



Opening Address Counsel Assisting – Kate Eastman AM SC

Public hearing 22: The experience of people with disability working in Australian Disability Enterprises

Virtual, 11 April 2022

Counsel Assisting in Sydney and Brisbane also acknowledge and pay our respects to the traditional custodians on the various lands we are meeting on today. We pay our respects to First Nations elders past, present and emerging, and also to First Nations people watching this public hearing.

We also acknowledge that today is the third anniversary of the establishment of this Royal Commission.

In reviewing the history of the entities described as sheltered workshops, it reveals a wide range of objectives and experiences. Some of the history in Australia takes us back to the period post the Second World War, when entities were developed to provide vocational rehabilitation services. Some of these entities provided training and skills development for people with disability to enable them to enter the open workforce. But for others, sheltered workshops as they were commonly called, provided an opportunity for people with disability to develop skills to work in community with other people with disability.

Sheltered workshops since the 1960s have been exclusively places for people with disability, and for this reason it's often described as segregated, congregated or closed settings. Workers were typically paid minimal or no wages, and sometimes paid in the form of training allowances, piecemeal pay rates per work, or productivity bonuses rather than an actual salary. Workers traditionally were not employed under contracts of employment and industrial awards which commonly set rates of pay for workers did not apply.

For the purpose of these opening remarks, I will not address the extensive regulation and funding arrangements for sheltered workshops or as they are now described, Australian

Disability Enterprises (**ADEs**). The Royal Commission has published a research report which is fairly extensive and I would invite anybody who wishes to look at the history of the regulation of ADE employment to have access to our research report.

Today, workplaces that are operated as ADEs provide a range of different work experiences. Generally, they include packaging, gardening, landscaping, cleaning, laundry services and food services.

There has been a significant change over the past 18 months with the transition from a block funding model administered by the Department of Social Services to a different arrangement which we will explore during the hearing operated by the National Disability Insurance Agency, the NDIA. ADEs must now register with the NDIA as a service provider in order to claim funding for employment supports delivered to NDIS participants, as part of a participant's plan.

As service providers, the ADE must comply with the conditions of registration, including the NDIS Practice Standards and the NDIS Code of Conduct. We are told that there are presently 161 ADEs registered as NDIS providers.

ADEs have a dual status as service provider and employer. They support employees and in this capacity have obligations with these two hats – service provider and employer. The NDIS pays for disability support and pricing in relation to the supports required for individuals. The NDIS does not subsidise wages. Rather, the wages are developed and decided through processes set out under the supported employment services award, and as the Chair has mentioned, that Award is currently under review by the Fair Work Commission. Under that Award there are 22 different approved wage assessment tools that can be used to determine a worker's capacity and their rate of pay.

We know from information provided by the Australian Government that for the financial year 2020 to 2021 there were 17,232 NDIS participants who worked at an ADE. This represents 7% of all NDIS participants.

Workers who perform work at ADEs are protected by Australian employment law, including the *Fair Work Act 2009* (Cth) and the *Disability Discrimination Act 1992* (Cth). But people who work in an ADE are not paid the minimum wage rate in Australia.

The current minimum wage for Australian adults is \$20.33 per hour. Applying the wage assessment tools, it is permissible for workers who work in ADEs to be paid as low as 12.5% of the minimum rate (the \$20.33) That constitutes a rate of \$2.54 per hour.

As part of the Fair Work Commission's review, the Commission received evidence about the average hourly pay rate for people working in ADEs in 2019. That average rate was \$7 per hour.

As part of the Fair Work Commission's review, one proposal is to set a minimum wage for people working in ADEs and the proposal is that the minimum wage be \$3.50 per hour.

One important development to note is that from 1 January 2021, ADE workers must be paid superannuation at the same rate as the rest of workers, 9.5% of ordinary earnings, or, \$15 per week whichever is the greater.

The Royal Commission has heard that many people who work in an ADE are paid just enough not to affect their Disability Support Pension, and it is the experience of people working in ADEs that there is often a very close link between their rates of pay and the preservation of their Disability Support Pension. Catherine McAlpine spoke about this, the Commissioners will recall, at Public hearing 9. In summary, if a person who has a Disability Support Pension earns more than \$180 per fortnight, that can affect their pension and their ongoing entitlement to the pension over a particular period of time. We will explore that in a little further detail during the course of this hearing.

