



Law Council  
OF AUSTRALIA

Office of the President

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Ms Kathryn Campbell AO CSC  
Secretary  
Department of Social Services  
Australian Government  
GPO Box 9820  
CANBERRA ACT 2601

Submitted online: <https://engage.dss.gov.au/ndis-thin-markets-project/ndis-thin-markets-project-make-a-submission/>

Dear Secretary

### **NDIS Thin Markets Project Consultation**

The Law Council of Australia (**Law Council**) welcomes the opportunity to make this submission to the Department of Social Services (**DSS**) consultation on the NDIS Thin Markets Project (**Consultation**).

This submission is not intended to be a comprehensive statement. Instead it raises some key issues of concern relating to thin markets, including in the context of the findings of *The Justice Project*<sup>1</sup> (**Justice Project**) and, particularly, with regard to the Northern Territory.

The Law Council is grateful for the input of the Northern Territory Law Society (**NTLS**), its Indigenous Legal Issues Committee and its National Human Rights Committee in the preparation of this submission. In addition, the NTLS has emphasised the relevance to the situation in the Northern Territory of the points made in the submission by the Darwin Community Legal Service (**DCLS**) to this Consultation.

#### *Context – people with disability and the justice system*

The Law Council considers that any attempt to address the issues concerning thin markets with respect to the NDIS should occur taking into account the broader context. This includes an understanding of how timely access, or the lack thereof, to appropriate disability-related services may affect a person's broader life outcomes, including their possible incarceration by the criminal justice system and their prospects of subsequent rehabilitation.

In the Justice Project, the Law Council undertook a large-scale inquiry into barriers to access to justice in Australia, including those faced in rural, regional and remote (**RRR**)

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<sup>1</sup> Law Council of Australia, *The Justice Project* (2018), <<https://www.lawcouncil.asn.au/justice-project>>.

contexts<sup>2</sup> and by people with disability.<sup>3</sup> It found that people with disability, including mental and cognitive health conditions, have starkly disproportionate levels of interaction with the criminal justice system, both as offenders<sup>4</sup> and victims.<sup>5</sup> People with disabilities comprise around 18 per cent of the country's population but almost 50 per cent of people entering prison.<sup>6</sup> To further illustrate:

- (a) according to Jesuit Social Service, a 2011 study by Corrections Victoria found that '42 per cent of men and 33 per cent of women (in a sample of the Victorian prison population) had been diagnosed with an [Acquired Brain Injury] ABI';<sup>7</sup>
- (b) a 2017 report by the Mental Health Commission of New South Wales stated that 50 per cent of adult prisoners have been diagnosed with or treated for a mental health condition and 87 per cent of young people in custody have a past or present psychological impairment.<sup>8</sup> It estimated that between 8 and 20 per cent of prisoners have an intellectual disability and suggested that the rates of cognitive impairment among prisoners are likely to be higher;<sup>9</sup>
- (c) a 2014 study of 65 per cent of youth detainees in New South Wales revealed 45.8 per cent had borderline or lower intellectual functioning;<sup>10</sup>
- (d) a 2014 survey of 273 young people serving custodial orders in Victoria found 39 per cent had depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in deliberate self-harm within the previous 6 months;<sup>11</sup>
- (e) Telethon Kids Institute recently conducted a prevalence study with respect to FASD among youth detainees at Banksia Hill Detention Centre in Western Australia. This revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth', with 89 per cent of incarcerated young people having at least one form of severe neurodevelopmental impairment;<sup>12</sup>

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<sup>2</sup> Law Council of Australia, 'Rural, Regional and Remote (RRR) Australians', *The Justice Project* (2018), <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Rural%20Regional%20and%20Remote%20%28RRR%29%20Australians%20%28Part%201%29.pdf>>.

<sup>3</sup> Law Council of Australia, 'People with Disability', *The Justice Project* (2018), <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>.

<sup>4</sup> *Ibid.*, 19.

<sup>5</sup> *Ibid.*, 23.

<sup>6</sup> Human Rights Watch 'I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia' (6 February 2018), at <<http://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>.

