



Law Council
OF AUSTRALIA

Market Readiness of the National Disability Insurance Scheme

Joint Standing Committee on the National Disability Insurance Scheme

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria their assistance with the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Joint Standing Committee on the National Disability Insurance Scheme's inquiry into the market readiness of services provided by the National Disability Insurance Scheme (**Inquiry**). This submission is substantially based on input received from the Law Institute of Victoria, informed by its Disability Law and Elder Law Committees. The Law Council is grateful for this contribution.
2. This submission will respond to the following areas as prompted by the Inquiry's Terms of Reference:
 - the transition of the National Disability Insurance Scheme (**NDIS**) to a market-based system; participant readiness to navigate new markets;
 - the development of the disability workforce to support the emerging market; the impact of pricing on the development of the market;
 - market intervention options to address thin markets; and
 - the impact of the Quality and Safeguarding Framework (**Framework**).
3. The Law Council recognises that, since the late-1980s, governments have increasingly sought to incorporate personal responsibility and free choice into social welfare policy. This has been demonstrated in several ways:
 - private businesses have been encouraged to deliver human services through the privatisation or 'contracting out' of government responsibilities. Partnerships between the public and private sectors have also been sought;
 - the language used by government has become increasingly commercial. For example, welfare recipients are often termed as 'customers' or 'clients'; and
 - agencies have cut staff numbers to maximise profit (while compromising capacity to deliver services).
4. It has been argued that these market-oriented reforms increase individual choice, as well as a service's overall efficiency. This is due to profit motive, accountability to shareholders and financiers, and preventing takeovers by competing enterprises. However, it is counter-argued that the introduction of competition in welfare policy does not automatically improve outcomes. There is potential for cost-cutting and low investment by for-profit providers. This may have a damaging impact on accountability, adaptability, innovation, responsiveness, and quality of care.
5. The *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) establishes the NDIS - a scheme designed to support persons with a disability, their families and carers, through an insurance-based approach to the provision and funding of support services.
6. At present, the NDIS issues funds directly to the providers of disability support services. However, a key aim of the NDIS is to 'enable people with disability to exercise choice and control in the pursuit of their goals and the planning and deliver of their supports'.¹ It is proposed that the NDIS transitions to a market-based system - that is, where funding

¹ *National Disability Insurance Scheme Act 2013* (Cth) section 3(1)(e).

is directed to the user. The user, therefore, will determine from which providers to seek services, and for how long. User choice and control were key principles in the original design of the NDIS, as envisioned by the Productivity Commission.²

7. Theoretically, at least, there are benefits to this change. Firstly, it places users at the centre of decision-making processes. Secondly, providers will need to compete by improving their marketing and service offering to attract users. Thirdly, if a service does not deliver to the expected standard, users have the freedom to switch to another provider.
8. This transition also reflects key recommendations made by the 2015 Competition Policy Review (**Harper Review**). Specifically, that user choice should be at the centre of service delivery. However, the Harper Review also recommended that government retain a stewardship function, that there should be a diversity of providers, and innovation in service delivery must be stimulated, whilst also ensuring minimum standards of quality.
9. The transition also involves risk. The client base is highly vulnerable, not necessarily adaptable, and may not have the resources to 'shop' for a better service. It could result in competition between providers being illusory with no real difference between second-rate services on offer. Further, it may also lead to the failure of some providers to service people with complex issues, as these tend to be less profitable.³
10. The Law Council is also concerned that there is a lack of market readiness among providers for the roll-out of the NDIS and that a lack of services is contributing to people being detained for longer periods of time. In some cases, this includes unlawful detainment in restrictive settings, such as prisons and psychiatric facilities. This disproportionately affects people with cognitive or psychiatric disabilities. It may cause them to become involved in a range of other legal problems, such as contracts, tenancy, debts, discrimination, fines, child protection and criminal law matters.
11. To illustrate these points, members of the Law Institute of Victoria who practise in disability law have provided the Law Council with the following examples:
 - a 19-year old person with complex disabilities has spent five months in prison unable to be released on bail because there is no service capable of providing support. This person has up to \$1.5 million in funding per year under the NDIS;
 - there are up to five clients currently held in corrections custody because service providers have not identified who can support these persons using allocated NDIS funds;
 - a client with Huntington's disease was detained as a compulsory patient in a psychiatric unit because specialist supported housing approved under their NDIS plan could not be arranged. The client's situation did not satisfy the criteria for compulsory detention under the *Mental Health Act 2014* (Vic), but the Mental Health Tribunal approved it because of concerns about discharge without appropriate support;

² Productivity Commission, *Disability Care and Support* (August 2011).

³ National Disability Services, *NDS Comments on the Competition Policy Review* (2014), 3.

- a client with an intellectual disability and mental illness was held in secure extended care unit of a psychiatric service for two years because of a lack of accommodation to which the client could be discharged; and
- a client has continued to be detained at Thomas Embling, Victoria's secure forensic mental health hospital, for two years after the end of their sentence due to lack of discharge support services.