As I mentioned, this is the third anniversary of the Royal Commission's establishment. In October 2020 the Royal Commission issued an Interim Report. It is a fairly extensive document but it is available on the Royal Commission's website. Commissioners, in your Interim Report you noted this:

Australian governments have a large number of policies and programs related to economic participation and the employment of people with disability. We are interested in how these work together and what changes, if any, need to be made, including to relevant legislation. We will also explore the relationship between poverty, unemployment and underemployment, and violence against, and abuse, neglect and exploitation of, people with disability. We will also examine the experiences of people with disability in segregated employment settings.

In the Interim Report, the Royal Commission said it had '*heard about the lack of quality or usefulness of work in some ADEs*'. You heard about '*poor workplace conditions and difficulties in transitioning to open or non-segregated employment*'.

You also noted in the Interim Report that people with disability working in ADEs had '*described being physically, verbally and sexually abused by colleagues and managers in*

the workplace' and, in some instances, when these issues were raised with the ADE service providers those concerns were ignored or not addressed.

In addition to the matters set out in the Interim Report, in March 2021 the Royal Commission published its responses to the Employment Issues Paper. That is also available on the Royal Commission's website. In the overview of responses, the Royal Commission heard about positive experiences and the benefits to some people with disability working in ADEs. Matters such as social connection, a sense of belonging, support and community were all identified as important benefits of working with an ADE.

The Royal Commission also noted in their overview of responses that:

Many responses raised concerns about wages paid to people with disability, including the practice of wage assessment, the use of wage subsidies, and the life course impacts of wage inequality, particularly from working fewer hours or being paid lower wages.

The Australian Human Rights Commission, in its submission, which was also dealt with in the overview of responses to the employment issues paper, raised its concern that '*the Supported Wage System may be discriminatory and provide inadequate wages*'. It questioned '*whether it is an effective tool to incentivise employment of people with disability. Some employers said wage assessment processes are complex and require significant administration that may result in errors such as underpayment.*'

In their response to the issues paper, we were told that '*the segregation of people with disability in employment mostly occurs in ADEs*'. And respondents identified issues with ADEs about the risk of increased violence, abuse, neglect and exploitation; the lack of social integration; and the use of wage tools producing low and unequal wages. Some of the responses '*called for ADEs to be phased out and a couple of responses said ADEs could not be considered as a stepping stone into open employment given that the data indicates that less than 1% of ADE employees make this transition successfully*'.

We heard that the Independent Advisory Council to the National Disability Insurance Scheme said '*it was important to support NDIS participants and their families to build confidence to try open services*', and it '*recommended that ADEs could become services that help people with disability to participate socially and economically and have interactions with people not paid to support them*'.

Some of these matters have been reflected, Commissioners, in the evidence that you've heard to date. For example, at Public hearing 9 you heard from people with disability who worked in ADEs. And you may recall the evidence of Jamie. Jamie was 58 years old. He

lived with a vision impairment and an Acquired Brain Injury. He had tertiary qualifications, including a Master of Human Services and Master of Social Work. He had spent over 20 years volunteering to develop his skills and experience. However, his opportunities for paid work had been limited and generally in ADEs. He said during his employment with an ADE he was paid an hourly rate of \$3.51. He said this was not nearly enough to cover the necessities of life. He said during his employment with various ADEs he was told his lower wages were intended to ensure he would not lose his Disability Support Pension. Commissioners, he said this to you:

A lifetime of unemployment and under-employment has ruined my life and left me welfare dependant.

He told you he feels exploited.

Commissioners, as you are aware, people with a disability have a right to work on an equal basis with others, this is a core human right. The right to work includes just and favourable conditions of work, and this represents long-standing approaches to human rights. Article 27 of the Convention on the Rights of Persons with Disabilities, the CRPD, recognises the right of persons with disabilities to work on an equal basis with others, and that includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities.

As the Commissioners are aware, the CRPD Committee is currently working on a general comment – General Comment 8. The draft of the General Comment, and the consultation, has revealed quite a wide range of responses, including a response provided by the Australian Government. At its essence, Article 27 requires Australia to safeguard and promote the realisation of the right to work for people with disability. The Commissioners will also be aware, in its October 2019 *Concluding Observations on Australia*, the CRPD Committee recommended a range of measures that Australia must implement to give effect to its obligations under Article 27. With respect to ADEs, the CRPD Committee recommended that Australia:

- First, undertake a comprehensive review of ADEs to ensure that they adhere to Article 27 of the CRPD and provide services to enable people with disability to transition from sheltered employment into open, inclusive and accessible employment, and also ensuring equal remuneration for work of equal value.

