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Joint Standing Committee on the National Disability Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ndis.sen@aph.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Joint Standing Committee on the National Disability Insurance Scheme's inquiry into the NDIS Workforce.

Please do not hesitate to contact me and my colleagues on _____ or at _____
if we can further assist with the Committee's
important work.

Yours faithfully,


Tom Ballantyne
Principal Lawyer
MAURICE BLACKBURN





**Maurice
Blackburn**
Lawyers
Since 1919

**Submission to the Joint
Standing Committee on the
National Disability
Insurance Scheme's
Inquiry into the NDIS
Workforce**

April 2020

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn believes that the most important factor in ensuring that the disability support workforce is fit for purpose lies in the sector's ability to provide secure, long term employment.

We remain particularly concerned about the potential for increased casualisation of the service provider workforce, and a growth in precarious employment in the absence of sufficient workforce planning.

It is vital that the involvement of the union movement is encouraged.

We highlight that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- These vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- Sham contracting is rife, with workers told they must be independent contractors rather than traditional employees. These employees are then missing out on superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect,
- Technology based employment matching services that actually employ their staff, rather than merely connect contractors to clients, need to be promoted,
- In order to compete with other care sectors (health, aged care), the employment conditions within organisations registered to provide NDIS services must be first rate, and
- The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants.

Ensuring that NDIS pricing is competitive will assist in the retention and attraction of workers. The Commonwealth Government has almost complete control of this particular lever and must ensure that NDIS fees for services encourage and promote long term, secure employment in the disability sector.

It is not an exaggeration to say that the obvious deficiencies in the disability workforce represent an existential threat to the efficiency and sustainability of the NDIS. Without immediate and extensive action, the NDIS workforce will quickly become under supplied and under skilled, with predictable tragic consequences for participants to quickly follow.

Responses to the Terms of Reference

a) The current size and composition of the NDIS workforce and projections at full scheme

The Government's 2019 report Growing the NDIS Market and Workforce Strategy¹ tells us that:

To assist providers to deliver these services, the NDIS is expected to be one of the largest job creation opportunities in Australian history, with up to an additional 90,000 full time equivalent employees (FTE) needed over the next five years. This will include a mix of highly skilled positions and a large number of roles that do not require formal qualifications. The NDIS will thus become the main supplier of funds for the employment of disability care professionals.

Maurice Blackburn submits that this headline focus on the size of the workforce is unhelpful. The focus for workforce development has to be on quality of service rather than the overall quantity.

Maurice Blackburn believes that the best outcomes for people with disability will be achieved when service providers offer secure, long-term employment, with attractive pay, conditions and professional development opportunities.

A focus on the scale of the workforce will only lead to a focus on finding ways to fill positions with whoever is available at the time. There is a real risk that attempts to address the shortage of workers will lead to a reduction in quality standards, worker exploitation and/or increasing costs. (Please refer to our response to ToR (c) for more detail on this).

Any focus on workforce development must start with the primary focus being on service quality.

We note that the Government's strategy document mentioned above prioritises fostering a capable workforce, through:

- Developing workforce capability, and
- Improving formal qualifications in the sector²

We agree that this is an appropriate starting point.

We also note, however, that there is no mention in the strategy of focusing on the creation of secure, long-term employment opportunities. There is no mention of working with unions to ensure appropriate work conditions are fundamental. The focus seems to be on workforce flexibility. While ever this is the underlying ethos, Maurice Blackburn believes the sector will never fulfil its responsibilities to people with disability.

There must not be a 'lowest common denominator' approach to the provision of services to people with disability.

¹ <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/growing-the-ndis-market-and-workforce-strategy>; p.1

² Ibid; p.9 & 10

b) Challenges in attracting and retaining the NDIS workforce, particularly in regional and remote communities

We note that the ToR specify that this inquiry is focused on 'the workforce providing NDIS services', not the workforce directly employed by the NDIA.

Maurice Blackburn submits that the majority of challenges in attracting and retaining staff to provide NDIS services stem from issues that potential employers are facing due to the architecture of the scheme.

Maurice Blackburn is hearing consistent messages from our networks in relation to workforce issues in the transition to a market based system for service providers. These messages can be divided into three clear streams – problems related to the constancy of funding; problems related to staff availability; and problems relating to service providers' relationship with the NDIA.