<sup>7</sup> Jesuit Social Services, *Submission to the Justice Project*, cited in Law Council of Australia, *The Justice Project Final Report* (2018). People with Disability chapter, <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>.

<sup>8</sup> Mental Health Commission of New South Wales, *Mental Health Commission of New South Wales, Towards a just system: Mental illness and cognitive impairment in the criminal justice system* (2017).

<sup>9</sup> *Ibid.*

<sup>10</sup> Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

<sup>11</sup> *Ibid.* 2.

<sup>12</sup> Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>>. See also Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

- (f) a 2010 Senate Inquiry found that approximately 98 per cent of Aboriginal and Torres Strait Islander inmates across all jurisdictions have a cognitive disability, and commonly also hearing loss. In the Northern Territory, over 90 per cent of Indigenous inmates experienced significant hearing loss;<sup>13</sup> and
- (g) a Victorian study showed that 92 per cent of Koori women in prison had a lifetime diagnosis of mental illness and nearly half were suffering from post-traumatic stress disorder.<sup>14</sup>

However, as also discussed in the Justice Project, many people with disability who enter the criminal justice system have a long history of undiagnosed or untreated impairment, despite multiple previous interactions with government agencies or services. This reinforces the need for concerted efforts by governments to increase resources for targeted prevention and early intervention approaches and programs for people with disability,<sup>15</sup> including through access to the NDIS.

Justice Project research, consultations and submissions also described key gaps in prison-based rehabilitation programs and/or prison responses to prisoners' needs, including insufficient rehabilitation programs to meet demand<sup>16</sup> and a lack of rehabilitation programs for people on short services or on remand, which was described as a missed opportunity to assist prisoners at a critical time.<sup>17</sup> In particular, the lack of NDIS services available to people in prison was described as a 'market failure',<sup>18</sup> and limited services often directly contributed to an inability for people with disability to obtain legal advice or secure bail.

The Justice Project's RRR chapter further confirmed the critical role played by non-legal services in underpinning the justice system, particularly, therapeutic justice models.<sup>19</sup> As Coverdale has stated:

*Community based programs for offenders and potential offenders have a real and attributable impact on the prevention of offending and re-offending. These programs include, for example, those in the areas of disability/psychiatric services, accommodation services, drug and alcohol programs, youth support services, mediation services, relationship counselling services, anger management or domestic violence counselling programs, victim/witness counselling services and interpreter services.*<sup>20</sup>

<sup>13</sup> Senate Legal and Constitutional Affairs References Committee, *Hear us*, [8.103]; Troy Vanderpoll and Damian Howard, 'Investigation into hearing impairment among indigenous prisoners in the Northern Territory', 3.

<sup>14</sup> Human Rights Law Centre and Change the Record Coalition, *Over-looked and overrepresented*, 18; Australian Law Reform Commission, *Pathways to Justice*, 354.

<sup>15</sup> Law Council of Australia, 'People with Disability', *The Justice Project* (2018), <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>.

<sup>16</sup> Knowmore, *Submission No 102*.

<sup>17</sup> Law Council of Australia, *The Justice Project Final Report* (2018). Prisoners and Detainees chapter, <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf>>.

<sup>18</sup> *Ibid*, 80.

<sup>19</sup> Law Council of Australia, 'RRR Australians', *The Justice Project* (2018), <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Rural%20Regional%20and%20Remote%20%28RRR%29%20Australians%20%28Part%201%29.pdf>>.

<sup>20</sup> *Ibid*, citing Richard Coverdale, Centre for Rural Regional Law and Justice, *Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011), 74.

However, the chapter also disclosed strong concerns about the extent to which such services are available in practice for people who require them in RRR areas.<sup>21</sup> Further, the chapter highlighted the difficulties commonly experienced by many RRR Australians in accessing justice and related services – including a higher degree of poverty, distance barriers and lack of public transport.<sup>22</sup>

The Law Council is concerned that a lack of timely access to disability-related supports may contribute to a situation in which people with disability are entering, and continuing to cycle through, the criminal justice system.