- Secondly, to ensure that the Supported Wage System is modified to secure correct assessment of the wages of persons in supported employment, including ADEs.

Commissioners, some of the concerns raised with the Royal Commission about the impact of segregated employment include the following:

- First, whether the early placement of young people with an intellectual disability into segregated day programs and sheltered employment options reduces their later opportunities for full economic participation.
- Second, the limited pathways to transition into open employment. Ms Mitra from the NDIA will tell you on Wednesday that in the financial year 2020 to 2021, 295 NDIS participants self-reported as transitioning from an ADE to open employment. That constitutes 1.7%.
- A third issue is about service providers' dual role to provide supports but also to be the employer. And this is particularly the case whether the service provider also provides accommodation as well as employment. Commissioners, this is a concern that you raised in your recent Commissioners Report concerning Public hearing 13 and Sunnyfield Disability Services. In the report you released last week on 5 April 2022, you noted that Sunnyfield provides employment services for 195 supported employees are additional to the 1,174 Sunnyfield employees generally. So in effect, people in supported employment at Sunnyfield were not treated as Sunnyfield employees.
- A fourth issue is low wages and welfare dependency contributing to poverty and exploitation
- The fifth is the place of ADEs in changing labour markets. We see in Australia increased casualisation and the onset of the gig economy. The way in which we do work is changing, and the question is whether ADEs are also up for these changes. And if not, what is the impact on people working in ADEs?
- A further consideration is also the move towards corporate responsibility. As the Commissioners are aware, there are new laws dealing with modern slavery which brings transparency to supply chains. Many people who work in ADEs are part of supply chains, and so there may be cause to start to think about the issues around corporate responsibility and transparency in supply chains being applicable to ADEs. There is, of course, the issue of overall accountability and who regulates ADEs. There is an issue about the representation of people with disability as recipients of services, but also employees being represented on the boards of

ADEs and part of the management. There are issues around complaint handling and dispute resolution, including access to legal representation and access to justice through the courts. And of course as you've said, Chair, there is the importance of hearing about what has worked and what is positive and not in any recommendations to lose what has worked well.

- Finally, there is the opportunity to consider alternative models. And the Commissioners will recall Scott Connolly from the ACTU, who gave evidence at Public hearing 19. And he told you about the ACTU's new disability policy. That policy deals extensively with supported wages. It advocates for the replacement of wage assessment tools and alternative models. And the ACTU's disability policy expressly refers to developments in the United States, including the state of Vermont, which moved away from segregated employment settings and the legislation of sub-minimum wages to new models. So there's much for the Royal Commission to consider.

Turning to this hearing. Over the next three days, you will hear from a number of people with disability who work or have worked in ADEs. You will very shortly hear from Phillip Shoolman. He will be here in the hearing room in Sydney. He has been a hard-working and dedicated employee over many years. He has worked in the same ADE on two occasions but he has also had experience working in open employment. Mr Shoolman attended a high school for Deaf and blind young people and we expect you will hear that he did not think that his school was a good "stepping stone" to prepare him for work. Mr Shoolman will tell you about his time working at the ADE. He is generally positive about his time there but has experienced frustration at the lack of interpreters. Mr Shoolman also enjoyed experiences in open employment, and when considering which employment setting is more suited to him, Mr Shoolman will tell you he prefers the pay in open employment but feels safer in the ADE environment around other people with disability.

Later today, we will move to the Brisbane hearing room and you will hear from Mahdi. That is a pseudonym. Mahdi was born in Afghanistan and travelled to Australia as a refugee. He is blind, and his first language is Dari and he has limited understanding of English. He will give his evidence with the assistance of a Dari interpreter and Mahdi will tell you about his attempts to obtain employment in Australia and his experiences in an ADE in which he worked for around three months commencing in 2020. He describes the work that he undertook as being "heavy duty", and it included sorting through packaging and recycling. In exchange for that work, he was paid \$3.70 an hour for the

first three months. He will talk about his efforts during that period to have his wages increased, only to be told in February 2021 that his wage would only increase to \$10 an hour for the next 12 months, and it might increase to \$15 an hour thereafter. Mahdi subsequently resigned and he is still searching for a new job.