Problems related to the constancy of funding:

Service providers report facing enormous issues moving from block funding to a fee for service based model. Organisations are having difficulty maintaining funding while the transition occurs, but also in making the fee for service model profitable.

This uncertainty is leading to an unwillingness or inability to make commitments to staff about tenure. An agency cannot retain staff under these circumstances.

We are aware of organisations of all sizes which are seriously considering their short and medium term viability, and actively pursuing closure or merger options. These include small community operations, as well as large scale organisations which have received multi-million dollar / multi-year contracts in the past. With little in the way of retained savings, they simply cannot see how they can survive the funding shortfalls during the transition period.

In our experience, service providers are not finding it easier to (a) find enough work to make money on a fee for service basis; or (b) find enough qualified staff willing to work for a rate that allows the business to make a profit.

The appearance of cost shifting from States to the NDIS (States removing funding for certain activities on the basis that it should be covered under NDIS funding) is acutely perceived by service providers.

Regardless of the accuracy of the perception, it has become a reality in the eyes of service providers which are transitioning from block funding to an open marketplace.

Under previous funding regimes, larger providers were able to 'juggle' their cash flow according on the staffing needs of the organisation and the needs of their clients. With the more prescriptive nature of NDIS funding, this flexibility has been removed.

Maurice Blackburn remains concerned that the shift to a market based approach is favouring the big companies over smaller community service providers. This is at odds with the goal of providing more flexible and tailored services.

Funding certainty must be maintained in order for service providers to feel confident in offering attractive, permanent jobs.

Problems relating to staff availability:

Maurice Blackburn is aware that small, individual contractors – especially personal carers - are struggling with the transition to a market based approach. Direct engagement, in particular, is something that a lot of smaller providers are expressing concern about.

Individual service providers are expressing concerns about the necessity of setting themselves up as a business, and the precarious nature of the consistency of work.

Maurice Blackburn is concerned that the transition to a market based system for service provision will not assist in the reduction of casualisation in the sector's workforce – if anything, we believe it will exacerbate it. In our experience, most participants will only need between two and six hours of assistance per day, meaning carers will still have to pick up various bits of work in a piecemeal fashion.

We are aware of the proposed use of apps to find carers, but a risk remains that there is a large portion of the workforce that will not be comfortable in using such technologies. This 'Uberisation' of the disability workforce, and other employment related structural issues, are discussed more in our response to ToR (c).

We also believe that the emphasis on fee for service creates an optics problem. We are concerned that the appearance of a highly casualised, piecemeal approach to work will deter potential new entrants into the disability sector workforce, particularly with respect to carers.

Problems relating to service providers' relationship with the NDIA:

For a service provider to employ staff in order to provide NDIS services, they first must be registered with the NDIA.

Maurice Blackburn has found that many service providers, formerly ambassadors for the scheme, have become deeply frustrated and angry about their interactions with the NDIA.

Many providers that we work with have found the registration process a matter of great complexity. The IT dysfunction within the NDIA, which has plagued the NDIS since the outset, has been regarded by most service providers as inexcusable. We have heard many reports of difficulties experienced in using the provider portal.

Several service providers have reported that responses to questions put to the NDIS differ from person to person. This is being interpreted in the field as the NDIA staff receiving inadequate training, or not having a strong understanding of the scheme.

One CEO of a community disability service provider in regional Australia likened his interactions with the NDIA to "trying to do a puzzle without having all the pieces".

In relation to regional and remote communities:

Maurice Blackburn has long advocated that the shifting structure of the market plus the existing thin markets in regional and rural communities will require strong and specific intervention by the NDIA.

We believe that options including the retention of block funding where appropriate, leveraging established community organisations, using hub and spoke models and relying on other mainstream providers are all worthwhile considerations. But it needs to be done on the

basis that staff are paid appropriately, engaged appropriately and that market rates can vary significantly between communities.

Maurice Blackburn has been made aware that there are a number of communities where plans have been created for participants but there are no service providers to provide the services. In one case, a participant in a remote Queensland town has had a plan developed for \$100,000 of care needs, including respite care. The closest appropriate respite care provider is 800 kilometres away.

Ensuring that staff are available to provide services in regional and remote communities involves acknowledging that pricing will be different in those areas.

