



Submission

Joint Standing Committee on the NDIS

December 2022

Our purpose

To enable the pursuit of a good life for everyone

Contents

Introduction	3
How Hireup supports both clients and employees	5
Recommendations for regulatory change	6
1. Universal worker screening checks	6
2. More logical system of registration	8
3. Enhanced capacity of existing agencies to serve basic regulatory functions, and scheme governance	11
4. Better performance review and tougher consequences for contravention	14
5. Fairer conditions for support workers	15
6. Protecting NDIS participants using contracting platforms from unforeseen liabilities	16
Conclusion	17

Introduction

In this submission, Hireup offers suggestions on how to improve the structure and operation of the National Disability Insurance Scheme (NDIS), as a critical social policy affecting so many people with disability in Australia today.

Hireup entered the NDIS market as a registered service provider in 2015 and has grown to support some 10,000 clients (NDIS participants) with a similar number of support workers. Hireup was the first online platform in the disability sector, as well as the first (and still one of the few) to employ its support workers.

Hireup's operational model demonstrates innovation and flexibility in empowering its clients to choose their own support workers using an online platform, while building an enduring and organisationally-supported disability support workforce. Hireup's employees are valued, offered career development and provided all the usual benefits associated with employment.

From the outset, Hireup chose to be a for-purpose, for-profit service provider, facilitating the transparency of support worker selection for NDIS participants, while always seeking ways in which to better its already high-quality and meaningful service offering. Hireup's ultimate goal is social change, through addressing and offering solutions to Australia's systemic failure to include people with disability in all aspects of life. Hireup's energetic and thoughtful involvement in the NDIS market since the scheme's inception means it is well placed to offer an organisational perspective on how the scheme can be improved, as well as where it needs reform as a matter of urgency.

The implementation of the NDIS has demonstrated Australia's capacity for global leadership in social policy, and promoting the rights of people with disability in particular, but aspects of the scheme are due for a redesign, as the realities of its operation have uncovered where the policy falls short. In summary, there is much to celebrate about the NDIS, but now is the time for the Commonwealth government to roll up its sleeves and truly make good on the promise to put people with disability at the centre of the system.

Much of this policy gap can be found in the system of quality and safety regulation, which has not actualised the system set out in the 2016 proposed NDIS Quality and Safeguarding Framework (Proposed Framework).¹ Revisiting ideas of best practice in the operation and regulation of the NDIS is overdue, as is considering how decision-makers should respond to new and growing modes of service delivery under the scheme, such as by contractor support workers either engaged through digital platforms or operating as sole traders.

1

https://www.dss.gov.au/sites/default/files/documents/04_2017/ndis_quality_and_safeguarding_framework_final.pdf

This submission also suggests that the government should review and amend the current perverse incentives for service providers not to register with the regulator, the NDIS Quality and Safeguards Commission (NDIS Commission), and the consequential difficulties in quality and safety monitoring of the scheme.

With inadequate oversight and intervention in the NDIS, and the current public debate's focus on costs rather than outcomes, there is potential for the NDIS to waste precious taxpayer dollars and operate more as welfare than insurance. This undermines the spirit of the scheme, which was to offer people with disability greater life control, certainty of support and the dignity of choice. In contrast, a welfare system is variable and fluctuates according to the government's budgetary priorities. We have seen this play out in participant plans being cut with spurious explanations, channelling participants towards the Administrative Appeals Tribunal to seek fairer and more reasonable support decisions.

This submission will also suggest other ways in which the government can tighten the system of regulation, to help course-correct the implementation of the NDIS and so reinforce Australia as a world leader in imagining better ways in which to support people with disability.

Hireup puts the voice of the client at the centre of all its operations, and is committed to continuous improvement. We demonstrate best practice by facilitating choice and flexibility for NDIS participants, but current regulatory frameworks frequently work against our considered employment model. **Without universal worker screening, more comprehensive registration requirements, proactive quality and safety monitoring and the government mandating fairer pay and conditions for support workers, Hireup's best-practice approach is at a competitive disadvantage, and NDIS participants using unregistered contractors are at risk.**

In order to promote the long-term interests of people with disability and the disability support workforce, as well as higher standards of care and support, this submission will recommend change in the following areas:

1. Universal worker screening checks
2. More logical system of registration
3. Enhanced capacity of existing agencies to serve basic regulatory functions, and scheme governance
4. Better performance review and tougher consequences for contravention
5. Fairer conditions for support workers
6. Protecting NDIS participants using contracting platforms from unforeseen liabilities

How Hireup supports both clients and employees

Hireup is a national, NDIS-registered provider of disability support services. Through a secure online platform, Hireup provides people with disability the tools to find, engage and manage their own support workers who fit their needs and share their interests, putting into practice the principles of choice and control that underpin the NDIS.