Since completing the Justice Project, the Law Council has continued to hear concerns from its constituent bodies regarding access to disability services, including the NDIS, in the context of justice issues. It has recently submitted that ‘detainees ... should receive the same level of healthcare that the general public would receive’,<sup>23</sup> and that a review is needed of how the NDIS ‘can be improved to support people with mental health and cognitive conditions in the criminal justice system’.<sup>24</sup>

These calls were reflected in the Law Council’s recent Call to Parties as part of the 2019 federal election,<sup>25</sup> which highlighted that more could be done to ensure that people with disability are not over-represented in the justice system and receive sufficient rehabilitative support. Its recommendations included:

- reviewing how mental health and disability services – particularly the NDIS – can be improved to support people with mental health and cognitive conditions in the criminal justice system;
- ensuring that detainees in each state and territory receive the same level of health care that the general public would receive; and
- investing in targeted early intervention and preventative services for people with disability, particularly in RRR areas, as well as disability support and advocacy for people in the justice system.<sup>26</sup>

#### Limited suitability of market-driven models for thin markets

The Law Council considers that detailed consideration is necessary of which model or models will best support people with disability to achieve progressively the full realisation of their rights. That consideration should have regard, among others, to the rights to ‘enjoyment of the highest standard of health’,<sup>27</sup> and to ‘social security, including social insurance’.<sup>28</sup> The right to social security is clarified by General Comment No. 19 of the UN

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<sup>21</sup> Ibid, 50-54.

<sup>22</sup> Ibid, 20-24.

<sup>23</sup> Law Council of Australia, *The Social and Economic Benefits of Improving Mental Health* (2019), <<https://www.lawcouncil.asn.au/resources/submissions/the-social-and-economic-benefits-of-improving-mental-health>>, 14.

<sup>24</sup> Ibid.

<sup>25</sup> Law Council of Australia, *Call to Parties* (2019), <<https://www.lawcouncil.asn.au/resources/publications/call-to-parties-2019>>.

<sup>26</sup> Ibid.

<sup>27</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 25.

<sup>28</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 9.

Committee on Economic, Social and Cultural Rights,<sup>29</sup> which sets out the essential component of a social security system, including coverage of health care<sup>30</sup> and disability.<sup>31</sup> The *Convention on the Rights of Persons with Disabilities (CRPD)* requires States Parties to ‘take all appropriate measures to ensure persons with disabilities access, [among other things] ... facilities and services open or provided to the public, both in urban and rural areas’ (emphasis added).<sup>32</sup> Those measures ‘shall include the identification and elimination of obstacles and barriers to accessibility’, including in respect of medical facilities.<sup>33</sup> States Parties to the CRPD must also ‘take effective and appropriate measures... to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion in participation in all aspects of life.’<sup>34</sup>

In regard to the practical exercise by people with disability of these rights, the Law Council is concerned that a market-driven model—for instance, falling within the ‘market facilitation’ and ‘market deepening’ categories described by the Consultation discussion paper<sup>35</sup>—may have serious limitations in its ability to address thin market situations. In particular, it notes that a sparse or dispersed market for a given service will tend to reduce its profitability, potentially leading to reductions in service quality, availability, and/or range. Opportunities for tailored service provision, which responds to the specific needs of individuals rather than providing a standardised service, may also be reduced in thin market contexts where a market-driven model of service provision is used, due to the associated resource requirements.

The Law Council also notes its concern regarding certain flow on effects which could potentially result from the use of market-driven models. It is possible that, in effect, a feedback loop might occur, where limited market depth leads to efficiency measures that reduce service quality or scope, which, in turn, further reduce service uptake. Such reductions in uptake may also lead to an incorrect underestimation of service needs present within given communities, if uptake is used as a measure to indicate needs. In addition, the Law Council shares the concern of the DCLS that, where the operation of a market-driven model leads to the eventual discontinuation of a non-profitable service, the absence of a safety-net or ‘provider of last resort’<sup>36</sup> may mean that NDIS participants lose access to certain services entirely.

