‘supported employment services’).

<sup>22</sup> ‘Supported Employment’, *Department of Social Services*, 11 April 2022 <<https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability/supported-employment>>.

<sup>23</sup> National Disability Insurance Scheme, *Supported Employment Under the NDIS: Industry Information and Consultation Paper* (Australian Government, November 2019) 7. See also explanation in *4 Yearly Review of Modern Awards—Supported Employment Services Award 2010 (AM2014/286)* [2019] Fair Work Commission [2019] FWCFB 8179, [249]–[251].



ADE places and, thus, will ‘potentially increase the number of people with disability in ADEs’.<sup>24</sup>

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’.<sup>25</sup> 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’.<sup>26</sup> Funding of employment supports for ADE employees with disability principally depends on what could be considered ‘reasonable and necessary’ for that individual.<sup>27</sup>

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.<sup>28</sup> 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 from abuse, neglect and exploitation’.<sup>29</sup> 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.<sup>30</sup> The objects of this Act extend to giving effect to Australia’s obligations under the CRPD and other international human rights instruments.<sup>31</sup> The funding of ADEs within the NDIS legislative framework thus positions them as furthering the realisation of disability human rights,

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<sup>24</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Employment* (n 3) 4.

<sup>25</sup> *National Disability Insurance Scheme (Supports for Participants) Rule 2013* (Cth) 7.17.

<sup>26</sup> National Disability Insurance Agency (n 13) 5.

<sup>27</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 34(1).

<sup>28</sup> *Ibid* ss 4(11)(b), (c).

<sup>29</sup> *Ibid* ss 4(1), (2), (6).

<sup>30</sup> *Ibid* ss 3(1)(c), (e).

<sup>31</sup> *Ibid* ss 3(1)(a), (i).

supporting community participation, and not as intrinsically harmful and as facilitating violent, neglectful and exploitative behaviours

### **3 Procurement Policies**

Commonwealth and state/territory-based government procurement policies provide 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.<sup>32</sup> 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’. 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.<sup>33</sup>

The historical legislative review in Part II.A demonstrates that legal and policy developments seeking to improve conditions for people with disability often 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, not

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<sup>32</sup> *Commonwealth Procurement Rules* (Department of Finance, 14 December 2020) 29 (Appendix A, cl 15) <<https://www.finance.gov.au/sites/default/files/2020-12/Commonwealth%20Procurement%20Rules%20-%2014%20December%202020.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* (25 January 2019) <<https://probonoaustralia.com.au/news/2019/01/disability-groups-divided-support-australian-disability-enterprises/>>.

<sup>33</sup> Government of Western Australia, ‘Purchase from an Aboriginal Business or Australian Disability Enterprise Guideline’ <<https://www.wa.gov.au/government/multi-step-guides/procurement-guidelines/procurement-planning-individual-purchases-guidelines/purchase-aboriginal-business-or-australian-disability-enterprise-guideline>>. 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: ‘Victoria’s Big Housing Build’, *Premier of Victoria, The Hon Daniel Andrews* (15 November 2020) <<https://www.premier.vic.gov.au/victorias-big-housing-build>>.

least of all by reason of the capacity for legal and service justifications of their existence to recalibrate and 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.<sup>34</sup> 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. Discussion in this section focuses on the role of the Fair Work Commission (FWC) in regulating ADE wages.

### ***1 Industrial Relations Law and the Supported Wage System***

The FWC can ‘make, vary and revoke modern awards’.<sup>35</sup> 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. Modern awards ‘provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors’.<sup>36</sup> A modern award must not include terms that discriminate against an employee on the basis of an employee’s physical or mental disability.<sup>37</sup> 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.<sup>38</sup>

The Supported Employment Services Award 2020 (Cth) (Supported Employment Services Award) is a separate industry award for employees in supported employment services.<sup>39</sup> The Supported Employment Services Award provides that: ‘An 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’.<sup>40</sup> Wage assessments are

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<sup>34</sup> For a history of wages in ADEs, see *Nojin v Commonwealth* [2011] Federal Court of Australia 283 ALR 800, 53, [18]–[53].

<sup>35</sup> *Fair Work Act 2009* (Cth) s 132.

<sup>36</sup> *Ibid* s 132; see also s 134.

<sup>37</sup> *Ibid* s 153(1).

<sup>38</sup> *Ibid* s 153(3)(b).

<sup>39</sup> *Supported Employment Services Award 2020* (Cth).

<sup>40</sup> *Ibid* cl 18.1.

reviewed regularly,<sup>41</sup> and employers must inform employees of their employment rights.<sup>42</sup> Therefore, ADE employees with 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. While most of these were developed by specific disability service providers,<sup>43</sup> the Supported Wage System Tool was developed by the Australian Government and is not specific to a particular service provider.<sup>44</sup> The Supported Wage System Tool only applies to ‘an employee with a disability’<sup>45</sup> 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’.<sup>46</sup> The Supported Wage System Tool can be used in ADEs *and* in open employment<sup>47</sup> (a point we return to in Part III.D). Assessment pursuant to the Supported Wage System Tool is conducted by an approved assessor, in consultation with the employer, employee and, if the employee wishes, a relevant union.<sup>48</sup> The rate of pay is adjusted following the review.<sup>49</sup> 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

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<sup>41</sup> 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.

<sup>42</sup> Ibid pts 31–2.

<sup>43</sup> 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.

<sup>44</sup> The Supported Wage System Tool is detailed in Schedule D of the *Supported Employment Services Award 2020* (Cth).

<sup>45</sup> *Supported Employment Services Award 2020* (Cth) sch D, D.1.

<sup>46</sup> Ibid sch D, D.3.1.

<sup>47</sup> 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: Fair Work Ombudsman, ‘Minimum Wages’ <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/minimum-wages>>. See also *Fair Work Act 2009* (Cth) s 284. The disability minimum wage applies to ‘a national system employee who is qualified for a disability support pension’, or who would qualified if they met the relevant Australian residency requirements: s 12 ‘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: Fair Work Ombudsman, ‘Employees with Disability Pay Rates’ <<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 all have industrial 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* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020) 241 <<https://apo.org.au/sites/default/files/resource-files/2020-12/apo-nid310247.pdf>>.

<sup>48</sup> *Supported Employment Services Award 2020* (Cth) sch D, D.5.1.

<sup>49</sup> Ibid sch D, D.7.2.

week.<sup>50</sup> If an individual is assessed as having productive capacity less than 12.5%, they are paid at 12.5%.<sup>51</sup> The wage assessment is reviewed periodically.<sup>5253</sup>

## **2 Disability Discrimination Law and Wage Assessment Tools**

The wage assessment system in ADEs has been a site of legal contestation. Yet, 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.

