



23 March 2017

Review of NDIS Costs
Productivity Commission
GPO Box 1428
BARTON ACT 2600

Maurice Blackburn
ABN 21 105 657 949
Level 8
179 North Quay
Brisbane QLD 4000
PO Box 13247
George Street, 4003
DX 1060
T (07) 3016 0300
F (07) 3236 1968

Dear Commissioners,

**Maurice Blackburn Submission in response to
*National Disability Insurance Scheme (NDIS) Costs
Issues Paper (the "Issues Paper")***

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1100 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 annually represents thousands of injured and disabled clients. We are in a unique position to understand the challenges that face the injured as we have seen firsthand the human cost of injury in the workplace, on our roads and in other environments.

In theory, the primary objective of a disability insurance scheme should be to provide adequate and appropriate disability care for those with permanent disability, and to provide effective rehabilitation services and return to work programs for those who are temporarily disabled due to injury or illness. Where circumstances require ongoing support, choice and control need to be at the centre of design. This must all be achieved within a financially sustainable framework that protects rights and embodies a balance between fair and just compensation and scheme affordability.

Maurice Blackburn welcomed the creation of a National Disability Insurance Scheme (NDIS) and a separate National Injury Insurance Scheme (NIIS) in 2013, which were intended to further fund the disability sector and alleviate significant levels of unmet need. However, we were critical of some aspects of the proposed scheme, as framed by the earlier Productivity Commission. The scheme is in the process of its final design. The design conceived by the earlier Productivity Commission Report, and embedded in the existing legislation and intergovernmental arrangements, has aspects that are deeply flawed. The consequences of these flaws are now bearing out, as roll-out of the scheme commences around the country.

We have played a constructive role in assisting State and Territories in introducing the initial pillars of the NIIS. However, there are fundamental issues in the NDIS and NIIS arrangements that must be addressed. NDIS-eligible individuals, their families and carers are suffering delays and confusions; they need certainty. Many risks and some gaps remain. Any action taken to improve the level and quality of disability care and support services must be done in a manner which is efficient, effective, equitable and accountable. To help inform the final design of the full scheme, our **enclosed** submission discusses the issues which require rectification and offers a policy or program response where possible.

Yours sincerely

Rod Hodgson
Principal
MAURICE BLACKBURN
Accredited Specialist Personal Injury Law





**Maurice
Blackburn**
Lawyers
Since 1919

**Submission to the
Productivity Commission
in response to the
National Disability
Insurance Scheme Costs
Issues Paper**

March 2017

Scheme design and rollout to date

The NDIS

Maurice Blackburn supported the resourcing of the historically underfunded disability sector but unfortunately the rollout has reflected a number of the concerns we articulated in our previous submissions.

We make the following observations in relation to Scheme intent and the experience of our clients, lawyers and those we work with to date:

- Initial costings were inadequate. There remain serious concerns about the scheme being extremely costly and possibly thereby unsustainable. Appropriate levels of funding must be committed to the scheme.
- Setting the criteria for eligibility has proven to be a difficult task. Disabilities are many and varied. Ensuring applicants are afforded an opportunity to put their case is essential. Without eligibility criteria being much clearer, cost and sustainability concerns will continue to manifest.
- The effectiveness and affordability of a disability insurance scheme depends, in part, on the interaction between benefits delivered under the scheme, and other systems already in place that can be used to gain access to disability care and rehabilitation.
- NDIS-eligible individuals are having difficulty understanding and interacting with the scheme, negotiating plans, and finding and negotiating supports with providers.
- Providers, formerly ambassadors for the scheme, are deeply frustrated and angry about their interactions with the NDIS. Most find the registration process a matter of great complexity. The IT dysfunction within the NDIA is regarded by most providers as inexcusable.
- Safeguarding the process and ensuring fairness and personal autonomy to the greatest degree must be the paramount considerations at all times.
- The centralised approach of the NDIA may have superficial appeal, but the loss of funding to State-based organisations is, in tandem with the NDIS not being ready, creating a vacuum for participants and providers.