12. These examples highlight that funding under the NDIS, or eligibility to receive funding under the NDIS, is ineffectual where a lack of appropriate and available support services prevents persons with disabilities from using those funds. It raises further concerns in that prolonged detention of prisoners (beyond their sentence) constitutes a denial of human rights.⁴

13. The Law Council submits that the NDIS represents a significant step towards Australia's implementation of the Convention on the Rights of Persons with Disabilities (**CRPD**).⁵ Once fully established, the number of people receiving government-funded support will be approximately 460,000.⁶ However, given its importance, the Law Council emphasises that any market-based reforms to the NDIS must prioritise quality of care and the empowering of people over profit-making and entrepreneurial ambitions. Further, as relayed by the Harper Review, the government must maintain a stewardship role by considering the mixed experiences of competition in other human services.

Transition

14. The Law Council believes that a successful transition to a choice and innovation-based sector is possible. However, this transition will take time. Participants will need to learn how to exercise their market power with confidence and be supported in doing so. Further, there may be delays in existing providers expanding their services, or new providers entering the sector. If transitioned correctly, however, a choice-based sector could provide people with a disability the opportunity for greater social and economic participation. It may also incentivise current providers to improve the quality of their services. However, before these reforms are introduced, it is necessary to examine the experiences of other human services sectors which are quasi-market operated. The Law Council submits that lessons can be learned, in particular, from the aged care sector.

15. Australia's aged care sector is heavily market-based. Comparisons can be drawn between the NDIS and Home Care Packages for older persons who wish to remain in their own homes but require assistance for transport, domestic jobs or personal care. The government provides funding to participants who are then able to purchase the services they choose. A contract is then drawn between the user and the provider of home care. The government also provides an advocate, if needed, to represent the user.

16. In recent years, there have been several scholarly reports and articles⁷ which have revealed declines in quality of care resulting in the mistreatment of older persons. The

⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12, section 21.

⁵ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106.

⁶ Department of Social Services, *NDIS Quality and Safeguarding Framework* (2016), 5.

⁷ See: Australian Institute of Family Studies, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (2015); Australian Law Reform Commission, *Elder Abuse – A National Legal Response Report* 131 (2016); Joseph Ibrahim, 'Recommendations for Prevention of Injury-Related Deaths in Residential Aged Care Services' (Victorian Institute of Forensic Medicine, 2017).

sector is also compromised by a lack of information needed to empower individuals, families and carers to make appropriate decisions.

17. The Law Council is aware of several examples of market failure in the aged care sector. Notably, the failure to collect relevant information about the sector, and the complaints system, which has been criticised for a lack of timeliness, clarity and fairness.⁸ It has also been noted that elderly people often struggle to find the right provider, due to the lack of information. As a consequence, services may be chosen based on false indicators of quality. These may include the location of a service, its appearance, or the friendliness of staff.
18. Considering this, the Law Council submits that governments should proceed slowly with implementing market approaches to the NDIS. Experiences of the aged care sector reveal that 'choice' may not always be genuine and meaningful. The choice might be limited to sub-standard for-profit providers. Many of the issues that older persons face will also be faced by NDIS participants. The success of the NDIS in ensuring 'choice' is contingent upon effective participation strategies, the availability of accessible information and independent oversight of the scheme.
19. The possibility for market failure in the disability-support sector should not be tolerated. Article 28 of the CRPD enshrines the rights of persons with disabilities to an adequate standard of living and social protection. Therefore, reforms that introduce choice and competition into the sector must be carefully planned, monitored and reviewed. The Law Council also proposes the following:
 - The provision of available information needs to be strengthened so as to ensure user choice is properly informed. This is important for vulnerable consumers with a variety of varied and complex needs. It also reflects Article 9 of the CRPD, which states that 'State Parties shall take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to ... information and communications'.⁹
 - Resources should be invested in advocacy which assists people navigating the new market-system and disputes arising from National Disability Insurance Agency (**NDIA**) decisions. Transparency and external accountability is crucial to maintain effectiveness and participant confidence. People may have difficulties accessing information about the NDIS and the application process. The Law Council submits that it is important that outreach and advocacy is undertaken with participants so that they are informed about their rights. Resources relating to recipients' rights under the NDIS should be available in multiple forms, including, written, audio, braille and languages other than English.
 - Information needs to be collected on the impact of market-reforms to the sector. Such information could be used to identify market failure and address it at an early stage of the NDIS roll-out. Information should be collected on the following: the level of business confidence; the configuration and size of providers; the financial stability of providers; and the rate of user's change. This information will be critical for the transition, as it illuminates how the NDIS will function in a market environment.

⁸ Kate Carnell and Rob Paterson, 'Review of National Aged Care Quality Regulatory Processes' (2017)

⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106.

- When market-reforms are introduced into the sector, the government should ensure that there is investment in oversight of such reforms on the sector. Government must also adequately respond to any adverse findings and adjust policy as required.