Last decade there was some disability discrimination litigation in relation to wage assessment. As part of the Wage Justice Campaign led by Australian Employees with Disability Legal Centre (AED Legal Centre) and People with Disability Australia (PWDA), in 2008 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. 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.<sup>54</sup> Under the BSWAT, ADE employees with disability could be paid just \$1.00 per hour.<sup>55</sup> 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. The BSWAT was suggested to be discriminatory on two bases related to

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<sup>50</sup> As of July 2022, the National Minimum Wage is \$21.38 per hour or \$812.60 per week: ‘Get Set for a Minimum Wage Increase’, *Fair Work Ombudsman* <<https://www.fairwork.gov.au/newsroom/news/get-set-for-a-minimum-wage-increase#national-minimum-wage-increase>>.

<sup>51</sup> *Supported Employment Services Award 2020* (Cth) sch D, D.4.1(b).

<sup>52</sup> *Ibid* sch D, D.7.2.

<sup>53</sup> *Ibid* sch D, D.7.2.

<sup>54</sup> *4 Yearly Review of Modern Awards—Supported Employment Services Award 2010 (AM2014/286)* (n 23) [309].

<sup>55</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, ‘Agents of Our Own Destiny’ (n 18) 12.

its competency aspect: the greater difficulty in meeting the competencies and in undertaking a question and answer style assessment.<sup>56</sup> The application was rejected at first instance.<sup>57</sup>

On appeal, a majority of the Full Federal Court<sup>58</sup> found that because of the competency aspect, the BSWAT discriminated based on disability, specifically against people with intellectual disability. 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’.<sup>59</sup> A majority of the Full Federal Court (Justice Katzmann and Justice Buchanan, Justice Flick 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.<sup>60</sup> The appeal from the decision of Justice Gray was allowed. Leave to appeal this decision to the High Court was refused.<sup>61</sup>

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.<sup>62</sup> The exemption was subsequently extended for a further two years<sup>63</sup> despite opposition by disability advocates on the ground that this would sustain human rights violations against people with

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<sup>56</sup> *Nojin v Commonwealth* (n 34) [5].

<sup>57</sup> *Ibid* [103].

<sup>58</sup> *Nojin v Commonwealth* (2012) 298 FCAFC 410.

<sup>59</sup> *Ibid* [130].

<sup>60</sup> *Ibid* [146].

<sup>61</sup> In refusing leave to appeal, Justine Crennan observed the ‘unchallenged expert evidence ... that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score’: *Commonwealth of Australia v Prior* [2013] HCATrans 101 (10 May 2013).

<sup>62</sup> Australian Human Rights Commission, *Australian Human Rights Commission Disability Discrimination Act 1992 (Cth), s 55(1) Notice of Grant of Exemption: Department of Social Services* (29 April 2014) <[https://humanrights.gov.au/sites/default/files/20140429\\_Notice\\_of\\_Exemption\\_BSWAT111.pdf](https://humanrights.gov.au/sites/default/files/20140429_Notice_of_Exemption_BSWAT111.pdf)>.

<sup>63</sup> Australian Human Rights Commission, *Australian Human Rights Commission Disability Discrimination Act 1992 (Cth), s 55(1) Notice of Grant of Exemption: Commonwealth, National Disability Services, Multitask Human Resource Foundation Ltd, Vincent Industries Inc., Jiffy Services and Tasmanian Association of Disabled Persons Abilities Centre* (18 December 2015)

<<https://humanrights.gov.au/sites/default/files/Decision%20PDF.pdf>>; Australian Human Rights Commission, *Australian Human Rights Commission Disability Discrimination Act 1992 (Cth), s 55(1) Notice of Grant of Exemption: Commonwealth on Behalf of Itself and Australian Disability Enterprises* (22 March 2016) <[https://humanrights.gov.au/sites/default/files/Decision%20PDF\\_1.pdf](https://humanrights.gov.au/sites/default/files/Decision%20PDF_1.pdf)>.

disability the basis of the court decision establishing the discriminatory nature of the BSWAT.<sup>64</sup>

Subsequent to *Nojin v Commonwealth*, Tyson Duval-Comrie—an ADE employee with intellectual disability—brought a representative complaint or class action in relation to the BSWAT. 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 continued to receive discriminatory wages (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.<sup>65</sup> 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*. The argument about discrimination focused on the competency aspect of the BSWAT, in similar terms to in *Nojin v Commonwealth*.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> In its original form, the legislation provided payments of 50% of the underpaid wages.<sup>69</sup> However, before the Bill

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<sup>64</sup> People with Disability Australia, *Submission in Response to an 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* (People with Disability Australia, July 2015) 3.

<sup>65</sup> *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523, [4].

<sup>66</sup> *Ibid* [9]–[10].

<sup>67</sup> *Ibid* [13].

<sup>68</sup> *Business Services Wage Assessment Tool Payment Scheme Act 2015* (Cth).

<sup>69</sup> Australian Lawyers for Human Rights, *Submission on Inquiry into Establishing a Modern Slavery Act in Australia* (2017) 9 <<http://alhr.org.au/wp/wp-content/uploads/2017/05/ALHR-Modern-Slavery-Act-Submission-2017-04-27F.pdf>>. 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 advocates because it provided insufficient redress for discrimination.: Australian Lawyers Alliance, *Redress and Remedy: The BSWAT Payment Scheme Is Not the Answer: Submission to Senate Standing Committee on Community Affairs Inquiry into Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* (Submission No 14, 23 July 2014); People with Disability Australia, *Submission to the Senate Standing Committee on Community Affairs Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014* (July 2014) <<https://www.aph.gov.au/DocumentStore.ashx?id=a08ce563-685f-465a-891f-19da6d694d78&subId=298361>>. In its final report, the Committee recommended the Bill be passed.: Senate Community Affairs Legislation Committee, *Inquiry into Business Services Wage Assessment Tool Payment Scheme Bill 2014; Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* (Commonwealth of Australia, 2014) ix <<https://www.aph.gov.au/>-

was passed, the BSWAT class action 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.<sup>70</sup> The subsequent legislated payment scheme offered individuals 70% of the productivity scored wage (minus that already paid in their actual wage).<sup>71</sup> Following the litigation and the payment scheme, service providers using the BSWAT were provided with financial support to transition to another wage assessment tool. 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 is currently reviewing the Supported Employment Services Award as part of its legislated role of periodically reviewing awards.<sup>72</sup> 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 their work, redesign of the pay classification involving introduction of two additional pay grades below the existing seven and a \$3.50 minimum wage.<sup>73</sup> The FWC is yet to make its final decision.<sup>74</sup>

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

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/media/Committees/Senate/committee/clac\_ctte/business\_services/report.pdf?la=en&hash=B1B905923711AF190F7765FA65D1BB660898D213>.

<sup>70</sup> *Duval-Comrie v Commonwealth of Australia* (n 65) [23]–[25].

<sup>71</sup> *Business Services Wage Assessment Tool Payment Act 2015* (Cth). See also Australian Government, *About the BSWAT Payment Scheme: Information for Legal Advisors* (Australian Government, 2016).

<sup>72</sup> The periodic review is pursuant to clause 26 of Schedule 1 to the *Fair Work Act*. See *4 Yearly Review of Modern Awards—Supported Employment Services Award 2010* (AM2014/286) (n 23) [2].