As an online platform for support work, Hireup is a rarity: we operate a contractor-free model and directly employ our support workers. This allows Hireup to offer its support workers a range of entitlements such as award wages, superannuation payments, workers compensation insurance and return to work services for anyone injured on the job. In the past year, more than 10,000 people with disability were actively using the Hireup platform, with a similar number of support workers providing support.

Hireup has a dedicated Trust and Safety team to manage our worker screening checks, support worker performance management and career development, assess workers against our own Code of Conduct (which incorporates the NDIS Commission's Code of Conduct as minimum standards, but goes much further),² and respond to incidents within a very short timeframe. This team measures our response times to such incidents, reports on performance to our Executive Leadership Team and the Board of Directors, and runs a 24-hour emergency phone line for incident reporting. The Trust and Safety team also reports extensively on notifiable incidents, and has systems in place to monitor its work against all relevant requirements, including an internal assurance program.

Where a support worker is injured, Hireup provides post-injury support in the form of lost wages, medical costs, rehabilitation and claims management support. Hireup employs a dedicated occupational rehabilitation expert to ensure our workers have easy access to in-house rehabilitation advice.

In short, Hireup has operationalised all aspects of incident prevention and integrated our systems of risk and incident management. We have assembled a team of passionate and competent people in these areas. We proactively use data to track trends such as worker fatigue, training requirements and other risks, to facilitate targeted mitigation measures. We ask our clients whether they recommend their workers after every shift, and any negative feedback is triaged and reviewed.

All of the above show Hireup's holistic measures to build our own disability support workforce and so enable a well-functioning disability support market for NDIS participants.

Hireup also demonstrates best practice in the support offered to clients with highly complex needs, either physical or mental, or challenging behaviours. This kind of complex support requires worker training on what constitutes a restrictive practice,

² <https://hireup.com.au/code-of-conduct-for-support-workers/>

which Hireup provides. Where a client is seeking mental health support, we assign a Hireup relationship manager so that client only has to tell their story once, to one person, minimising any associated trauma. As far as possible, in any situation we will be directed by the client on how to support them safely, without unnecessary administrative obstacles.

Hireup puts a huge amount of energy and effort in the NDIS registration process, as well as restrictive practice and other audit and reporting requirements. We find it deeply concerning that unregistered workers in this space are not trained to recognise what a restrictive practice looks like, and may unknowingly be providing this type of support against the rules and without the oversight of the NDIS Commission. With training and experience in best practice, Hireup is fully aware of all the ways in which support work in complex areas may become problematic, and the significant consequences.

Recommendations for regulatory change

As noted above, Hireup's operational model gives us a unique insight into the challenges facing the disability sector and how these may be addressed.

The NDIS has created a new marketplace for disability services, and Hireup has shown how to both embrace the opportunities presented by this new market *and* promote the interests of its clients as well as the disability support workforce. But not all companies in the sector operate in this way. Hireup is concerned that, in this market, the NDIS guiding principles of choice and control must be complemented by a working system of quality and safety assurance, and with specified minimum labour standards. Without such public interest measures in place, the government will not be properly protecting PWD against violence, abuse, neglect and exploitation.

We are advocating for increased government intervention in the disability sector, to address potential market failure in areas of public safety, quality control and labour standards. We are not suggesting the introduction of heavy-handed regulation that would quash innovation and competition in the disability sector. We do believe though that the relatively new market-based system of the NDIS requires stronger regulatory protections.

The NDIS is a crucial social and economic policy reform that needs more government action to ensure the best use of taxpayer funds, to ensure a sustainable and adequate disability sector workforce, and to prevent harm. In particular, the disability sector needs better government oversight and more comprehensive regulation in the areas set out below.

1. Universal worker screening checks

Worker screening checks should be required across-the-board for anyone providing work that is paid for using NDIS funding, including those working for self-managed

NDIS participants and unregistered providers. This should be a blanket minimum standard. The advent of a national system has demonstrated that worker screening is neither onerous nor expensive, and it presents a fundamental opportunity to protect potentially vulnerable clients from violence, abuse, neglect and exploitation.