In many cases, what agencies in regional and remote areas pay their staff per hour is greater than what is provided to the participant for that support through the NDIS.

For specific input in relation to Aboriginal and Torres Strait Islander communities, please refer to our response to ToR (g).

c) The role of Commonwealth Government policy in influencing the remuneration, conditions, working environment (including Workplace Health and Safety), career mobility and training needs of the NDIS workforce

At the risk of stating the obvious, ensuring that NDIS pricing is competitive will assist in the retention and attraction of workers. The Commonwealth Government has almost complete control of this particular lever and must ensure that NDIS fees for services encourage and promote employment in the disability sector.

Further, Maurice Blackburn believes that workforce infrastructure planning is a fundamental issue for the NDIS in terms of quality outcomes and sustainability.

The Productivity Commission report which was the foundation for the scheme was woefully deficient in providing any workforce solutions. A high-quality, better skilled workforce is needed if the quality of support to individuals with complex needs is to improve.

Maurice Blackburn has long advocated that measures should be put in place to enhance skills training and capacity of the disability workforce.

Strategies to address the growing shortage of workers risk either reducing quality standards or increasing costs, or both. It is absolutely crucial that appropriate levels of funding are committed to this issue. It should not be permitted to bring a "lowest common denominator" approach to the provision of services to eligible individuals. There must be sufficient and properly qualified staff available Australia-wide. The risks in not adopting that approach are plain:

- Unscrupulous entities and individuals will enter the market, seeking to exploit the funds available;
- Unskilled and untrained workers will be recruited to work with people with complex multifaceted needs;

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- Those workers will be highly vulnerable to exploitative conduct by their employing entity;
- Participants will suffer detriment as a consequence; and
- The intended benefits in increased workforce participation will be illusory.

We remain particularly concerned about the potential for increased casualisation of the service provider workforce, and a growth in precarious employment in the absence of sufficient workforce planning.

It is vital that the involvement of unions and worker advocacy bodies is encouraged.

Maurice Blackburn draws the Committee's attention to the current trend toward the 'Uberisation' of the disability workforce. It is important that the legislative and regulatory frameworks underpinning the NDIA's work recognise that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- That these vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- Sham contracting is rife, with workers told they must be independent contractors rather than traditional employees. These employees are then missing out on superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect,
- That technology based employment matching services that actually employ their staff, rather than merely connect contractors to clients, need to be rewarded,
- That in order to compete with other care sectors (health, aged care), the employment conditions within organisations registered to provide NDIS services must be first rate. (for more on this topic, please refer to our response to ToR (e)).
- The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants.

Possible ways forward in relation to staffing issues:

In our experience, the most precarious employment markets are also much less likely to be unionised. It is crucial that the NDIA liaise with the union movement on any structural enhancements that can be put in place to ameliorate exploitative working arrangements.

Maurice Blackburn would like to see NDIA's procurement processes for service provision have far higher expectations on the credentials of the applicant firm as an employer of choice. If a firm cannot provide details of their employment model and processes, they should not be registered as an NDIA provider.

d) The role of State, Territory, Commonwealth Governments in providing and implementing a coordinated strategic workforce development plan for the NDIS workforce

The legislation underpinning the NDIS enshrines a very important role for states and territories within its provisions. On the majority of substantive issues, states and territories have a powerful voice in the directions chosen by the federal government and the NDIA.

These powers should not be taken for granted.

It should be remembered that, until recently, states and territories had the majority say in how the needs of people with disability were serviced in their jurisdiction. This institutional memory should not be discarded.

People with disability, and service providers, are reliant on state and territory governments to remain analytical and critical of decisions happening at the federal level.

State and territories need to remain alert to changes that erode this power of veto and oversight. Nowhere is this more important than on issues pertaining to the entitlements offered under the scheme, and the workforce which provides those services.

e) The interaction of NDIS workforce needs with employment in adjacent sectors including health and aged care

Adjacent sectors are currently operating in tsunami-like circumstances:

- The aged care sector is dealing with the influx of baby boomer generation clients, and will shortly be having to respond to the outcomes of the Royal Commission.
- The health sector is under immense strain from the current COVID-19 crisis. Many workers in the health sector will take a significant amount of time to recover from the stress and anxiety created by this pandemic. There is a real risk that fed up workers will leave the sector.