<sup>73</sup> *Ibid.*

<sup>74</sup> ‘Supported Employment Services Award review (AM2014/286)’, *Fair Work Commission* <<https://www.fwc.gov.au/hearings-decisions/major-cases/4-yearly-review/awards-under-review/supported-employment-services>>.



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’.<sup>75</sup> 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.<sup>76</sup> Moreover, the FWC expressed the view that the nature of employment in ADEs is ‘markedly different’ to the general labour market. 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’.<sup>77</sup> 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’.<sup>78</sup>

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’. The FWC suggested that open employment is only ‘desirable’ but not ‘practicable’ for people with more ‘severe’ disability. Therefore, ADEs are ‘the only realistic opportunity for employment they will ever have’. The FWC was driven to ensure that ‘the capacity of ADEs to continue to employ disabled persons is not prejudiced’.<sup>79</sup>

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 (e.g., not being paid below the national minimum wage and not having individualised productivity-based wages).<sup>80</sup> The FWC expressed the preliminary view that a single wage assessment tool is desirable to prevent ADE employees with disability receiving differential

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<sup>75</sup> 4 Yearly Review of Modern Awards—Supported Employment Services Award 2010 (AM2014/286) (n 23) [245].

<sup>76</sup> Ibid [245].

<sup>77</sup> Ibid [248].

<sup>78</sup> Ibid [247].

<sup>79</sup> Ibid [246].

<sup>80</sup> Ibid.

pay depending on the tool their employer uses<sup>81</sup> and that some of the current wage assessment tools might have discrimination issues, like BSWAT.<sup>82</sup>

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.<sup>83</sup> A productivity-only assessment ‘would not be fair or appropriate or achieve the modern awards objective’.<sup>84</sup> Because, in the FWC’s view, ADEs provide employment roles specific to the skills and capacity of people with disability,<sup>85</sup> ‘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.<sup>86</sup> The Supported Wage System Tool does not recognise the reduced value generated by work done by ADE employees 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.<sup>87</sup> 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’.

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.<sup>88</sup> 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.<sup>89</sup> Mandatory use of the Supported Wage System Tool would be likely to have a ‘significantly detrimental effect on 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

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<sup>81</sup> Ibid [317].

<sup>82</sup> Ibid [317].

<sup>83</sup> Ibid [357].

<sup>84</sup> Ibid [368]–[369].

<sup>85</sup> Ibid [357].

<sup>86</sup> Ibid [357].

<sup>87</sup> Ibid [348].

<sup>88</sup> Ibid [357].

<sup>89</sup> Ibid [364].

employ disabled persons’ and potentially result in closure of ADEs.<sup>90</sup> 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’.<sup>91</sup> 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.<sup>92</sup> Moreover, possible financial benefits of increased wages to ADE employees without disability ‘would be diminished by a reduction in their DSP payments’.<sup>93</sup>

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.<sup>94</sup> 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 (e.g., the ‘ADE camp’). 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’.<sup>95</sup>

The FWC proposed a new wage assessment methodology that ‘took into account the value of the work they performed and their productivity level’.<sup>96</sup> 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.<sup>97</sup> Grade A would be paid at \$7.00 per hour and Grade B at \$14.00 per hour.<sup>98</sup> Employees with disability could be paid a percentage of these rates, with a minimum hourly rate of \$3.50.<sup>99</sup> The new classifications

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<sup>90</sup> Ibid [358].

<sup>91</sup> Ibid [359].

<sup>92</sup> Ibid [364].

<sup>93</sup> Ibid [364].

<sup>94</sup> Ibid [360].

<sup>95</sup> Ibid [367].

<sup>96</sup> Ibid [9].

<sup>97</sup> Ibid [372]. The Award ranges from Grades 1 to 7, with Grade 7 being paid at

<sup>98</sup> Ibid [372].

<sup>99</sup> Ibid [374].

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.<sup>100</sup> 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’.<sup>101</sup>

The proposed changes were subject to submissions and a conference of interested parties<sup>102</sup> and subsequently trialled by the Australian Government ‘to determine their practicality and cost effects on ADEs’.<sup>103</sup> The report of the trial was submitted to the FWC on 24 November 2021.<sup>104</sup> Following receipt of the report, the FWC is now receiving any further submissions from interested parties, and will then make a final determination varying the Award. However, the determination will not take effect for 14 months to allow ADEs to transition to the new structure.<sup>105</sup> 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’.<sup>106</sup>

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 people 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 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 disability in ADEs is interconnected to the social security system,<sup>107</sup> 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

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<sup>100</sup> Ibid [368].

<sup>101</sup> Ibid [375].

<sup>102</sup> Ibid [378].

<sup>103</sup> The trial was due to commence in March 2020 and run for three months: Ibid [379]–[380]. However, the trial was delayed due to COVID-19: *Statement: 4 Yearly Review of Modern Awards—Supported Employment Services Award 2020 (AM2014/286)* [2021] Fair Work Commission [2021] FWCFB 3139.

<sup>104</sup> ARTD, *Fair Work Commission New Wage Assessment Structure Trial Evaluation Final Report* (Department of Social Services, 24 November 2021)

<<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014286-report-dss-241121.pdf>>.

<sup>105</sup> *4 Yearly Review of Modern Awards—Supported Employment Services Award 2010 (AM2014/286)* (n 23) [379].

<sup>106</sup> Department of Social Services (n 10).

<sup>107</sup> Australian Government Solicitor (n 47) 249 n 39.

II.B.1). Around 90 percent of ADE employees also receive the DSP along with their ADE wages.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

### *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.<sup>111</sup> 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.<sup>112</sup> 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 not have a conflict 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 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.<sup>113</sup>

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<sup>108</sup> 'What are ADEs?', *ADEs Work For Me* <<https://ade.org.au/what-are-ades>>.

<sup>109</sup> 'Employer Reporting Service', *Services Australia*, <https://www.servicesaustralia.gov.au/employer-reporting-service>.

<sup>110</sup> 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: 'Disability Support Pension and JobKeeper: Answers to Questions You Might Have (Easy Read Version)', *Department of Social Services*, <[https://www.dss.gov.au/sites/default/files/documents/05\\_2020/dss-disability-support-pension-jobkeeper-payment-easy-read-fact-sheet-accessible.docx](https://www.dss.gov.au/sites/default/files/documents/05_2020/dss-disability-support-pension-jobkeeper-payment-easy-read-fact-sheet-accessible.docx)>.

<sup>111</sup> Claire Spivakovsky and Linda Steele, 'Disability Law in a Pandemic: The Temporal Folds of Medico-Legal Violence' (2022) 31(2) *Social & Legal Studies* 175, 178. See also Nick O'Neill and Carmelle Peisah, 'Chapter 6 - Guardianship' in *Capacity and the Law* (Sydney University Press, 2011).

<sup>112</sup> See, eg, *Guardianship Act 1987* (NSW) s 17.

