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

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Abstract

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

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

1 Introduction

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

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

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

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

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

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

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

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

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

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

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

¹Modern Slavery Act 2018 (Cth).

²Modern Slavery Act 2015 (UK).

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

2 Human rights and disability segregated employment

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

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

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

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

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

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

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

3 Australian Disability Enterprises

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

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

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

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

3.1 Legal framework of ADEs

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

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

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

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

⁴Disability Services Act 1986 (Cth).

⁵National Disability Insurance Scheme Act 2013 (Cth).

⁶Fair Work Act 2009 (Cth).

⁷Supported Employment Services Award 2020 (Cth).

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

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

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

3.2 Segregation, discrimination, exploitation and violence through ADEs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Applying modern slavery law to Australian disability segregated employment

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

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

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

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

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

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

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

4.1 Forced labour

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

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

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

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

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

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

Element 1: Engaged in Conduct

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

Element 2: Intended to Engage in Conduct

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

Element 3: Coercion, Threat or Deception

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

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

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

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

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

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

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

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

¹³*Pulini*, [59] Morrison JA.

¹⁴*Pulini*, [72] Morrison JA.

¹⁵*Pulini* [1]–[9] Morrison JA.

¹⁶*Pulini* [73] Morrison JA.

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

4.2 Servitude

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹*Tang*.

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

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

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

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

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

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

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References

- Anti-Slavery Australia** (2017) Bo-Syun Chen & Yu-Hao Huang (2017), *Anti-Slavery Australia*. Available at: <https://antislavery.org.au/bo-syun-chen-and-yu-hao-huang-2017/> (accessed 12 April 2022).
- Australian Human Rights Commission** (2016) *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*. Sydney: Australian Human Rights Commission. Available at: <https://humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination> (accessed 12 April 2022).
- Australian Institute of Health and Welfare** (2020) *People with Disability in Australia 2020*. Canberra: Australian Institute of Health and Welfare. Available at: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/summary> (accessed 12 April 2022).

- Bantekas I, Pennilas F and Trömel S** (2018) Article 27: Work and Employment. In Bantekas I, Stein MA and Anastasiou D (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*. Oxford: Oxford University Press, 777–800.
- Barclay J** (2021) *The Mark of Slavery*. Chicago: University of Illinois Press.
- Beckwith R-M** (2016) *Disability Servitude: From Peonage to Poverty*. New York: Palgrave Macmillan.
- Ben-Moshe L and Stewart J** (2017) Disablement, Prison and Historical Segregation: 15 Years Later. In Malhotra R (ed), *Disability Politics in a Global Economy: Essays in Honour of Marta Russell*. Abingdon: Routledge, 87.
- Berg L** (2016) *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour*. Abingdon: Routledge.
- Burn J, McLeod F and Knackstredt N** (2016) *Establishing a National Compensation Scheme for Victims of Commonwealth Crime*. Canberra: Law Council of Australia. Available at: <http://www.antislavery.org.au/images/FINAL%20REPORT%20-%20ASA%20-%20LCA%20The%20Case%20for%20a%20National%20Compensation%20Scheme.pdf> (accessed 10 April 2022).
- BuyAbility** (nd) What is supported employment? *BuyAbility*. Available at: <https://buyability.org.au/supported-employment/> (accessed 12 April 2022).
- Carey C and Peterson S** (2019) Trafficking people with disabilities: A legal analysis. *Cardozo Journal of Equal Rights and Social Justice* 26, 471–498.
- Centre for Research Excellence in Disability and Health** (2021) *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia*, Research Report. Brisbane: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Available at: <https://disability.royalcommission.gov.au/system/files/2021-11/Research%20Report%20-%20Nature%20and%20extent%20of%20violence%2C%20abuse%2C%20neglect%20and%20exploitation%20against%20people%20with%20disability%20in%20Australia.pdf> (accessed 2 February 2023).
- Committee on the Rights of Persons with Disabilities** (2019) *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc. CRPD/C/AUS/CO/2-3. Available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdcBNJQCwIRF9xTca9TaCwjm50InhspoVv2oxnsujKTREtaVWFxhEZM%2F0OdVJz1UEyF5IeK6Ycmqrn8yzTHQcn> (accessed 12 April 2022).
- Committee on the Rights of Persons with Disabilities** (2022) *General Comment No. 8 (2022) on the Right of Persons with Disabilities to Work and Employment*, UN Doc. CRPD/C/GC/8. Available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crpdgc8-general-comment-no-8-2022-right-persons> (accessed 11 October 2022).
- Connor S** (2014) The dignity of slavery – or ‘Why my shoes are cheaper at Kmart’, *Global Freedom Movement*, 21 October. Available at <https://globalfreedommovement.org/sweatshops-in-australia-lucky-country-exposed/> (accessed 2 February 2023).
- Cullen M and McSherry B** (2009) Without sex – Slavery, trafficking in persons and the exploitation of labour in Australia. *Alternative Law Journal* 34, 4–10.
- Degeling S and Barker K** (2015) Private law and grave historical injustice: The role of the common law. *Monash University Law Review* 41, 377–413.
- Department of Finance** (2020) *Commonwealth Procurement Rules*. Canberra: Australian Government. Available at <https://www.finance.gov.au/sites/default/files/2020-12/Commonwealth%20Procurement%20Rules%20-%202014%20December%202020.pdf> (accessed 10 April 2022).
- Department of Social Services** (nd) *Supported Employment*, Department of Social Services. Available at: <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability/supported-employment> (accessed 12 April 2022).
- Disabled People's Organisations Australia** (2020) *Segregation of People with Disability Is Discrimination and Must End*. Sydney: People with Disability Australia. Available at: https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability_Position-Paper.pdf (accessed 10 April 2022).
- Erevelles N** (2011) *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic*. New York: Palgrave Macmillan.
- Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth).**
- Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).**
- Farbenblum B and Berg L** (2017) Migrant workers' access to remedy for exploitation in Australia: The role of the National Fair Work Ombudsman. *Australian Journal of Human Rights* 23, 310–331.
- Fasciglione M** (2015) ‘Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism’ in Valentina Della Fina and Rachele Cera (eds) *Protecting the Rights of People with Autism in the Fields of Education and Employment*. Cham: Springer, 145–170.
- Fellows J and Chong MD** (2020) Australia's Modern Slavery Act: Challenges for a post-COVID world? *Alternative Law Journal* 45, 209–214.
- Fudge J** (2018) Slavery and unfree labour: The politics of naming, framing, and blaming. *Labour* 82, 227–244.
- Harpur P** (2019) *Ableism at Work: Disablement and Hierarchies of Impairment*. Cambridge: Cambridge University Press.
- Hodkinson S, Lewis H, Waite L and Dwyer P** (2021) Fighting or fuelling forced labour? The Modern Slavery Act 2015, irregular migrants and the vulnerabilising role of the UK's hostile environment. *Critical Social Policy* 41, 68–90.