The current requirement to screen workers applies to registered providers only. It is a nationally coordinated system, which sounds comprehensive but is actually an opt-in check for unregistered disability support providers. Worryingly, in the past Hireup has rejected employment applications from support workers who refuse to complete this check, only to see the services of the same workers advertised online via contractor platform businesses. The partial application of this requirement represents a gaping hole in the system of quality and safety assurance for the NDIS.

To make things worse, the operation of the worker screening check system is widely misunderstood. The NDIS Commission does not make explicit in its online information that these screening arrangements apply only *some* of the time. For example, in the NDIS Commission website's explanation of "What is Worker Screening?", it states only the below:

"The NDIS Worker Screening Check is an assessment of whether a person who works, or seeks to work, with people with disability poses a risk to them. The assessment will determine whether a person is cleared or excluded from working in certain roles with people with disability."³

The missing information here is critical - that the checks are not mandatory in most cases. This has created an extremely dangerous situation for NDIS participants and their families, who frequently assume safety checks have been performed on their workers - after all, they are allowed to spend government-provided funds on engaging their services - when in fact there may have been zero scrutiny of the character, history and even criminal record of the people welcomed into the lives of people with disability and their families in often the most personal of situations.

The practical effect of the current worker checking system is that the onus to screen for the safety and trustworthiness of unregistered providers has been placed on NDIS participants and their families, without their being made aware of this fact. As has been suggested in a recent media report about a NDIS-funded support worker who was jailed for child sex offences, it should absolutely be the responsibility of the government to verify that the people receiving government funds are fit for the job in the most basic sense.⁴

³ <https://www.ndiscommission.gov.au/workers/worker-screening/applying-worker-screening-check>

⁴

<https://www.abc.net.au/news/2022-03-25/ndis-funded-support-worker-jailed-for-child-sex-offences/100937746>

Making worker screening checks a universal requirement for those receiving NDIS payment would be easy to administer, as the systems are already in place. This would be a quick fix with far-reaching benefits.

2. More logical system of registration

There is much room for improvement in the current system of NDIS registration: it is patchy and cumbersome, leaves huge gaps in data gathering and oversight of the support workforce and scheme operations and, as mentioned above, actually encourages non-registration.

Summary of obligations:

Registered NDIS providers must:

- comply with the **conditions of registration** stated on your certificate of registration
- demonstrate **compliance with the NDIS Practice Standards**,
- Comply with **quality audits**
- comply with the **NDIS Code of Conduct**
- have an **in-house complaints management and resolution system** to record and manage any complaints you receive
- have an in-house **incident management system**, and notify the NDIS Commission should a reportable incident occur
- fulfil **worker screening requirements** and ensure all workers have been screened
- meet the **behaviour support requirements**, including reporting the use of restrictive practices to the NDIS Commission.
- complete a **worker orientation e-learning module** called 'Quality, Safety and You'
- Undertake a **suitability assessment** of key personnel to deliver NDIS supports and services upon registration and renewal
- There are also **additional conditions** under the NDIS Act 2013 which will apply to providers that deliver 'Assistance with daily personal activities'

Unregistered NDIS providers must:

- comply with the **NDIS Code of Conduct**
- be able to **effectively manage complaints**

At present it is possible for unregistered workers to provide some of the most personal kinds of disability support, such as attendant care work. As already noted, these workers are not even required to have a worker screening check. It is Hireup's

submission that NDIS registration requirements should not be an opt-in system in this way but that, instead, registration should be mandated based on the category of care provided by support workers, and the corresponding level of vulnerability of those being cared for.

Registration of varying degrees should be required for specific kinds of one-to-one support, as with the UK system of care according to which, for example, “personal care” work in the home requires registration, while other kinds of home-based work do not. In addition, rather than the current one-size-fits-all system, registration standards could be tiered, where appropriate, so that those applicable to larger organisations are more extensive than those for smaller providers who generate less revenue.

In addition to better protecting NDIS participants, more comprehensive requirements for registration would lead to enhanced data collection on how NDIS funds are being spent, as well as clarify who exactly is providing these critical services. This data would also pave the way for proactive quality and safety monitoring activities.