<sup>113</sup> For example, in guardians in New South Wales 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

Guardianship laws emerged in Australian states and territories following deinstitutionalisation. 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 a significant area of contention 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.<sup>114</sup>

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,<sup>115</sup> Tasmania<sup>116</sup> and Western Australia,<sup>117</sup> 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’ and ‘if the person is to be allowed to work—to decide the nature of the work, the place of employment and the employer’.<sup>118</sup> People with disability might also have separately appointed a financial manager to administer their finances,<sup>119</sup> including any wages received from an ADE.

### **2 *Consent to Use of Restrictive Practices on ADE Employees***

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functions should be taken into consideration’: *Guardianship Act 1987* (NSW) 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).’

<sup>114</sup> See, e.g., Spivakovsky and Steele (n 111).

<sup>115</sup> *Guardianship and Management of Property Act 1991* (ACT) ss 7(3)(c), (d).

<sup>116</sup> *Guardianship and Administration Act 1995* (Tas) s 25(2)(c).

<sup>117</sup> *Guardianship and Administration Act 1990* (WA) s 45(2)(c).

<sup>118</sup> *Guardianship and Management of Property Act 1991* (n 115) ss 7(3)(c), (d).

<sup>119</sup> Australian Government Solicitor (n 47) 219–20.

Second, decisions made by guardians can subject people with disability to restrictive practices in ADEs.<sup>120</sup> 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 (e.g., locking someone in a room by themselves), chemical restraint (e.g., sedating someone or menstrual suppression), physical restraint (e.g., holding someone to prevent their movement), mechanical restraint (e.g., tying someone to a chair) and environmental restraint (e.g., preventing access to food in fridges and kitchen cupboards). Restrictive practices are usually justified as being used in response to behaviours of concern to protect the person with disability or others.<sup>121</sup> 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.<sup>122</sup> When use of restrictive practices is consented to 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 assault<sup>123</sup> and false imprisonment<sup>124</sup> and will not constitute violence for the purpose of state and territory victims' compensation and support schemes.<sup>125</sup>

Use of restrictive practices by ADEs (or other disability service providers delivering support to ADE employees) that are NDIS providers is regulated by NDIS legislation and guidelines which generally requires consent from the guardian or other substitute decision-maker under relevant state and territory law.<sup>126</sup> 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'.<sup>127</sup> The *National*

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<sup>120</sup> See, eg, reference to their use in Queensland ADEs: 'Queensland Government Advises ADEs on Restrictive Practices', *National Disability Services* <<https://www.nds.org.au/news/queensland-government-advises-ades-on-restrictive-practices>>.

<sup>121</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Restrictive Practices Issues Paper* (26 May 2020) 1. For a critique of restrictive practices, see Spivakovsky and Steele (n 111); Dinesh Wadiwel, 'Disability and Torture: Exception, Epistemology and "Black Sites"' (2017) 31(3) *Continuum* 388.

<sup>122</sup> Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2013) 14(2) *QUT Law Review* 90.

<sup>123</sup> These vary across states and territories. In NSW, for example, see *Crimes Act 1900* (NSW) ss 59, 61.

<sup>124</sup> 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 at 601 [83]; *R v Garrett* (1988) 50 SASR 392 at 405.

<sup>125</sup> 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).

<sup>126</sup> *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).

<sup>127</sup> *Ibid* s 7A, see generally Part 2.

*Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) provide that use of restrictive practices should be used as a last resort, the least restrictive option in the circumstances, used for the shortest time possible, and used in response to risk of harm to a person with disability or others and proportionate to the potential negative consequences of that harm.<sup>128</sup> 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. The Disability Royal Commission recently noted that: ‘Many people with disability, and representative and advocacy organisations and others argue that restrictive practices are not needed and should be eliminated’.<sup>129</sup> This position aligns with recent recommendation by the United Nations Committee on the Rights of Persons with Disabilities 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’.<sup>130</sup>

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’,<sup>131</sup> and restrictive practices might also be applied outside the ADE (e.g., by a disability support worker, family member or group home staff member) but have lasting effects while an individual is working in an ADE (e.g., 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.<sup>132</sup> Therefore, it is not clear how many of these are related to ADE settings.

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.

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<sup>128</sup> Ibid ss 21(3)(c)–(f).

<sup>129</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Restrictive Practices Issues Paper* (26 May 2020) 1, 7.

<sup>130</sup> Committee on the Rights of Persons with Disabilities, (n 7), para 30(a).

<sup>131</sup> National Disability Insurance Agency (n 13) 5.

<sup>132</sup> NDIS Quality and Safeguards Commission, *Activity Report: 1 January to 31 March 2022* (NDIS Quality and Safeguards Commission, 2022) 15-16.



### III INJUSTICES OF ADEs

The official legal and service representation of ADEs discussed in Part II can be contrasted with longstanding work of Australian Disabled People's Organisations (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 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'.<sup>133</sup>

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.<sup>134</sup> 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'. It offers online workshops on open employment for people with intellectual disability and their families.<sup>135</sup> The Wage Justice Australia campaign led by 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.<sup>136</sup> Wage Justice Australia led successful litigation challenging the discriminatory nature of wages in ADEs (as discussed above in Part II.B).

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 calling for 'a fully resourced five-year transition plan for

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<sup>133</sup> Judy Huett, 'A Champion of Change on the World Stage' (Conference Paper, Strengthening Disability Advocacy Conference 2014: Champions of Change, 4–5 August 2014) <<https://www.daru.org.au/conference-session/a-champion-of-change-on-the-world-stage>>.

<sup>134</sup> See details of various DPOs campaigns at <<https://www.inclusionaustralia.org.au/topic/employment/>>.

<sup>135</sup> Inclusion Australia, 'Everyone Can Work' <<https://www.everyonecanwork.org.au/>>. See similar campaigns by Council for Intellectual Disability and Victorian Advocacy League for Individuals with Disability: 'More Than Just a Job', *Council for Intellectual Disability* <<https://cid.org.au/event/more-than-just-a-job/>>; 'Employment Project', *VALID* <<https://www.valid.org.au/resources-and-media/resources/valid-employment-project/>>.

<sup>136</sup> 'What We Do', *Wage Justice Australia* <<https://www.wagejustice.org.au/>>.

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 \$9000 per person).<sup>137</sup> DPO Australia (a coalition of peak DPOs) has a current 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’.<sup>138</sup>

The work of DPOs and disability advocates on ADEs, which is driven by the leadership of people with disability (including people with intellectual disability) and lived experiences and human rights of people with 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.

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<sup>137</sup> ‘Equal Pay, Equal Respect: Time to End Discriminatory Wages for People with an Intellectual Disability’, *Inclusion Australia* <<https://www.inclusionaustralia.org.au/equal-pay-equal-respect-time-to-end-discriminatory-wages-for-people-with-an-intellectual-disability/>>. See also Inclusion Australia, *Equal Pay, Equal Respect: Federal Election 2022 Platform* (Inclusion Australia, 2022) 6.