- Hohmann J** (2022) Conceptualising domestic servitude as a violation of the human right to housing and reframing Australian policy responses. *Griffith Law Review*, 1–25.
- Hsin LKE** (2020) Modern slavery in law: Towards continuums of exploitation. *Australian Journal of Human Rights* 26, 165–175.
- Hunt-Kennedy S** (2020) *Between Fitness and Death: Disability and Slavery in the Caribbean*. Chicago: University of Illinois Press.
- Inclusion Australia** (2022a), *Equal Pay, Equal Respect: Federal Election 2022 Platform*. Sydney: Inclusion Australia. Available at: <https://www.inclusionaustralia.org.au/wp-content/uploads/2022/05/Equal-Pay-Equal-Respect-Federal-Election-2022-Platform-Inclusion-Australia.pdf>.
- Inclusion Australia** (2022b), '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/>.
- Inclusion Australia** (2022c) *What Works: Making Disability Employment Services (DES) Work for People with an Intellectual Disability*. Sydney: Inclusion Australia. Available at: https://www.inclusionaustralia.org.au/wp-content/uploads/2022/02/Our-Submissions_2022_02_What-Works-Final-Report-2021.pdf (accessed 13 April 2022).
- Inclusion Australia and People with Disability Australia** (2022) *Wage Equity and More Choices in Employment for People with an Intellectual Disability: Research Review*. Sydney: Inclusion Australia. Available at: <https://www.inclusionaustralia.org.au/wp-content/uploads/2022/04/ADE-research-brief-April-2022.pdf> (accessed 13 April 2022).
- Joint Standing Committee on Foreign Affairs** (2017) *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*. Canberra: Parliament of Australia. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf (accessed 10 April 2022).
- Kayess R and French P** (2008) Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review* 8, 1–34.
- Kenway E** (2021) *The Truth About Modern Slavery*. London: Pluto Press.
- Langensiepen K** (2021) An end to sheltered workshops for person with disabilities - Vote in the Social Affairs Committee, *Die Grünen/EFA* (26 January 2021). Available at: <https://www.katrin-langensiepen.eu/de/article/132.an-end-to-sheltered-workshops-for-person-with-disabilities-vote-in-the-social-affairs-committee.html> (accessed 12 April 2022).
- Malaquias C** (2019) Ethical supply chains, disability, sheltered workshops, segregation and exploitation, *Starting with Julius* (19 April 2019). Available at: <http://www.startingwithjulius.org.au/ethical-supply-chains-disability-sheltered-workshops-segregation-and-exploitation/> (accessed 11 April 2022).
- May-Simera C** (2018) Reconsidering sheltered workshops in light of the United Nations Convention on the Rights of Persons with Disabilities (2006). *Laws* 7.
- McGaughey F.** (2021) Behind the scenes: Reporting under Australia's Modern Slavery Act. *Australian Journal of Human Rights* 27, 20–39.
- National Disability Insurance Agency** (2021a) *Supports in Employment Provider Handbook*. National Disability Insurance Agency. Available at: <https://www.ndis.gov.au/media/2919/download?attachment> (accessed 11 April 2022).
- National Disability Insurance Agency** (2021b) What is the NDIS? NDIS. Available at: <https://www.ndis.gov.au/understanding/what-ndis#what> (accessed 11 April 2022).
- National Disability Rights Network** (2011) *Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work*, National Disability Rights Network. Available at: <https://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf> (accessed 11 October 2022).
- Nichols A and Heil E** (2022) Human trafficking of people with a disability: An Analysis of state and federal cases. *Dignity: A Journal of Analysis of Exploitation and Violence* 7, 1–19.
- Nolan J and Boersma M** (2019) *Addressing Modern Slavery*. Sydney: NewSouth Publishing.
- Nolan J and Bott G** (2018) Global supply chains and human rights: Spotlight on forced labour and modern slavery practices. *Australian Journal of Human Rights* 24, 44–69.
- Nolan J and Frishling N** (2019) Australia's Modern Slavery Act: Towards meaningful compliance. *Company and Securities Law Journal* 37, 104–126.
- People with Disability Australia** (2021) *We Belong Here: Our Nation Must End Exclusionary Systems That Harm People with Disability*. Sydney: People with Disability Australia. Available at: https://pwd.org.au/wp-content/uploads/2021/07/27072021-SUB-PWDA_DRC-Inclusion.pdf (accessed 12 April 2022).
- Redmond, P** (2020) Regulating through reporting: An anticipatory assessment of the Australian Modern Slavery Acts. *Australian Journal of Human Rights* 26, 5–26.
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability** (2020) *Employment, Issues Paper*. Brisbane: Royal Commission into Violence, Abuse, Neglect and Exploitation. Available at: <https://disability.royal-commission.gov.au/publications/employment> (accessed 12 April 2022)
- Senate Community Affairs References Committee** (2015) *Final Report: Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*. Canberra: Parliament of Australia. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report (accessed 11 April 2022).