The NIIS

Maurice Blackburn has significant issues regarding the NIIS, which are summarised as follows:

- The NIIS is intended to “complement” the NDIS.¹ Maurice Blackburn believes the catastrophically injured should be able to access the NDIS as a safety net for those that are not covered by existing schemes. Furthermore, based on the key principle of choices, those with other rights should be given the option of opting in to such a scheme. Loss of the autonomy to do so should not be forsaken.
- Maurice Blackburn does not support the curtailing of common law rights as anticipated in the original Productivity Commission Report of 2011. The stripping of rights as part of the NIIS is contrary to the concept of choice and control, promotes bureaucracy and waste, and ultimately pushes the cost burden to the taxpayer.

Although the 2011 Productivity Commission’s reports did not expressly state that New Zealand’s Accident Compensation Corporation (ACC) scheme was the envisioned endgame for their proposed nexus between the NDIS and NIIS, plainly that was the case. Unfortunately, some associated with that Report and subsequent governance of the scheme:

- (i) Had a long history of attacking the common law as a pillar of the delivery of compensation and damages as one means of supporting those with disabilities,
- (ii) Facilitated, in Chapter 17 of the report, a dishonest critique of the common law, and
- (iii) Completely failed to identify the fundamental flaws in the New Zealand scheme.

New Zealand's ACC is unique. This is because it is a failure on both fairness and economic grounds. By design, and over more than 40 years, it has effected a fundamental shift of financial responsibility for various forms of undesirable conduct, from the wrongdoer and its private insurer, to public entities, and ultimately the taxpayer and community. In contrast, the UK, Canada, USA and Australia, all maintain a robust common law system, albeit one with statutory modification to meet particular circumstances. The economic folly of long-tail schemes such as the New Zealand ACC scheme must be clearly understood in the context of the review of a scheme conceived by an earlier Productivity Commission which had an unhealthy ideological attraction to that scheme. We will expand on this theme, below.

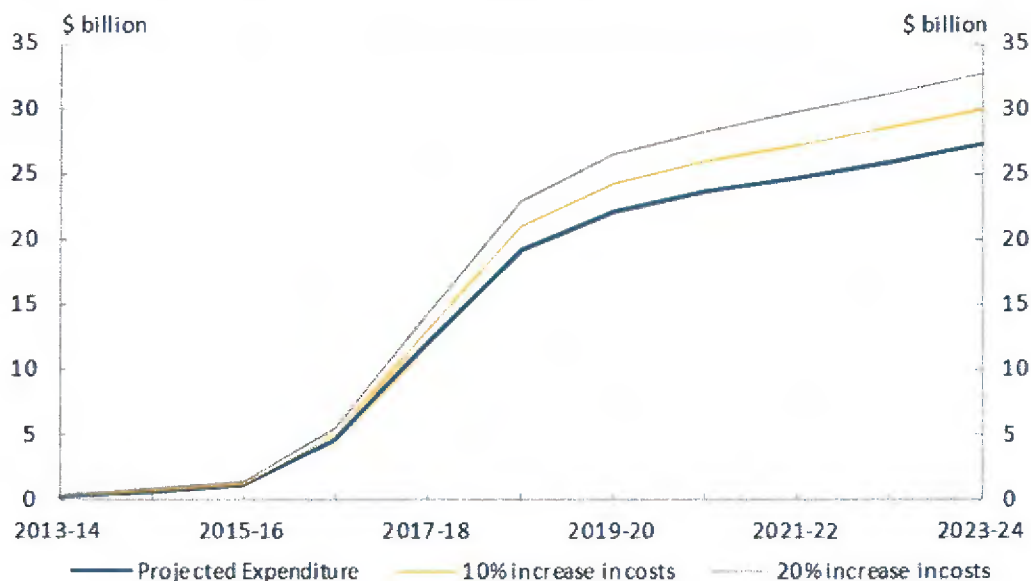
Scheme costs

What drives scheme costs?