<sup>138</sup> Disabled People’s Organisations Australia (n 129) 12. See also People with Disability Australia, *Ask What We Want: Ensure Employment Services Encourage Meaningful Work for People with Disability* (Submission to the Royal Commission Against Violence, Abuse, Neglect and Exploitation of People with Disability, People With Disability Australia, 2022) 13 <[https://pwd.org.au/wp-content/uploads/2022/02/DES.review.PWDA\\_.AC\\_.submission.2022-02.pdf](https://pwd.org.au/wp-content/uploads/2022/02/DES.review.PWDA_.AC_.submission.2022-02.pdf)>; Women with Disabilities Australia, *WWDA Response to Employment Issues Paper* (Women with Disabilities Australia, August 2020) 5 <<https://wwda.org.au/2020/08/disability-royal-commission-wwdas-response-to-employment-issues-paper/#:~:text=WWDA%E2%80%99s%20submission%20outlines%20the%20intersectional%20disadvantage%20experienced%20y,recommendations%20are%20categorised%20into%20the%20following%20key%20areas%3A>>.

## *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-20<sup>th</sup> century to provide vocational and training opportunities. This occurred at a time when many people with disability were still living in largescale 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.<sup>139</sup> The closure of largescale 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’ schools or disability classes in mainstream schools, then as adults moving into group homes and be transported by disability service mini buses to spend their days in ADEs or in recreational day programs exclusively for people with disability. This is described by Inclusion Australia as a ‘polished pathway’. Inclusion Australia refers to the ease with which people with disability can move into, and remain in, ADEs as a ‘polished pathway’.<sup>140</sup>

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<sup>139</sup> ‘A Brief History of Australian Disability Enterprises’, *ADEs Work For Me* <[<sup>140</sup> Inclusion Australia, \*What Works\* \(n 165\) 10. 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 for some people with disability 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, ‘What’s on the Disability Agenda for the New Government’, \*Patreon\*, 7 August 2022 \(on file](https://ade.org.au/a-brief-history-of-australian-disability-enterprises#:~:text=The%20forerunners%20of%20Australian%20Disability,in%20the%20open%20employment%20market.>.</a></p></div><div data-bbox=)

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

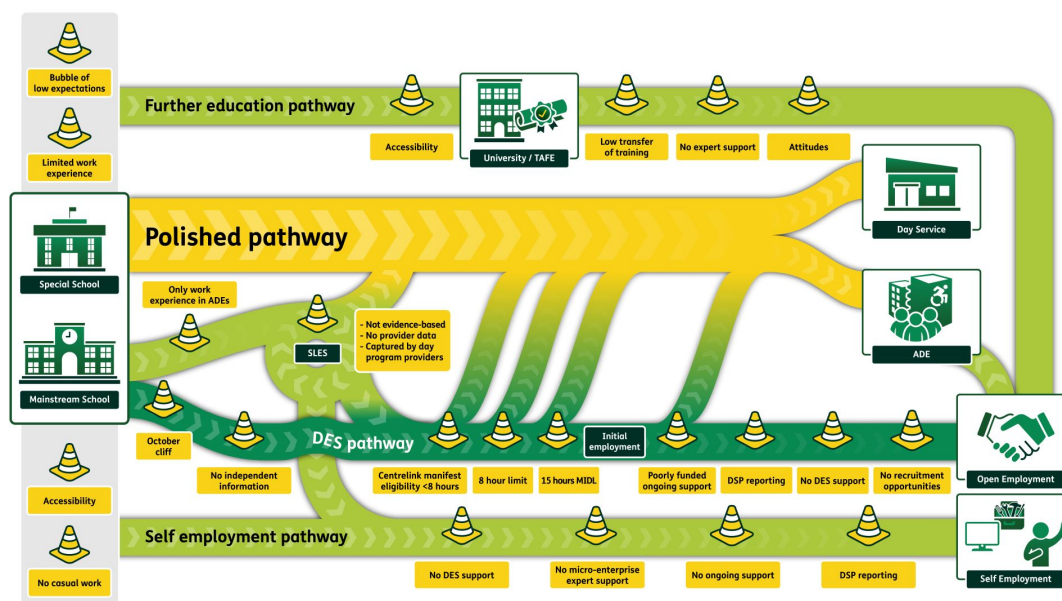


Figure 1: Inclusion Australia, 'Polished Pathway'.<sup>141</sup>

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).<sup>142</sup> 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 a study of ADE employees observed that there were separate lunchrooms for ADE employees with disability and other staff.<sup>143</sup> 'George' was quoted in the Inclusion Australia 2022 Federal Election platform as

with author). See also Scott Avery, *Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability* (First People's Disability Network, 2019); Ruth McCausland and Leanne Dowse, 'From "At Risk" to "A Risk": The Criminalisation of Young People with Cognitive Disability in Residential Care' (2022) *Incarceration*; Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020).

<sup>141</sup> Inclusion Australia, *DES Reform Submission* (Inclusion Australia, February 2022) 45.

<sup>142</sup> 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, 2–3.

<sup>143</sup> Samantha Connor, 'The Dignity of Slavery – or "Why My Shoes are Cheaper at Kmart"', *Global Freedom Movement* (21 October 2014) <<https://globalfreedommovement.org/sweatshops-in-australia-lucky-country-exposed/>>.

explaining the exclusion he experienced in ADEs as compared to open employment: ‘They got me champagne for my 60<sup>th</sup> 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”.’<sup>144</sup> People with disability experience compounding layers of segregation and are segregated across other systems, including education, transport, housing and justice.<sup>145</sup> 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.<sup>146</sup> Across their lives, ADE employees 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” 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.’<sup>147</sup>

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 ‘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’.<sup>148</sup> Yet, this transition remains elusive for many. Cain notes, ‘[v]ocational research in the 1970s found that placement of people with disability in segregated employment settings is almost always a *terminal placement*’.<sup>149</sup> Startlingly, 40 years on, this has not changed, with the AHRC in its 2016 *Willing*

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<sup>144</sup> Inclusion Australia, *Equal Pay, Equal Respect: Federal Election 2022 Platform* (Inclusion Australia, 2022) 8.

<sup>145</sup> Disabled People’s Organisations Australia, *Segregation of People with Disability is Discrimination and Must End* (September 2020) <[https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability\\_Position-Paper.pdf](https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability_Position-Paper.pdf)>; People with Disability Australia, *We Belong Here: Our Nation Must End Exclusionary Systems that Harm People with Disability* (Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ‘Promoting Inclusion’ Issues Paper, July 2021) <[https://pwd.org.au/wp-content/uploads/2021/07/27072021-SUB-PWDA\\_DRC-Inclusion.pdf](https://pwd.org.au/wp-content/uploads/2021/07/27072021-SUB-PWDA_DRC-Inclusion.pdf)>.

<sup>146</sup> Connor (n 143).

<sup>147</sup> Inclusion Australia, *Equal Pay, Equal Respect: Federal Election 2022 Platform* (Inclusion Australia, 2022) 5.