The NDIS Commission checks and safeguards largely do not apply to unregistered service providers. There is little or no scrutiny of their work practices until something goes wrong and a complaint is made against them to the Commission, or a problematic workplace incident is reported. As well as a troubling absence of information about the way in which a significant section of the market is delivering services, there is no room for systematic service improvement in terms of a productive dialogue between the regulator and those responsible for large-scale service delivery.

Expanded registration requirements would also allow for the tracking of vital health and safety measures - for example, COVID vaccination status and morbidity statistics in the pandemic, information on which is not currently available from unregistered providers.

In addition to not mandating registration in most areas of disability support work, the current regulatory framework offers perverse incentives not to be an NDIS registered provider of support services, for the following reasons:

1. Little benefit: There is a small commercial incentive to register, in the form of access to the quickly shrinking agency-managed market. Apart from this, there is little benefit from registration. It may be said that registration can be used as a competitive point of difference: however, experience tells Hireup that, on the whole, clients assume all workers are registered, or at least subject to safety and compliance checks.
2. High cost: For registered providers, the cost of operations is substantially more than unregistered counterparts. For Hireup, there are 17 staff members whose work allows us to meet our NDIS registration obligations, as well as product

teams to build systems to manage our obligations, and the leadership who oversee our compliance. This costs Hireup around \$2 million per year.

3. Compliance burden: Registered providers must adhere to a wide range of specific NDIS Practice Standards and Quality Indicators, and submit annually to thorough auditing to ensure compliance, including critically important reporting functions regarding restrictive practices and incidents.

Differing COVID-related requirements:

Disproportionate vaccine reporting requirements

In response to COVID-19, each state and territory introduced mandatory vaccination policies for disability support workers. These were based on the Australian Health Protection Principal Committee's definition of disability support workers as:

- a) a person who is providing intensive disability support services to
- b) persons with disability by
- c) a person engaged by a **registered** NDIS provider or a state or territory government.

As a result, the onus was significantly greater for registered providers.

Registered providers were required to report fortnightly, and in a high level of detail, while unregistered providers were able to operate (vaccinated or not) unchecked.

Regular reporting from the NDIS Quality and Safeguards Commission into vaccination rates amongst disability support workers reflected registered providers only, with zero oversight on compliance rates of unregistered providers.

For the above reasons, even some previously-registered service providers are choosing not to renew their registration, as it makes little sense in light of current commercial and regulatory developments. This situation cannot be allowed to continue, as it will further undermine the integrity of service quality and safeguards. And, as more registered providers choose not to maintain their registration - or those who maintain registration become commercially unviable - the pool of services from which participants seeking registered providers may choose will obviously shrink, leaving those participants with fewer and fewer options outside a largely unsupervised model of disability support provision.

Certain types of disability support work do require registration with the NDIS Commission, to impose a layer of regulation in specific contexts (for example, restrictive practices). However, it is possible to circumvent this requirement by running unregistered contractor support workers under the auspices of a third-party registered company, even where those workers are engaged directly via an

unregistered platform provider (such as Mable).⁵ According to such arrangements, Mable - which is not a registered provider - solicits business from an NDIS participant requiring support be provided by a registered provider, and then runs their payments through this “host” organisation in order to tick the relevant regulatory box. We suggest that this convoluted process is not a genuine means of ensuring the registered provider is taking responsibility for the quality of care provided by the Mable support worker, which is obviously the intention of the legal requirement, and is a problematic arrangement. We query the extent of monitoring and compliance being carried out by these hosts, who are connected to the support workers in only the most remote terms.

In contrast, where the support workers are employed by a registered provider such as Hireup, that provider is liable for the standard of care offered and will take steps to ensure all requirements are met, to safeguard that business’s reputation and to ensure a viable service model. Registered providers are subject to a series of reporting and compliance requirements, providing vital data for policymakers. In the disability sector, being an NDIS-registered employer means fulfilling a variety of audit and reporting functions relevant to the operation of the NDIS, as well as meeting payroll, superannuation and other liabilities that all add to the quality of information governments receive about the way in which our disability support workforce is operating, and likely future needs.

By operating an NDIS-registered provider, then, Hireup is contributing to not only the enhancement of service standards but also the refinement of the NDIS as a whole. As a registered provider, Hireup is working hand-in-hand with government and the regulator to ensure the sustainability of the entire disability support system.

3. Enhanced capacity of existing agencies to serve basic regulatory functions, and scheme governance

Hireup submits there is a greater call for the NDIA and NDIS Commission to monitor, regulate and support the NDIS market. This will necessitate a funding boost for both agencies.