- Spivakovsky C and Steele L** (2022) Disability law in a pandemic: The temporal folds of medico-legal violence. *Social & Legal Studies* 31, 175–196.
- Stein MA and Bantekas I** (2021) Including disability in business and human rights discourse and corporate practice. *Business and Human Rights Journal* 6, 490–513.
- Steele L** (2014) Disability, abnormality and criminal law: Sterilisation as lawful and ‘good’ violence. *Griffith Law Review* 23, 467–497.
- Steele L** (2023 forthcoming) Law and disability supported employment in Australia: The case for ending segregation, discrimination, exploitation and violence against people with disability at work. *Monash University Law Review*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187360 (accessed 11 October 2022).
- US Commission on Civil Rights** (2020) *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*. Available at: <https://www.usccr.gov/reports/2020/subminimum-wages-impacts-civil-rights-people-disabilities> (accessed 12 April 2022).
- Varman R, Skalen P, Belk RW and Chaudhuri HR** (2021) Normative violence in domestic service: A study of exploitation, status, and grievability. *Journal of Business Ethics* 171, 645–665.
- Vijayarasa R** (2016) *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions About Trafficking and its Victims*. London: Routledge.
- Vijayarasa R** (2019) A missed opportunity: How Australia failed to make its modern slavery act a global example of good practice comments. *Adelaide Law Review* 40, 857–866.
- Vijayarasa R and Villarino, JMB** (2013) Modern-day slavery – A judicial catchall for trafficking, slavery and labour exploitation: A critique of Tang and Rantsev. *Journal of International Law and International Relations* 9, 36–61.
- Women with Disabilities Victoria** (2019) *Submission to the Australian Human Rights Commission’s National Inquiry into Sexual Harassment in Australian Workplaces*. Melbourne: Women with Disabilities Victoria. Available at: https://humanrights.gov.au/sites/default/files/2019-05/submission_312_-_women_with_disabilities_victoria.pdf (accessed 12 April 2022).
- Women with Disabilities Australia** (2020) *Response to the Employment Issues Paper of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*. Rosny Park: Women With Disabilities Australia. Available at: <https://wwda.org.au/wp-content/uploads/2020/08/WWDA-Response-to-Employment-Issues-Paper-Final1.pdf> (accessed 12 April 2022).

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