<sup>148</sup> BuyAbility (n 9).

<sup>149</sup> Paul Cain, ‘All the Way to the Moon and Back: Ending Discrimination against People with Intellectual Disability in Employment’ (2014) *Precedent* 48. See also National Disability Rights Network, *Segregated and*

*to Work* report on discrimination in employment for people with disability and older people noting ‘in 2014 only 159 ADE employees (0.8%) moved into open employment’.<sup>150</sup> A Public Hearing of the Disability Royal Commission on ADEs, noted that for 2020-21 financial year only 295 NDIS participants (1.7 per cent) self-reported as transitioning from an ADE to open employment.<sup>151</sup><sup>152</sup> One advocate quoted in an Inclusion Australia submission to the Disability Royal Commission describes ADEs as a ‘life sentence’.<sup>153</sup>

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.<sup>154</sup>

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)

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*Exploited: The Failure of the Disability Service System to Provide Quality Work* (January 2011) 32 <<https://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>>.

<sup>150</sup> Australian Human Rights Commission, Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Australian Human Rights Commission, 2016) (‘*Willing to Work*’) 242.

<sup>151</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation, ‘Public Hearing 22: The Experience of People with Disability Working in Australian Disability Enterprises’

<<https://disability.royalcommission.gov.au/public-hearings/public-hearing-22>>. See also Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Commonwealth of Australia, October 2020) 373 <<https://disability.royalcommission.gov.au/publications/interim-report>>.

<sup>152</sup>

<sup>153</sup> Inclusion Australia, *Inclusion Australia: A Qualitative Response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Inclusion Australia, October 2020) 27.

<sup>154</sup> *Ibid* 23.

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.<sup>155</sup>

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.<sup>156</sup> 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’.<sup>157</sup> 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. Moreover, women with disability experience slightly lower rates of employment (46%) compared to males with disability (50%).<sup>158</sup> 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’.<sup>159</sup> People with disability experience higher levels of poverty than people without disability: 45% of people with disability in Australia live in poverty, 11% experience deep and persistent disadvantage, and 61% cannot afford to cover their basic needs on their current income.<sup>160</sup> People with disability encounter barriers from employers to accessing and retaining open employment. 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 people with disability in the workplace.<sup>161</sup> Government programs, policies and federal laws can also be barriers to

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<sup>155</sup> ‘Our Supporters’, *ADEs Work For Me* <<https://ade.org.au/our-story>>.

<sup>156</sup> Ghassan Hage, *Waiting* (Melbourne University Publishing, 2009) 74.

<sup>157</sup> *Ibid* 140–1.

<sup>158</sup> Australian Institute of Health and Welfare, *People with Disability in Australia 2020* (2020) 267.

<sup>159</sup> Inclusion Australia, *Equal Pay, Equal Respect: Federal Election 2022 Platform* (Inclusion Australia, 2022) 4.

<sup>160</sup> Women with Disabilities Australia, *Response to the Employment Issues Paper of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Women With Disabilities Australia, August 2020) 30.

<sup>161</sup> Australian Human Rights Commission, *Willing to Work* (n 150).

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 employers from employing people with disability and place people with disability at risk of significant financial disadvantage if their employment falls through.<sup>162</sup> 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.<sup>163</sup> 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 (i.e., 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.<sup>164</sup> 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,<sup>165</sup> 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.<sup>166</sup> 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 subject to a method of determining their wages that is not legally capable of application to employees without disability. The fact that the work capacity,

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<sup>162</sup> Ibid 239–239, 254–255.

<sup>163</sup> Ibid 246.

<sup>164</sup> For a discussion of some of the limitations of disability discrimination law in the employment context, see Harpur (n 16) ch 7.

<sup>165</sup> May-Simera (n 142) 3.

<sup>166</sup> Ibid 4.



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 going to be able to contribute as much as employees without disability. As the AHRC notes, ‘No 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’.<sup>167</sup>

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’.<sup>168</sup>

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 interim report, ADE employees 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* itself which, 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

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<sup>167</sup> Australian Human Rights Commission, *People with Disability and Employment: Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (24 September 2020) 1, 29 <<https://disability.royalcommission.gov.au/system/files/exhibit/EXP.0063.0001.0001.pdf>>.

<sup>168</sup> Inclusion Australia, ‘Inclusion Australia: A Qualitative Response’ (n 141) 23–4.

the relevant award wage’ and will ‘need substantial ongoing support to obtain or retain paid employment’ because of ‘their disabilities’.<sup>169</sup> The *Fair Work Act 2009* (Cth) provides that 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.<sup>170</sup> They are perceived as having an ‘innate inability to attain the merit-worthy attributes to be considered as an “equal” in the first place’.<sup>171</sup> The construction of people with disability as fundamentally different to people without disability is a common trope in law that justifies discrimination.<sup>172</sup>

Second, the construction of people with disability in the *DSA 1986* and the FWC’s interim report reflects the ‘medical model’ of disability—disability as an individual, internal deficit and people with disability as incapable by reason of their disability.<sup>173</sup> 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. 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 segregation and community exclusion of people with disability, dressed up as furthering human rights and community participation. Indeed, as part of the Supported Wage System itself and the FWC’s justification of the distinct character of ADE workplaces, ADE employees must make adjustments to fit a job to the needs of a person with disability, and 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 interim report renders the problem 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

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<sup>169</sup> *Disability Services Act 1986* (Cth) 7 (‘supported employment services’).

<sup>170</sup> *Fair Work Act 2009* (Cth) s 12 ‘employee with a disability’.

<sup>171</sup> May-Simera (n 142) 5.

<sup>172</sup> Linda Steele, ‘Court Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability’ (2016) 39(3) *UNSW Law Journal* 1002.

<sup>173</sup> Dan Goodley, *Dis/Ability Studies: Theorising Disablism and Ableism* (Routledge, 2014).

do the job’, including re-designing job duties and working time arrangements.<sup>174</sup> 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 changes.

Third, discrimination is legitimated as necessary because of exclusion experienced by people with disability. The recent FWC interim report 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.<sup>175</sup>

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 is campaigning to the FWC against changes to the Supported Wage System Award.<sup>176</sup> 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’<sup>177</sup> of what people with disability (notably people with intellectual disability) are considered capable of. This is captured by a case study included in the Women with Disabilities:

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

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<sup>174</sup> *Supported Employment Services Award 2020* (Cth) sch D, D.9.

<sup>175</sup> Niklas Altermark, *Citizenship Inclusion and Intellectual Disability: Biopolitics Post-Institutionalisation* (Routledge, 2019); Spivakovsky and Steele (n 111).

<sup>176</sup> Our Voice Australia, *In the Matter of a Review of the Supported Employment Services Award 2010* (Our Voice Australia, 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, *Supported Employment Services Award 2010 – FWC [2019] FWCFB 8179 AM2014/286*.