As noted above, the NDIA currently does not have the capacity to track NDIS expenditure at a service level for unregistered providers. There is an absence of both qualitative and quantitative assessment of unregistered service providers overall, both of which are crucial to the performance monitoring of the NDIS. The NDIS Commission has no information on unregistered service providers until the lodging of a complaint or an incident report. Both agencies need a better capacity to gather data on how, when and where taxpayer funds are spent.

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https://mable.com.au/help_centre/thought-ndis-managed-use-registered-providers-didnt-think-better-caring-registered-provider/

The Proposed Framework promised that the new national system would enable trends and emerging issues to be identified and addressed.⁶ This performance monitoring and data collection is obviously yet to happen in any meaningful sense. It is desperately needed.

Also as noted above, the scheme itself was designed to be an insurance scheme based on evidence, not a new welfare vehicle. Insurance schemes are intended to reduce costs in the long term, which necessitates measuring any gaps between forecast and actual outcomes. This means that assessing the effectiveness of the NDIS, as well as where it might be improved, rests on the measuring of outcomes, including how the scheme is benefiting participants. This is not currently taking place. Any discussion about the usefulness, or “sustainability”, or “value for money” of the scheme, currently rests on a discussion of how much money is being spent annually, and the analysis stops there.

A welfare-based model is also highly subject to the economic conditions facing the government of the day. This has been the unfortunate preoccupation of current public discussion about the NDIS: a focus on funds spent in the wider context of the government’s budgetary constraints, completely ignoring the fundamental principle that providing support to participants in the short term should lead to enhanced community and workforce participation in the long term, and both improve the quality of life of participants *and* save the government money overall, according to the significant economic multiplier effect. The distressing situation faced by many participants in recent months who have had their plans reduced for no obvious reason also undermines the fundamental principle of the scheme, which was to provide people with disability and their families certainty of access to appropriate supports.

A lack of information gathered about service providers represents a missed opportunity in scheme review and improvement, and a worrying safety and quality gap, and also means that the NDIS is not operating as a well-functioning market for services. There are huge implications for participants, as the principles of choice and control are wholly dependent on the availability of quality independent information about service providers. Engaging a support worker for the first time is a significant decision for an NDIS participant, and it is difficult to back out of an unsatisfactory arrangement. Participants need more regulatory support to combat the high transaction costs involved in establishing support work relationships, and information asymmetry. It is not easy to find suitable support workers in the first place, it takes time to build trust, and it is not easy to walk away from a bad situation.

The recent Royal Commission into Aged Care Quality and Safety considered the issue of regulating government-funded care marketplaces:

“We acknowledge that there are particular challenges in designing and managing systems that are not private markets but depend heavily on

⁶ See above n 1, p 8.

government funding. The design and management of such ‘quasi-markets’ should be constantly refined. However, this is not a reason for abdication of system governance responsibility by the Australian Government. Rather, it calls for a particular form of system governance that reflects the needs of the aged care system, which delivers intensely personal services. These needs are vastly different from the business-consumer style governance arrangements that exist in other sectors. The aged care [regulator] needs to be proactive and adaptive, steering the system toward strategic objectives that are based on the health, safety and wellbeing of older people. It should not leave the system unattended and unwatched.”⁷

Consistent with the above, Hireup suggests that the NDIS market, which also delivers intensely personal services, is in many respects “unattended and unwatched”.

NDIS reporting and compliance:

Key Issues:

- **Non-existent reporting requirements for unregistered providers:** reporting on matters such as restrictive practices and incidents is required of registered providers only. This leaves a serious safeguarding gap for participants engaging unregistered independent contractors and hugely uneven costs for those trying to comply.
- **Non-existent auditing of unregistered providers:** similarly, unregistered providers are not subject to auditing of their services against the NDIS Practice Standards and Quality Indicators, so the NDIS Commission has no oversight or demand for accountability for the services delivered by unregistered providers.