QUESTIONS (p10)

- Are there any cost drivers not identified above that should be considered in this study? If so:
 - how do they impact costs in the short and long term?
 - how, and to what extent, can government influence them?

When fully implemented in 2019-20 the NDIS is expected to benefit approximately 460,000 Australians with disability and will have a total annual cost of \$22.1 billion. While we hold a wide range of reservations of the wider recommendations of the National Commission of Audit, their modelling of an unanticipated increase in NDIS participant numbers or package costs demonstrated that there will be a substantial impact on total expenditure.²



Source: Department of Finance and the National Commission of Audit.

For any disability insurance scheme to be financially sustainable, it should ensure expected costs associated with entitlements, administration of the scheme and capacity building is appropriately balanced against expected revenue such as that generated from taxation, compulsory contributions to insurance, or other means and investment over a forecast horizon.

As the Issues Paper rightfully acknowledges, financial sustainability is essential if scheme participants are to consistently receive reasonable and necessary care while they remain in the scheme. Cost overruns could jeopardize the level of care and support participants receive, or result in a return to some of the less desirable features of the previous system (including, for example, an inequitable rationing of support services). Cost overruns could also lead to pressure to reduce the scope and certainty of care and supports provided under the NDIS, or require governments to provide more funding at the expense of other programs.

This would be a disaster for current and future scheme participants. The oversubscribed Australian Capital Territory scheme, and the well-publicised experience of children with

autism in South Australia, is in our view a microcosm, and early examples of what may occur on a widespread basis should remedial action not be taken.

A key challenge facing providers is the NDIS pricing model. A recent Curtin University study of 180 disability groups found 42% of providers were generating a profit of less than 3%. For many providers under the scheme, the risk of financial collapse is very real.³ The pricing model problem is a consequence of the NDIA's desire to be a price-setter for the entire national disability sector. The central command and control model fails to recognize local market dynamics. In rural and regional areas in particular, even if availability of services can be determined, differential pricing is common.

The volume of plan errors is adding to this cash flow issue. For example, in New South Wales, the Department of Ageing, Disability and Home Care (ADHC) stops funding the provider at the time of plan approval, even if that plan is incorrect and requires review. One charity CEO said that 80% of its clients' NDIS plans required review because of incorrect information and communication issues between local area coordinators and NDIA planners. This places providers in the difficult position of being required to deliver services without payment for those clients waiting for their plan to be amended.⁴

Scheme boundaries

Eligibility for the NDIS

QUESTIONS (p15)

- *To what extent have the differences in eligibility criteria in the NDIS and what was proposed by the Productivity Commission affected participant numbers and/or costs in the NDIS?*
- *Are there other aspects of the eligibility criteria of the NDIS that are affecting participation in the scheme (to a greater or lesser extent than what was expected)? If so, what changes could be made to improve the eligibility criteria?*
- *To what extent is the speed of the NDIS rollout affecting eligibility assessment processes?*

The Issues Paper notes that in the first quarter of the transition phase, an additional 28,684 people were deemed eligible to enter the scheme. Critically, the Issues Paper also states that the NDIA projects that by 2019-20 the NDIS will include 460,000 participants and cost about \$22 billion each year. These projections originate from work undertaken by the Commission for its 2011 report on *Disability Care and Support*. At that time, without sufficient clarity on eligibility criteria, the Commission projected that the scheme would cover 411,000 participants and would cost \$13.6 billion (gross) at maturity. The estimates have been updated by the NDIA to include: inflation and population changes; costs associated with participants aged over 65 years (who enter the scheme prior to 65 years); and additional epidemiological data on incidence and mortality rates for different disabilities. Specific cost pressures identified include:

- Higher than expected number of children
- Increasing package costs
- Potential participants continuing to approach the scheme
- Lower than expected numbers existing
- Mismatch between benchmark package costs and actual package costs

Maurice Blackburn regularly works with clients, disability and support groups, advocacy organisations and other lawyers. Of the hundreds of people with some form of interaction with the NDIS, the experiences and concerns are consistent with the above analysis.