<sup>177</sup> Inclusion Australia, *What Works: Making Disability Employment Services (DES) Work for People with an Intellectual Disability* (December 2021) 19 <[https://www.inclusionaustralia.org.au/wp-content/uploads/2022/02/Our-Submissions\\_2022\\_02\\_What-Works-Final-Report-2021.pdf](https://www.inclusionaustralia.org.au/wp-content/uploads/2022/02/Our-Submissions_2022_02_What-Works-Final-Report-2021.pdf)>.

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'.<sup>178</sup>

The Public Hearing of the Disability Royal Commission on ADEs heard that ADE employees with disability are not provided 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.<sup>179</sup>

## ***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 competitive advantage in supply chains in being able to offer cheaper goods and service. ADEs are also framed as 'social enterprises' and thus marketed as doing social good for the benefit of people with disability and broader society, this giving rise to 'disability-washing' associated with the ADE model as a marketing point of differentiation to consumers (similar to critiques of 'greenwashing', 'pinkwashing' and 'bluwashing'<sup>180</sup>). 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'.<sup>181</sup> People without disability working in ADEs as managers, supervisors and support workers receive financial benefit through access to income

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<sup>178</sup> Women with Disabilities Australia (n 147) 58.

<sup>179</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation, 'Public Hearing 22: The Experience of People with Disability Working in Australian Disability Enterprises' <<https://disability.royalcommission.gov.au/public-hearings/public-hearing-22>>.

<sup>180</sup> 'It's a Trap; How to Beware of Greenwashing, Pinkwashing and Bluwashing', *Ccrave* (1 October 2021) <<https://ccrave.medium.com/its-a-trap-how-to-beware-of-greenwashing-pinkwashing-and-bluewashing-b71badebb82b>>.

<sup>181</sup> National Disability Rights Network (n 137) 9.

they receive to support, supervise or manage ADE employees with disability<sup>182</sup> (noting that the Supported Employment Services Award is by definition only applicable to people with disability) without having to have their productivity assessed. Consumers financially benefit from cheaper goods and services produced by ADEs.<sup>183</sup> 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'.<sup>184</sup> The 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'.<sup>185</sup>

ADEs are extractive of 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* access 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 in 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. The second is that some female ADE

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<sup>182</sup> 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': May-Simera (n 142) 3.

<sup>183</sup> Catia Malaquias, 'Ethical Supply Chains, Disability, Sheltered Workshops, Segregation and Exploitation', *Starting with Julius* (19 April 2019) <<http://www.startingwithjulius.org.au/ethical-supply-chains-disability-sheltered-workshops-segregation-and-exploitation/>>.

<sup>184</sup> Senate Community Affairs Reference Committee, *Purpose, intent and adequacy of the Disability Support Pension* (Commonwealth of Australia, 2022) 107 <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024728/toc\\_pdf/Purpose,intentandadequacyoftheDisabilitySupportPension.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024728/toc_pdf/Purpose,intentandadequacyoftheDisabilitySupportPension.pdf;fileType=application%2Fpdf)>.

<sup>185</sup> National Disability Rights Network (n 137) 24, see also 28; *ibid* 28.

employees with disability are providing personal care (such as toileting and mealtime support) to their colleagues, when presumably this should be covered by NDIS funds.<sup>186</sup>

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 above at the start of Part III of Inclusion Australia's 'Equal Pay Equal Respect' campaign which was run by people with disability and led by people with intellectual disability, proposes to solve the issue of financial sustainability through the Federal Government in the short-term funding the wage gap needed to increase wages to the minimum wage level (estimated to be a net cost of \$9000 per person), while the organisations operating ADEs develop strategies to transition away from segregated workplaces.<sup>187</sup>

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 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. 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'. The promotion of realising *social inclusion* through ADEs, rather than *social or even financial and legal equality* for ADE employees with disability, reifies inequality and hierarchies in which people with disability are economically disadvantaged. Yet, these are false

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<sup>186</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation, 'Public Hearing 22: The Experience of People with Disability Working in Australian Disability Enterprises'

<<https://disability.royalcommission.gov.au/public-hearings/public-hearing-22>>.

<sup>187</sup> Above n 137.

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%.<sup>188</sup>

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.<sup>189</sup> 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.<sup>190</sup> 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 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,

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<sup>188</sup> Inclusion Australia, 'Inclusion Australia: A Qualitative Response' (n 141) 27.

<sup>189</sup> National Disability Rights Network (n 137) 8–9.

<sup>190</sup> Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minnesota Press, 2020); 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; Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic* (Palgrave Macmillan, 2011).

abolition of disability segregated employment and effective processes for enforcing legal guarantees of equality and non-discrimination).<sup>191</sup>

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 (e.g., in sheltered employment) or unpaid labour (e.g., 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 medications, medical treatments and surgeries and, relevant for present purposes, warehousing and care and support services.<sup>192</sup>

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’ (i.e., monetising) their disability. Thus, their exploitation at 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.<sup>193</sup> For example, Women with Disabilities Victoria state that: ‘The particular workplace characteristics and

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<sup>191</sup> Ben-Moshe (n 178).

<sup>192</sup> Mia Mingus, ‘Medical Industrial Complex Visual’, *Leaving Evidence* (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, for example, Barbara Ehrenreich and John Ehrenreich, ‘The Medical Industrial Complex’, *The New York Review* (17 December 1970) <<https://www.nybooks.com/articles/1970/12/17/the-medical-industrial-complex/>>.

<sup>193</sup> Carolyn Frohmader and Therese Sands, *Submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (Australian Cross Disability Alliance (ACDA), 2015) <<https://wwda.org.au/wp->



practices of sheltered workplaces mean that they are sites where women with disabilities are exposed to a higher risk of violence'.<sup>194</sup> Indeed, some argue that institutions per se are violent.<sup>195</sup> 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 interim report) 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).<sup>196</sup> 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.<sup>197</sup>

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'. 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.<sup>198</sup> Women with Disabilities Victoria suggest that the gendered nature of the manual labour primarily performed in ADEs causes gender segregation and male domination in these workplaces and strict adherence to masculine and feminine gender roles.<sup>199</sup> 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'.<sup>200</sup> Women with Disabilities Victoria stated that: 'Because ADEs are commercial businesses which can remain hidden from the wider community, they are often gate kept work environments'.<sup>201</sup> Their sheltered nature

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content/uploads/2013/12/ACDA\_Sub\_Sen\_Inquiry\_Violence\_Institutions.pdf>; National Disability Rights Network (n 137) 7.

<sup>194</sup> Women with Disabilities Victoria, *Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces* (Submission No 312, Women with Disabilities Victoria, 29 February 2018) 19.

<sup>195</sup> Kate Rossiter and Jen Rinaldi, *Institutional Violence and Disability: Punishing Conditions* (Routledge, 2018).

<sup>196</sup> Frohmader and Sands (n 181).

<sup>197</sup> Ibid.

<sup>198</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Employment* (n 3) 5.

<sup>199</sup> Women with Disabilities Victoria (n 194) 20.

<sup>200</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (n 140) 29.