In respect of indigenous communities, the Justice Project found that ‘Aboriginal and Torres Strait Islander-controlled organisations and Aboriginal and Torres Strait Islander people are most appropriately placed to provide services and speak on behalf of Aboriginal and Torres Strait Island peoples.’<sup>37</sup> It is acknowledged that the planning and delivery of services in a way which is community led will result in increased uptake and effectiveness within

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<sup>29</sup> Economic and Social Council, *General Comment No 19: The right to social security (art 9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008).

<sup>30</sup> *Ibid*, [13].

<sup>31</sup> *Ibid*, [20].

<sup>32</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 9(1).

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*, art 26(1).

<sup>35</sup> Ernst & Young, ‘NDIS Thin Markets Project Discussion paper to inform consultation’ (online, April 2019) <<https://engage.dss.gov.au/ndis-thin-markets-project/ndis-thin-markets-project-discussion-paper/>>.

<sup>36</sup> DCLS, ‘NDIS Thin Markets Project’ (May 2019), 2.

<sup>37</sup> Law Council of Australia, ‘Aboriginal and Torres Strait Island People’, *The Justice Project* (2018), 7, <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%2028Part%201%29.pdf>>.

Aboriginal and Torres Strait Islander communities.<sup>38</sup> A market-driven approach will not necessarily prioritise community engagement or leadership and its suitability may in that respect also be limited.

The Law Council agrees that NDIS participants in general should not be characterised as consumers,<sup>39</sup> as doing so risks giving a potentially misleading impression that persons with disability have a substantial degree of choice or control over what services they need and when. It supports the recommendation to 'Provide a government-backed safety-net of services to ensure that people with disability have access to the same standard of services, regardless of where they live'.<sup>40</sup>

#### Barriers to accessing service provision

In thin market contexts, the Law Council understands that barriers to accessing service provision may be significantly increased. Thin markets often occur in RRR locations, which is exemplified by the DCLS' experience in the Northern Territory. Geographic distance may place otherwise available services beyond the reach of persons with disability unless support for travel is also provided. In addition, existing disadvantage and vulnerability may be compounded. This may happen, for instance, where resource limitations mean that people from Aboriginal and Torres Strait Islander communities or other culturally and linguistically diverse backgrounds are forced to call upon family or other informal arrangements to provide translation, information and/or cross-cultural support. For service providers, it may often be more difficult in RRR locations to engage, train, support and retain highly qualified and specialised staff.

The Law Council supports careful consideration of the funding of 'travel ... where needed to access a plan, or services under a plan',<sup>41</sup> and it considers that assistance is needed, in culturally and linguistically appropriate forms, to ensure vulnerable people are empowered to address barriers and access necessary services.<sup>42</sup>

#### Research and assessment of needs

Finally, the Law Council would welcome the conduct of additional assessment to ensure that NDIS service delivery, resource and funding models are appropriately differentiated to reflect the range of different contexts in which it is implemented, including thin markets. Issues including higher operating costs, workforce challenges and fewer economies of scale should be considered in thin markets regions and adjustments made accordingly to maintain quality and continuity in service provision.

The Law Council supports the recommendation that a mapping of services should be undertaken 'alongside assessment of need to better plan provision of services, identify gaps and allocate resources'.<sup>43</sup> In particular, any assessment of need should not rely upon records of service uptake but should seek independently to quantify needs within the Australian community, noting that barriers—including those discussed above—may prevent many people with disability from requesting or receiving services.

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<sup>38</sup> See, for example: Rhys Price-Robertson and Myfanwy McDonald, 'Working with Indigenous children, families, and communities: Lessons from practice' *CAFA practice sheet* (March 2011), <<https://aifs.gov.au/cfca/sites/default/files/publication-documents/ps6.pdf>>.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 6, recommendation 1.

<sup>41</sup> *Ibid.*, 6, recommendation 2.

<sup>42</sup> *Ibid.*, 4.

<sup>43</sup> *Ibid.*, 6, recommendation 3.

In you require any additional information, please contact Mr Mike Clayton, Senior Policy Lawyer, on 02 6246 3755 or [mike.clayton@lawcouncil.asn.au](mailto:mike.clayton@lawcouncil.asn.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

**Arthur Moses SC**  
**President**