Today you will also hear from some parents of people who work in ADEs. That is Kaite and Gert. Kaite's daughter Emilee works at an ADE and has done so for the past 17 years. Gert's adult children, Frederic and Springer, worked at an ADE for 24 and 23 years respectively but they no longer work at that ADE. Kaite and Gert talk about the positive aspects of their children's employment and both of them acknowledge that the opportunity for their children to work has had positive impacts for the whole of their family. Gert is the mother of 5, and she says that having the opportunity for her children work also provided a form of respite.

However, Kaite and Gert will speak about some of their concerns, including the conditions of the workplace and personal care tasks required to be carried out by Springer and Emilee. Some of the themes that arise from both Kaite and Gert, include inadequate support for their children transitioning from school to work; inadequate opportunities to progress which arise from the repetitive nature of work; but also the limited assistance in transitioning their work from segregated to open employment.

Commissioners, tomorrow you will hear from Gregory Tucker. He currently works in an ADE but is also an advocate for VALiD, the Victorian Advocacy League for Individuals with Intellectual Disability. Commissioners, might recall that Mr Tucker gave evidence last year at Public hearing 12 concerning the vaccine roll out. He will tell you about his work experience and the nature of the work that he is doing at his current ADE. He will also tell you about his ambitions and wishes for the future.

Tomorrow you will also hear from Marc and Tay. They are both currently employed with the ADE known as the Bedford Group and I will just call them Bedford for our present purposes. Marc has worked for Bedford for around 30 years, and in Tay's case for around 20 years. Marc started at Bedford within a relatively short period of completing secondary school. The Royal Commission will hear from each of Marc and Tay separately about their employment with Bedford, including their experiences with the Individual Training Plans and wage assessments. Tay is likely to tell you about their experiences with the changes that have come about as a result of Bedford transitioning

to the NDIS, and the NDIS New Employment Model. They will probably tell you that they have found it confusing and stressful.

Some of the key issues that arise from the evidence of Marc and Tay is their perspectives whether they feel they are paid a fair wage for the work that they perform and their concerns about access to training opportunities in their workplace. Tay wants to get a job in open employment which they believe they can do with the right type of support.

Then on Wednesday you will hear from Anthony Reid. He went straight from education in a special school to an ADE and he's worked at the same ADE for 25 years. He enjoys his work at the ADE but, like Mr Tucker, he is also an advocate with VALiD and he too participated in the hearing last year concerning the COVID vaccine rollout.

Commissioners, there will be some other witnesses and during the next three days you will hear from Catherine McAlpine, the CEO of Inclusion Australia, the national peak body for persons with intellectual disability. Ms McAlpine gave evidence at Public hearing 9 about the experience of people with intellectual disability generally and it is expected she will speak this week about the employment of people with intellectual disability in segregated employment settings. She will build upon the evidence she gave at Public hearing 9 to describe how low and stereotyped expectations; the limited availability of independent information for people with disability and their families; and the structured systems and processes established to support people with disability, including intellectual disability, operate together to produce the results seen in a recent NDIA report.

Ms McAlpine will tell you about Inclusion Australia's perspective regarding the differences between open and segregated settings, and the significance of those differences for people with intellectual disability over the course of their life. She will also talk about Inclusion Australia's perspectives on the key considerations for the future.

It is also important, Commissioners, that you have the opportunity to hear from the service providers. Bedford, the employer of Marc and Tay, will participate in this hearing. Mr Myron Mann, Bedford's present CEO, will give evidence. Bedford has operated since 1945, primarily in South Australia and it operates over 14 different sites. It is one of Australia's largest employers of people with disability in an ADE setting. It employs – and there are two numbers – either 1,060 or 1,100 people with disability. The majority of the employees, some 630, are people with intellectual disability. Mr Mann will tell you that 70% of their workers are men. 14% of the workers work full-time and 86% work part-time. The longest serving employee of Bedford has worked at Bedford for 50 years.

In terms of the wages paid to employees with disability at Bedford, Mr Mann says that the lowest paid worker is paid \$2.37 per hour and the highest paid worker is on an hourly rate of \$23.85. But the median average hourly rate is \$5.48.

Bedford employs people with disability to work in packaging, manufacturing, commercial landscaping and commercial cleaning. For its manufacturing work, which you may hear about, the preparation and development of flat pack furniture, Bunnings is its largest customer.