More worryingly though, if providers cannot meet demand, people with a disability risk ending up on waiting lists or missing out on services.

We believe that a disability insurance scheme should base compensation on the level of expected need for disability care and not the level of impairment. Impairment level may not serve as a good proxy for the level of disability care needed and may result in the disability care needs of some people not being met if their needs are greater than average. A functional approach based on expected need reduces the risk of depriving people of particular care and support based on a particular diagnosis. For example, a person with a severe physical disability may be in a better position to safely live alone with appropriate appliances than someone with a moderate intellectual disability who cannot safely cook for themselves. Both the TAC and WorkSafe schemes provide access to medical and disability services based on reasonable need for care.

We note that the architecture of the eligibility criteria remains vague. The Act does not contain eligibility criteria; it contains broad statements on what will underpin the criteria. The eligibility criteria are found in the NDIS Rules, and are built around the notion of 'reasonable and necessary supports'. It is not an income support scheme; it is confined to aids, equipment, care, accommodation, and non-income supports.

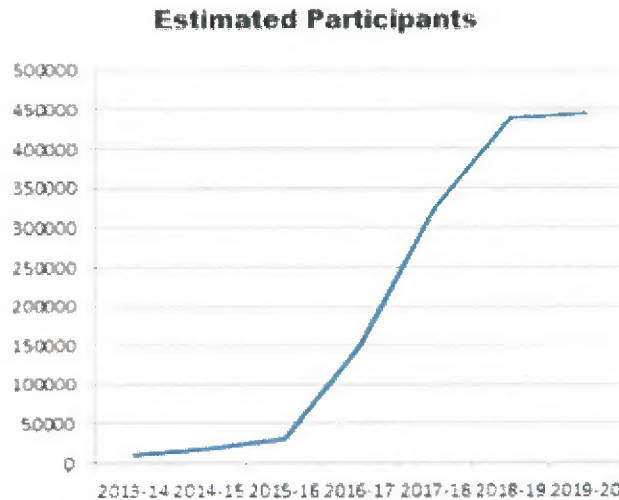
The NDIA say that they will help people who have a significant and permanent disability and who need assistance with everyday activities. This includes people whose disability is attributed to intellectual, cognitive, neurological, sensory or physical impairment, or a psychiatric condition.⁵ However, there is a lack of clarity on the "significant and permanent" criteria. Contributing to this problem is a lack of clear guidance for staff on the way the Scheme operates, including eligibility and reasonable and necessary support.⁶ We suggest more detail on eligibility criteria be placed in the Act. It is essential to clarify the boundaries which the 2011 report, and the legislation, left opaque.

A responsive NDIS will ensure disability is client-oriented, such that care is responsive to client expectations and preferences, is delivered in a timely manner, and clients are satisfied with the amount and type of care received.

We believe the roll-out timeline of the NDIS is highly ambitious and increases the serious risk of inadequate delivery of services to participants. It also poses significant financial risks to the scheme as a whole. The current schedule anticipates that the system will be able to satisfactorily cope with an increase in the number of people covered by the scheme from 30,000 in 2015-15 to 450,000 in 2018-19.⁷

In March 2014 an independent report into the NDIA noted that the "bringing forward of the commencement date, together with the results of compromises to the proposed design of the Scheme in response to stakeholder concerns, has caused a large number of significant problems". They stated that the "biggest impact of the decision to bring forward the start date is that all effort was on getting to the trial phase and insufficient effort was devoted to preparation for the next phases of the rollout for the Scheme. As a result, there are some challenges emerging".⁸

They noted that the biggest challenges were therefore just over the horizon and included this graph which illustrates the point:⁹



They noted that ramping up numbers by about 300,000 people between 2017 and 2018 would put pressures on the organization and the available workforce in the disability sector. The numbers they estimated may well prove to be a gross underestimate.