The disability sector will be competing with those desperate adjacent sectors for skilled workers. The heightened need for workforce planning cannot be underestimated.

The Growing the NDIS Market and Workforce report tells us that³:

*To help grow a capable workforce that delivers supports and services that maximise the health and wellbeing of NDIS participants, the Government, through the NDIS Commission, will be developing an NDIS Capability Framework. The Capability Framework, **which will be developed over a three-year period** coinciding with full scheme, will set out the behaviours and core capabilities to be demonstrated by providers and workers when delivering services, depending on their role.*

³ Ibid; p.9 & 10. (Our emphasis)

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The report goes on to say:

During the development phase, the Government will work closely with state and territory governments as well as NDIS providers, participants, workers, and technical experts to create a framework that complements workforce capability frameworks that might exist in other jurisdictions or sectors. The Capability Framework will be an important resource for NDIS providers in workforce planning and development.

Maurice Blackburn encourages the Committee to consider whether this cascading series of frameworks is the best response, when equipping the sector to complete with adjacent sectors currently in crisis mode in relation to capacity.

If the disability sector were to focus on the creation of secure, long-term employment opportunities, including access to excellent professional development opportunities, this would make them more than competitive in the jobs marketplace.

f) The opportunities available to, and challenges experienced by, people with disability currently employed, or wanting to be employed, within the NDIS workforce

Maurice Blackburn is aware of work that the Independent Advisory Council was doing in advocating for the prioritisation of those with lived experience of disability to be trained in service provision – especially in planning and community support roles.

Maurice Blackburn believes that for this ideal to be realised, it must move from broad aspirational statements to having some concrete actions attached.

For example, it would be useful to describe:

- The types of role most suited to upskilling by people with disability
- How NDIS service provision can best benefit from the lived experience of people with disability in a workplace context

Maurice Blackburn would be highly supportive of any move to practicalise this worthy ideal.

g) Any other matters

Maurice Blackburn draws the Committee's attention to specific issues workforce issues related to the delivery of NDIS services to Aboriginal and Torres Strait Islander peoples.

We have read the Australian Lawyers' Association submission to this inquiry, and recommend their findings on this topic to the Committee:

- 45% of Aboriginal and Torres Strait Islander people report living with disability or long-term health conditions. 7.7% of Aboriginal and Torres Strait Islander people reported having severe and profound disability. This is 2.1 times the rate for non-Aboriginal and Torres Strait Islander people.

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- The prevalence of disability is higher among Aboriginal and Torres Strait Islander women (47% reported living with disability or long-term health conditions, with 8.4% experiencing severe and profound disability, compared to men: 42.9% and 7.1%).
- The majority of Aboriginal and Torres Strait Islander people with disability live in poverty, lack access to appropriate housing, and young Aboriginal and Torres Strait Islander people with disability often cannot attend school or can only participate in a limited way because the local school cannot accommodate their disability.⁴
- Aboriginal and Torres Strait Islander people with disability often fail to get NDIS plans or are given seriously under-resourced plans. One major reason for this is the absence of meaningful advocacy.⁵
- The difficulties of accessing appropriate NDIS plans is particularly serious in remote communities, where 44% of Aboriginal and Torres Strait Islander people report living with disability or long-term health conditions and 7.5% report having severe and profound disability.
- The lack of services in remote Aboriginal and Torres Strait Islander communities means that either the community itself must bear the cost of providing necessary support services to Aboriginal and Torres Strait Islander people with disability, or that those people must leave the community and their Country in order to access the necessary services. The latter option presents a difficult dilemma for Aboriginal and Torres Strait Islander people with disability.
- The NDIS needs to be prepared and equipped to provide necessary support services in remote communities so that Aboriginal and Torres Strait Islander people with disability can continue to participate in community, cultural and ceremonial activities.
- The lack of access to disability support services in remote communities has a significant discriminatory effect on Aboriginal and Torres Strait Islander women. This produces a gender inequity in which the burden for compensating for lack of services in remote communities falls predominantly on Aboriginal and Torres Strait Islander women, either through the provision of informal care, or in being forced to leave communities and Country in order to access necessary support services.⁶

⁴ Griffis, Damian (2019). *In traditional language, there is no word for disability*. The Guardian, 21 November 2019.

⁵ Griffis, n 4 above.

⁶ Ibid.