Participation

20. The Law Council is concerned about how people with mental illness and psychosocial disabilities will interact with the NDIS. Members of this group are particularly at risk of restrictive detention and interventions, in addition to a range of other legal and social problems linked to their disability. These people are more likely to be rejected from the NDIS.¹⁰ The recommendations of the *Mind the Gap* report,¹¹ written by the University of Sydney and Community Mental Health Australia, highlights the problems that persons in this group may face. It also outlines preventative solutions to ensure these problems do not occur. This includes the development of outreach programs for homeless persons and persons from remote communities. These programs seek to engage participants with the NDIS and provide additional training to those who work within the scheme.
21. An increasing number of state-based disability support services have offered participants greater choice and control. For example, in Queensland, the 'Your Life, Your Choice' initiative allows people with disability to participate in planning and delivering their own support and services. However, the Law Council submits that assistance is still needed to build participants' capacity to engage with the NDIS.

Disability Workforce

22. The success of the transition to a market-based system will depend on the size, diversity and flexibility of the disability workforce.
23. Workforce shortages have been identified as a risk to the NDIS.¹² The size of the Workforce will need to increase as the NDIS is gradually rolled-out and caters to more participants. Governments should look for workers who both possess the appropriate skills and are just entering the labour market. This is important as Australia's ageing population is heavily reflected in the composition of formal carers employed to help people with disabilities. Per the Australian Bureau of Statistics, the average age of a primary carer is 55 years.¹³ This means that demand for carers will increase as the NDIS progresses.
24. In response to market reforms, the workforce may experience a wider-range of work hours. Shifts could become fragmented, occurring at any time of the day and in an array of settings. NDIS services will need to provide flexible work practices to accommodate workers and NDIS participants. Arrangements will need to be made so as to respond to the diverse needs and wishes of NDIS participants, whilst guaranteeing that working conditions are attractive to engage a larger workforce.

¹⁰ Independent Advisory Committee *Advice on Implementing the NDIS for People with Mental Health Issues*, 2017.

¹¹ University of Sydney and Community Mental Health Australia, *Mind the Gap: The National Disability Insurance Scheme and Psychosocial Disability* (2018).

¹² Productivity Commission, *Disability Care and Support* (2011), 49.

¹³ Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers, 2009* (2009).

25. The Law Council submits that considerable resources should be allocated to ensuring enough staff are sufficiently skilled. The NDIA or another authority should be given this responsibility. This includes drawing on pre-NDIS best practice service models.

Pricing

26. The Law Council highlights the need for independent oversight of price-setting for support services available under the NDIS, in order to maintain impartiality and accountability. An independent authority, separate to the NDIA should be established for this purpose.

Market Intervention

27. The Law Council submits that the current range and flexibility of services under the NDIS does not match what is currently provided to persons with disabilities through the provision of state-based Individual Support Packages. The NDIA has identified that there are many services which do not exist but are required by NDIS participants.¹⁴
28. The Law Council submits that the Commonwealth should consider prompting the market if a service does not exist. The market could be motivated by providing funding and support beyond what is currently provided for service providers to set up businesses that cater to the needs of participants.¹⁵

Quality and Safeguarding Framework

29. The Law Council submits that the Framework is essential to prevent market failure. If established correctly, the Framework can ensure that the rights of persons with disabilities, as outlined by the CRPD are protected.
30. Further, the Framework reflects a key recommendation of the Harper Review:

*Governments cannot distance themselves from the quality of human services delivered to Australians — they will continue to have an important role as market stewards in human services sectors.*¹⁶
31. This reflects Article 16 of the CRPD which states that to prevent abuse, State Parties should ensure all programmes designed to serve persons with disabilities are effectively monitored by independent authorities. However, the Law Council considers quality assurance and appeals processes should be reviewed and refined for optimum outcomes.
32. The Law Council is concerned that there is no mandatory time frame for completing internal reviews of NDIA decisions. Delays may result in cases not being heard within the 12-month period of a plan, in which case the review process would have to be re-initiated.

¹⁴ NDIA, *NDIS Market Approach: Statement of Opportunity and Intent* (November 2016), 16.

¹⁵ Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers, 2009* (2009), 28.

¹⁶ Competition Policy Review, *Final Report* (March 2015), 229.

Other Matters

33. In addition, the Law Council submits that competition, by itself, will not be sufficient to spur innovation. Research will be needed to drive the level of innovation and improve the delivery of disability support services.

Conclusion

34. There is great potential for individual participation in allowing NDIS participants to exercise choice in selecting service providers. However, as has been evidenced in the aged care sector, moves to market-based systems may result in poorer quality of care.
35. This example highlights the need for the government to retain stewardship of the NDIS by ensuring that supports are available for NDIS participants to make informed decisions, such as, which provider to seek services from, how to change providers and how to issue complaints when a service does not meet expected standards of care.