As recently as late July 2015 it was reported that children with autism spectrum disorder have flooded the South Australia trial site of the NDIS. The bilateral agreements between the States and Commonwealth predicted that 5085 children aged up to 14 would be eligible, yet there are about 10,000 and 46% of them have autism.

There is some likelihood that such a blowout would be replicated in the full rollout, and is a subset of a broader issue: poor planning and analysis. They said: “The agency is like a plane that took off before it had been fully built and is being completed while it is in the air.”¹⁰ They strongly recommended that the timetable for rolling out the NDIS needed to be reassessed.¹¹

A prudent approach would be to consider a slower roll-out schedule to help minimise the risks associated with the introduction of the scheme. An extended phasing in of the scheme would need to be re-negotiated with the States on the basis of independent assessment of the preparedness of each jurisdiction and associated rollout risks. A revised rollout schedule could involve a complete cessation of the rollout on a regional basis for a specified period, to enable the remedial work to be undertaken, and a fresh analysis of readiness after that period.

Aside from managing financial risks, a roll-out over an extended period would avoid significant frustration and distress for those living with disabilities and their families, and allow lessons learned from the early results to be incorporated into the scheme’s final design.

The intersection with mainstream services

QUESTIONS (p16)

- *Is the current split between the services agreed to be provided by the NDIS and those provided by mainstream services efficient and sufficiently clear? If not, how can arrangements be improved?*
- *Is there any evidence of cost-shifting, duplication of services or service gaps between the NDIS and mainstream services or scope creep in relation to services provided within the NDIS? If so, how should these be resolved?*
- *How has the interface between the NDIS and mainstream services been working? Can the way the NDIS interacts with mainstream services be improved?*

Under recent reforms to the health system, the Commonwealth Government is taking additional responsibility for the funding of health services, has moved to improve and unify standards for care, and has introduced greater accountability and transparency. However, it has not taken direct responsibility for service provision and indeed has sought to devolve greater responsibility to the local level.

The effectiveness and affordability of a national disability insurance scheme depends, in part, on the interaction between benefits delivered under the scheme, and other systems already in place that can be used to gain access to disability care and rehabilitation, including:

- Income and welfare support services through social security;
- Health and aged care system;
- Other disability support systems, such as HACC;
- Employment services, education and training; and
- The judicial system and access to the common law of tort.

It is critical that the Australian Government plays a leadership and coordinating role in the future delivery of disability care and support. The Australian Government has entered into bilateral agreements with the States and Territories defines the types of services to be provided and funded through the NDIS and those that are to be left to mainstream services. However, poorly defined boundaries in this regard raise the risk of gaps in services, duplication of services, and cost shifting between agencies or governments.

Ensuring that the suite of policies focusing on related areas such as disability care and support, health and aged care are coordinated across the whole of government is most likely to reduce overlapping responsibilities and inefficiency, and hence maximise the available resources that can be used to improve service delivery.

We suggest the scheme should deliver access for individuals to an experienced intermediary who provides assistance and advice in choosing the most appropriate care services, locating providers and budgeting for the costs of care. For example, in the UK a local authority is available to undertake an assessment of an eligible individual's care needs and the care recipient can provide input into their care plan on the types of services they prefer. We have specific concerns that the theory of choice is being overrun by the reality of centralised, cookie cutter approaches to package designs. A simplistic approach that seeks to apply a one-size-fits-all approach to the task of improving disability care and support in Australia risks becoming bureaucratic, unwieldy and unresponsive to specific community needs. The early signs, a mere nine months into the current rollout schedule, are that those risks are already manifesting. As such, any proposed scheme with respect to severe and profound disability that may be considered has to be developed having regard to, and be

able to work alongside, existing compensation systems that are often integrated into broader policy approaches to provide holistic outcomes.

One consequence of the foreshadowed introduction of the NDIS was for many State government funded organisations to either vacate the field, or reconfigure themselves to meet the anticipated NDIS criteria to be funded. This engendered a vacuum: the NDIS was obviously not ready, yet the funding of State organisations was withdrawn or curtailed. Many, probably most, such organisations had an admirable record of provision of services in an efficient and effective way. Cooperative federalism, whereby State-based and funded organisations with long and positive histories of service-delivery are given funding, is one way to address the profound internal dysfunction of a scheme which has, rightly in our view, been likened to a plane being built whilst in flight.