Bedford made a submission to the Royal Commission's Issues Paper on employment which I've referred to a little earlier, and a copy of Bedford's submission is available on the Bedford website but also the Royal Commission's website. Bedford wanted the Royal Commission to be aware of the issues that arise for service providers in the transition to the NDIS. There are both challenges and positive aspects to the transition. It raises concerns about unfunded supports, the complexity of wage assessment tools, wages and the relationship with the Disability Support Pension. In his statement, Mr Mann acknowledges that ADEs have not traditionally been established, structured or funded with the primary or formal focus on transitioning to open employment. Bedford does not have a specific policy dealing with the transitioning of supported employees to open employment.

Bedford is a member of the National Disability Services, NDS, and you will hear from Ms Leigh and Ms Langford of the National Disability Services. It is the peak body for the non-government disability service organisations, representing over 1,100 service providers. The NDS members have a presence in every state and territory in Australia and they will share the perspective of their members who operate ADEs. They have a position that supported employment, which is the expression they use to describe work in ADEs, "should remain a legitimate and viable option as part of a continuum of employment options for people with disability, if they are eligible and they choose to access it". They see ADEs as "an option for those who are unlikely to be able to gain or maintain mainstream employment".

In relation to the impacts on the NDS members having to pay supported employees award wages, NDS has expressed the view that all supported employment services would be forced to cease their current operations if they were to pay full Award rates. NDS will tell you that the removal of supported employment could result in a large number of supported employees being marginalised from the labour force. This

consideration, along with other impacts upon supported employees and their families will need to be carefully considered when planning any process of transition. They will also speak to you about the NDS 'Industry Vision'.

On Wednesday you will hear again from Ms Debbie Mitchell from DSS. You will recall she appeared recently at Public hearing 21. Ms Gerrie Mitra from the NDIA, and you will recall she participated at Public hearing 19. We propose to examine the transition of ADEs from DSS to the NIDA, and the role of the NDIA funding models, particularly with respect to the protection of the rights of NDIS participants as employees. We will ask the NDIA about its expectations with respect to transition models, and some of the matters identified in the Responses to the Issues Paper. Importantly, we will focus on the rights and the protection of those rights of people with disability.

Commissioners, we also received in the preparation of the hearing, a statement from Sandra Parker, the Fair Work Ombudsman. We will not hear from her in person this week, but you will recall Ms Parker gave evidence at Public hearing 19. In her statement for this hearing, she said that the Fair Work Ombudsman does not routinely identify whether an organisation is an ADE. She says that over the past three financial years the Fair Work Ombudsman has undertaken 43 investigations of ADEs, of which 31 have been in the financial year 2020 to 2021. These investigations have resulted in three enforcement actions and the recovery of over \$24 million in under-payments for 6,477 employees.

Commissioners, the focus of this hearing is an opportunity to listen and to understand the experience of people with disability. It is not the purpose of this hearing to make any judgement about the choices people with disability or their families may make. Some of the evidence may be distressing, and the Royal Commission encourages those watching, whether by the web stream or in person, to be mindful that the topics may be upsetting and we encourage those to seek support in that respect. And we have up on the screen the content warning together with the telephone numbers for the National Counselling Referral Service, Lifeline and Beyond Blue.

Commissioners, for this public hearing, we will not ask the Royal Commission to make any adverse findings with respect to any individual experiences of people with disability who work in ADEs. For this hearing, the Royal Commission will not be making findings as to whether a particular person or employer breached the law or breached a policy. The Royal Commission does not operate as a substitute for the Fair Work Commission, the

Fair Work Ombudsman or local complaint processes or conducting internal investigations. However, this public hearing will contribute to the Royal Commission's ongoing work in examining violence, abuse, neglect and exploitation of people with disability in employment and economic participation.

I conclude with a reminder about the protection of witnesses. There are provisions in the Royal Commissions Act that have a very clear objective of protecting witnesses who give evidence before the Commission. In particular, I draw attention to section 6M of that Act, which provides that:

any person who uses, causes, or inflicts, any violence, punishment, damage, loss or disadvantage to any person on account of the person having appeared as a witness, given evidence, or produced documents to the Royal Commission, commits an indictable offence.

Can I make a further reminder, and that is section 6N of the Act. It makes it an offence for any employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee having appeared as a witness before the Royal Commission; given evidence before the Royal Commission; or produced any document or information to the Royal Commission.