In addition, the NDIS Commission does not currently have the capacity to offer much-needed education and guidance to participants about how to successfully utilise the market in order to secure safe and quality disability support services. Again, this is not how the regulatory framework was intended to operate. The Proposed Framework states:

“Focusing on building the capability of participants and supporting them to make connections recognises that the actions people take themselves—or that their family, friends and others around them take—are likely to be the most important component of the quality and safeguarding system. It also recognises the need for participants to be informed and discerning ‘consumers’ for the

⁷ Royal Commission into Aged Care Quality and Safety Final Report, Vol 3A, p 39.

benefits of a market-based system to be realised, in particular to encourage providers to be flexible, responsive to participants' needs and innovative.”⁸

As part of supporting people with disability to participate in the scheme, the NDIS Commission should be making readily available transparent information on the good practices, or otherwise, of registered providers. This will be discussed further below. And the NDIS Commission is also not currently providing education and guidance to service providers on how to comply with current regulatory requirements, which is yet another reason why it is simply easier not to register, to the detriment of the scheme overall.

There are numerous other gaps in the work of the regulator and other agencies related to the NDIS. The NDIS Commission currently does not have the capacity to proactively assess the extent of service provider compliance with its Code of Conduct. And the NDIA is not operating efficiently, presumably due to budgetary constraints. There are overly-long waiting times for NDIA responses to applications for various specialised services, such as Individualised Living Options. Finally, there is a significant backlog in NDIS plan reviews, resulting in default extensions of existing packages that inadequately provide for the changing needs of those requiring complex support.

4. Better performance review and tougher consequences for contravention

The fundamental job of a regulator is to provide safety and quality protections for the most vulnerable consumers of goods and services in our society. Currently, NDIS service providers compete in the NDIS market almost entirely on price. There is arguably no incentive to provide quality or cost-effective services, as there is no independent assessment of these benchmarks nor transparency in quality indicators. There is a strong need for government intervention here to improve the service quality information available to facilitate NDIS participant choice and control.

As well as gathering evidence on the safety and quality of service providers across-the-board, the regulator should take decisive action against wrongdoers. This means amending the current regime to allow for stronger penalties for breaches of the rules. The current sanctions are too weak to act as a real deterrent: a registered provider may only be deregistered, and anyone may be banned from providing services. Even then, the onus is again on the participant to ascertain for themselves whether or not their service provider is in fact deregistered and/or banned, before engaging their services.

These regulatory sanctions are inadequate, given the gravity of breaches that can happen in the context of disability support services. This is why the regulatory system should be underpinned by the introduction of criminal offences for non-compliance. Australia should take its cue here from the UK, where a contravention of that care

⁸ See above n 1, p 7.

system's clear registration requirements has the potential to attract criminal penalties in the form of fines and potential imprisonment.

As described above, NDIS participant choice and control also rests on proper reporting on service provider performance against standards. There is a desperate need for NDIS participants to be better informed about how service providers stack up against both each other and the requirements of the scheme. The Proposed Framework refers to this need for informed decision-making by people with disability:

“Choice and control also mean that participants are able to make decisions about the level of risk they are prepared to take and have the tools and information they require to make informed judgements about the quality and suitability of providers.”⁹

To this end, service providers under the NDIS should be subject to UK-style inspections by an independent agency to facilitate transparent reporting on quality of care. The UK Care Quality Commission is an independent body whose judgments and star ratings of service providers are published online, subject to real-time adjustment and review. This new agency could in some respects replicate the work of the Australian Children's Education and Care Quality Authority, which currently rates early childhood centres on whether they are excellent, exceeding, meeting, working towards or require significant improvement on national quality standards. The precedents are there, and the need for action in this area is urgent.

5. Fairer conditions for support workers

The NDIS principles of choice and control for people with disability should not be an excuse to exploit the critical disability support workforce by offering them substandard pay and benefits. Contractor model platforms in the disability sector often claim that it is their choice *not* to employ workers that facilitates flexibility in support for NDIS participants, but this is clearly a fallacy. Hireup demonstrates that responding to client requests for flexible modes of support is a feature of a platform service provider, not contracting, and can coexist with optimal labour conditions for support workers.

Hireup takes care to build and nurture the career pathways of our support workers, offering training and opportunities to move laterally within our organisation, as well as opportunities for advancement. We have a highly-responsive Trust and Safety team in the event that a support worker experiences a workplace incident or injury, to monitor and support that worker's rehabilitation and return to work. We offer training and skills development. We seek out, listen to and act on employee feedback in frequent and regular engagement surveys. We take care to comply with all the quality and safety standards of the NDIS Commission and pay award wages, and our leadership and management have received multiple accolades for their innovative and visionary approach to service provision in the disability support sector.