The Information, Linkages and Capacity building (ILC) services roll out which is expected in mid-2017 with a \$132 million budget is expected to develop a system to provide assistance to 1.2 million people. We are concerned with the size of the ILC's mandate compared to its relatively small budget.

Without an effective ILC program, people with disability will not achieve genuine community inclusion and NDIS participant numbers may blow out as people with less severe functional impairments are forced to exaggerate their disability in order to get something from the NDIS.¹²

This interaction with other schemes is lived on a daily basis by our lawyers and many of our clients who receive lump sum compensation payments.

Any participant who receives compensation for the types of supports the NDIS otherwise provides is obliged to repay the NDIS for any funding they had previously received for the compensable injury.

The compensation will also be taken into account when assessing future funding plans and the participant will likely be required to make a contribution towards their plan (known as a Compensation Reduction Amount or CRA). Such arrangements are appropriate because the participant has already effectively been compensated for their injury and disability. Crucially, they also help reduce the NDIS's liabilities and secure its financial position.

Thousands of claims are determined each year for people who are likely to be eligible for the NDIS.

However, before these claims can be settled, the legal representatives need an estimate of the potential repayment to the NDIS for past supports, and an estimate of the likely CRA. Without those estimates, the participant's legal representatives cannot advise their client on the impact of any settlement on their NDIS entitlements.

Currently, we are experiencing significant delays in obtaining the information from the NDIA, preventing the timely settlements of claims. We are hopeful that this will be addressed quickly.

The intersection with the National Injury Insurance Scheme

QUESTIONS (p17)

- *How will the NIIS affect the supply and demand for disability care services?*
- *What impact will the full establishment of the NIIS have on the costs of the NDIS?*
- *Are sufficiently robust safeguards in place to prevent cost shifting between the NIIS and the NDIS?*

An ongoing major reservation of Maurice Blackburn has been the staged implementation by stealth of a New Zealand-style Accident Compensation Corporation, alluded to briefly, above.

The clear intent of the *2011 Disability Care and Support Report* was to move to a national no-fault scheme and then to merge, by 2020, the NDIS and NIIS in the medium term, leading to a New Zealand-style scheme.

We believe such a scheme would be dangerous from many perspectives.

Firstly, the New Zealand experience has been of the diabolical combination of stripping away rights, blowing out costs to be paid by the taxpayer and undermining the dignity of those injured and disabled due to the stripping back of support over time.

In the United Kingdom, United States, Canada and Australia; the common law has been and continues to be a foundation stone for seeking compensation. The common law has proven to be a flexible and resilient facilitator of access to justice in all of these jurisdictions.

Maurice Blackburn does not support the abolition of a common law entitlement for those whose disability arose in compensable circumstances. A wrong doer should be liable to “correct the wrong” and not the public purse. We consider it inappropriate to require that a person take funding for their needs in a prescribed manner when an alternative means of doing so may be far more suitable.

Furthermore, at a time when budget deficits are a problem, the likely outcome of a national no-fault scheme would be the cutting of benefits, as has occurred in New Zealand in response to successive budget blowouts.¹³ This would be a catastrophe not only for injured people on the basis that we would likely see a leveling down of benefits – a race to the bottom – but it would also be a huge impost on the public purse at a time when governments, Federal and State, are already under significant pressure. That pressure will only increase as a tsunami of baby-boomers increasingly impacts our health and aged-care sectors.

When New Zealand socialised the cost of various behaviors in the early 1970s by introducing the ACC scheme, one major consequence was a fundamental change in the private insurance market. Entities and individuals who had previously carried some of the risk of negligent behaviors by privately insuring for those risks, ceased to do so.