<sup>201</sup> Women with Disabilities Victoria (n 194) 20.

means ‘very limited oversight of the daily workplace practices and instances of harassment, violence and abuse in ADEs’.<sup>202</sup>

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.<sup>203</sup> The legal regulation of restrictive practices means they constitute a form of ‘disability-specific lawful violence’.<sup>204</sup> 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 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.<sup>205</sup> 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 impact 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 (e.g., 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

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<sup>202</sup> Ibid.

<sup>203</sup> Spivakovsky and Steele (n 111).

<sup>204</sup> Ibid; Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and “Good” Violence’ (2014) 23(3) *Griffith Law Review* 467. See also Senate Community Affairs References Committee, *Final Report: 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* (November 2015) 4 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)>.

<sup>205</sup> Safe Work Australia, *Preventing Workplace Violence and Aggression: National Guidance Material* (January 2021) <<https://www.safeworkaustralia.gov.au/sites/default/files/2021-01/Guide%20for%20preventing%20workplace%20violence%20and%20aggression%20-%20for%20publishing.docx>>.

in individualised terms as ‘challenging behaviour’) there is a risk that ADEs will dismiss or not even hire people who are perceived to be acting out due to their disability.<sup>206</sup>

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.<sup>207</sup> 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.<sup>208</sup> 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:

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.<sup>209</sup>

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<sup>206</sup> 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, Claire Spivakovsky, Sarah Joseph, and Marius Smith, *Improving Educational Outcomes for Children with a Disability in Victoria*, Final Report (Castan Centre for Human Rights Law, June 2018) <<https://apo.org.au/sites/default/files/resource-files/2018-06/apo-nid180676.pdf>>.

<sup>207</sup> Fleur Beaupert, ‘Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness’ (2018) 7(1) *Laws* 3.

<sup>208</sup> Australian Human Rights Commission (n 150) 203–204.

<sup>209</sup> 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.<sup>210</sup>

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 or simply because of how the service provision is structured.

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’.<sup>211</sup> ‘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’.<sup>212</sup> 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 (e.g., housing), this could also constitute servitude.<sup>213</sup> Concerns about ADEs as forms of modern slavery have previously been raised by disability rights and human rights advocates.<sup>214</sup> The Disability Royal Commission flagged the issue of modern slavery at its recent Public Hearing on ADEs, with the CEO of the largest ADE in Australia answering in the negative when asked if he has considered the risk of modern slavery in its ADE operations.<sup>215</sup>

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<sup>210</sup> See above n 135.

<sup>211</sup> *Criminal Code Act* (Cth) s 270.6(1).

<sup>212</sup> *Ibid* s 270.4(1).

<sup>213</sup> Author working paper.

<sup>214</sup> Australian Lawyers for Human Rights (n 69); Malaquias (n 183). See also Catia Malaquias and Jackie Softly, ‘Time to Stop Defending the Low Ground – Moving from Segregated to Open Employment’, *Starting With Julius* (21 October 2018) <<http://www.startingwithjulius.org.au/time-to-stop-defending-the-low-ground-moving-from-segregated-to-open-employment/>>.

<sup>215</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation, ‘Public Hearing 22: The Experience of People with Disability Working in Australian Disability Enterprises’ <<https://disability.royalcommission.gov.au/public-hearings/public-hearing-22>>.

### ***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*. 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.

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,<sup>216</sup> both 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.

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<sup>216</sup> See, e.g., US Commission on Civil Rights, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities* (September 2020) 1–57 <<https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>>; Katrin Langensiepen, 'An End to Sheltered Workshops for Person with Disabilities – Vote in the Social Affairs Committee', *Die Grünen/EFA* (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>>.

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.<sup>217</sup> There should also be more consideration of 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.<sup>218</sup>

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.<sup>219</sup> 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 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 transition away from ADEs, it is important to be alert the risk of the inequality and violence of ADEs travelling, largely invisibly, into mainstream/open employment settings in the community.<sup>220</sup> 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

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<sup>217</sup> Inclusion Australia, *DES Reform Submission* (Inclusion Australia, February 2022); Erin Wilson and Robert Campain, *Fostering Employment for People with Intellectual Disability: The Evidence to Date* (Inclusion Australia, August 2020).

<sup>218</sup> Simon Darcy, Jock Collins and Megan Stronach, *Australia's Disability Entrepreneurial Ecosystem: Experiences of People with Disability with Microenterprises, Self-Employment and Entrepreneurship* (UTS Business School, University of Technology Sydney, 2020) <<https://www.uts.edu.au/about/uts-business-school/management/projects/disability-entrepreneurship>>; Simon Darcy, Jock Collins and Megan Stronach, *Australia's Disability Entrepreneurial Ecosystem: Experiences of People with Disability with Microenterprises, Self-Employment and Entrepreneurship - Report 2 Policy and Organisational Level Initiatives* (UTS Business School, 2021) <<https://www.uts.edu.au/about/uts-business-school/management/projects/disability-entrepreneurship>>.

<sup>219</sup> 'Equal Pay, Equal Respect: Time to End Discriminatory Wages for People with an Intellectual Disability', *Inclusion Australia* <<https://www.inclusionaustralia.org.au/equal-pay-equal-respect-time-to-end-discriminatory-wages-for-people-with-an-intellectual-disability/>>.

<sup>220</sup> 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 Linda Steele, *Disability, Criminal Justice and Law Reconsidering Court Diversion* (Routledge, 2020).

colleagues without disability because the Supported Wage System can apply in open employment.<sup>221</sup> There is a.

The 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 the DPO Australian 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.<sup>222</sup> Thus, the role of law in 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,<sup>223</sup> and industry-led redress of labour exploitation.<sup>224</sup>

#### 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—law justifies

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<sup>221</sup> 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: ‘Our 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* (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/kd49ugek4>>. The hotel is part of an international hotel chain that is featured in a documentary ‘Chef Antonio’s Recipe for a Revolution’. How employing people with disability under an unequal wage system is revolutionary is questionable given that this system has existed for decades.

<sup>222</sup> Disabled People’s Organisations Australia, *Segregation of People with Disability is Discrimination and Must End* (September 2020) <[https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability\\_Position-Paper.pdf](https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability_Position-Paper.pdf)>.

<sup>223</sup> 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; 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; Frances Simmons, Jennifer Burn, and Fiona McLeod, ‘Modern Slavery and Material Justice: The Case for Remedy and Reparation’ (2022) 45(1) *UNSW Law Journal* 148.

<sup>224</sup> 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.

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’,<sup>225</sup> thus further distancing them from realisation of equality. 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 and ontological violence.<sup>226</sup> 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 specific 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, 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 current Disability Royal Commission and the wave of 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 use of restrictive practices? How are

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<sup>225</sup> May-Simera (n 142) 4.

<sup>226</sup> 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.



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 or 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 with Disabilities Victoria have 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'.<sup>227</sup> 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,

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<sup>227</sup> Women with Disabilities Victoria (n 194) 21.

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 policies 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 thirty years ago recounted by Kim Walker that opened this article will continue to evolve and survive.