⁹ See above n 1, p 6.

In contrast, contracting support workers work largely without supervision and without support in the event that something goes wrong. They are offered neither meaningful training nor career development. They are literally “on their own” in all respects: in providing for their future financially (no superannuation, no paid leave), in terms of a minimum rate of pay consistent with the relevant award (the award does not apply to contractors and nor do they have collective bargaining), if something goes wrong (no entitlement to workers compensation nor personal insurance), and in a workplace collegiate sense (no training days, collaborative projects, conferences, skills-development seminars, or mentoring). In short, this is a truly precarious mode of work that has no promise of long-term consistency or improvement in working conditions, and no likelihood of advancement.

It is clear that ameliorating conditions for support workers promotes the quality, skills and stability of the disability workforce. But there is an added dimension to the need to ensure fair pay and conditions for workers where the funding for those services flows from a government source like the NDIS, with participant plans calculated by reference to the nominal hourly rates under the relevant modern award. At the very least, there should be a prohibition against disability support workers being paid at below-award rates. Similarly, Hireup argues that in this specific context the usual employee protections should apply, even should support workers be accepted to be non-employee contractors - that is, protections relating to workers compensation and the mitigation of risk. These steps are consistent with the aim of the NDIS, which was designed to maintain and strengthen the existing support workforce, not undermine it.

The above protections should be at least equivalent to the relevant modern award provisions. Currently, this award covers some of the workforce, those employed by traditional service providers and platform providers like Hireup, but not those working as contractors under other platform arrangements (or individual contracting engagements arranged informally through online classifieds or social media). The award-style protections should be applied across the entire workforce. In addition, all NDIS-funded disability support workers (including contractors) should be entitled to workers compensation equivalent to that applicable to “workers” under state and territory laws. Finally, all NDIS-funded disability support workers should benefit from the superannuation provisions applicable to “employees” under Commonwealth law.

6. Protecting NDIS participants using contracting platforms from unforeseen liabilities

Another problematic gap in the quality and safety regulation of services offered to NDIS participants arises in the context of legal responsibilities for sham contracting, and work health and safety. Sham contracting is when a person or organisation purports to engage a worker as a contractor, but actually directs and controls their work to the extent that it would meet the legal requirements of an employer-employee relationship. Where a sham contracting relationship is found to exist, the deemed

employer may be liable for back pay and other entitlements equivalent to employment under the relevant award.

This is relevant because, where an NDIS participant engages a contractor support worker using a platform business, in some circumstances that participant may be construed as an employer in a sham contracting situation. (A platform employment model of service provision such as Hireup obviously removes this potential liability.) In addition, an NDIS participant hiring a support worker via a contracting platform may be liable under work health and safety laws for any harm suffered by the worker. In the national model work health and safety laws, the wide definition of an employer, or “person conducting a business or undertaking” (PCBU), is likely to encompass the NDIS participant in this situation.

The client accessing care workers from a contracting platform typically is not warned of the above employer-like liabilities, and the associated risk. It is unreasonable to expect NDIS participants to be aware of the legal complexities of the situation, and to take necessary precautions. Just as the NDIS Commission currently offers inadequate information to NDIS participants and their families about how provider registration and worker screening works, these quality and safety risks associated with contracted workers are not common knowledge. Legislative amendment in the WHS space would go some way towards fixing the issue, but the problem of sham contracting remains, requiring a more comprehensive reassessment of the appropriateness of allowing widespread use of contracted support workers in the disability sector.

Conclusion

As the Commonwealth government prepares to review NDIS design, operations and sustainability, it is timely to consider both how the scheme may be optimised, to reach its true potential, and where aspects of its implementation have been neglected, to the detriment of people with disability. The government’s reframing of the public debate on the “cost” of the scheme is important, as is targeting poor service provision and better informing participants about how to safely wield their choice and control. Support workers under the scheme deserve fair pay and conditions, with long-term career options, and should be more comprehensively protected from risk.

There is a strong and obvious connection between closer monitoring of the operation of the NDIS - and intervention by the regulator where services are substandard - and the prevention of harm to people with disability. The NDIA and NDIS Commission should be sufficiently resourced to administer, track and regulate the scheme responsively, as trusted partners to participants and providers alike, not adversaries. Best-practice principles of regulation should be translated into improvements to the scheme’s parameters and operation. Small steps in the right direction will deliver far-reaching benefits.