The primary arguments in support of a no-fault based system is reduced barriers to accessing disability care and better health outcomes for individuals due to earlier access in a non-adversarial climate. However, removing existing rights to access compensation through the common law and offering statutory based compensation reduces the capability for some individuals to achieve good health, particularly those with greatest need, thereby creating inequities. Statutory-based compensation is usually based on an ‘average’ level of impairment and fails to take into account the individual situation of the person. Given each person’s welfare is based on their own individual circumstances, common law provides the benefit of flexibility in delivering a personalised compensation arrangement that reflects the

nature of the individual's needs and enables them to choose the manner in which their care and support is provided. As continues to be made abundantly clear through the roll-out of the NDIS, one size does not fit all, and these no-fault schemes do not appreciate this critical feature.

Another major benefit associated with the common law for persons injured as a result of negligence is that a lump sum monetary award or settlement gives the disabled person choice to make decisions as to their own support and care services and to access rehabilitation and employment services where appropriate and when they need them.

Equally important, to restrict or remove existing common law rights would remove incentives for good behavior and risk increasing the cost of disability care and services. Surely, the optimum approach would be for both government regulation and the common law to operate in tandem to promote risk minimization.

The 2011 Report estimated that the NIIS would be mature 40-60 years from when it commenced. However in the meantime they recommended reviewing both schemes in 2020, with a view to possibly combining the schemes into a national, no-fault scheme similar to that in place in New Zealand.¹⁴ The New Zealand-type NIIS model never lived up to the high expectations that brought it into being. One of the main arguments for the New Zealand scheme was and is its economic efficiency. This claim has not been borne out. Very early in the scheme, it became apparent that the scheme was becoming too costly. Repeatedly over four decades, the response in New Zealand has been to transfer funds from consolidated revenue to try to keep the scheme solvent, in lockstep with regularly reducing the benefits available to scheme participants. The scheme is perennially insolvent by any accepted commercial criteria. It is the worst of all worlds: miserly benefits, large bureaucracy, poorly funded and regularly needing taxpayer injections of funds. The finality of the common law, in addition to the benefits articulated above, reduces the numbers of people in long-tail schemes.

The experience of the South Australia Workers' Compensation scheme is also instructive. In 1994 the South Australian government abolished the ability to pursue negligent employers in that State, and introduced a pure no-fault scheme. Almost immediately it got into financial trouble, and ended up being \$1.4 billion dollars in the red, with a 70% funding ratio. For over a decade, two further concerning policy responses emerged to deal with the continuing funding problems: benefits for people injured at work were progressively reduced, and premiums paid by employers increased to about double those of comparable jurisdictions.

The lived experience of pure no-fault, long-tail schemes is that:

- (i) Those schemes always become financially unsustainable;
- (ii) Those with disabilities suffer because the policy responses involve both a diminution of benefits, and extinguishment of appeal rights;
- (iii) Those schemes reduce victims' incentives to take care; and
- (iv) The taxpayer foots the ever-increasing bill.

Market readiness

Will the workforce be ready?

QUESTIONS (p24)

- *Is increasing the NDIS workforce by 60,000-70,000 full time equivalent positions by 2019-20 feasible under present policy settings? If not, what policy settings would be necessary to achieve this goal, and what ramifications would that have for scheme costs?*

The workforce is not ready.

The 2011 Productivity Commission report paid wholly inadequate attention to workforce infrastructure planning. And the NDIA's approach to workforce planning has been deficient from inception.

In addition to funding issues and the timetable for implementation, workforce infrastructure planning is a fundamental issue for the NDIS in terms of quality outcomes and sustainability. A high-quality, better skilled workforce is needed if the quality of support to individuals with complex needs is to improve.

This has been an issue of ongoing concern for our firm and those we work with.

While the responsible Department and the Authority did not have a clearly documented work program to implement its disability workforce development responsibilities, the Agency documented a program of activities to operationalize its market transition responsibilities. However there was no published overall work plan which sets out timeframes and deliverables.¹⁵ Measures should be put in place to enhance skills training and capacity of the disability workforce.

An Australian National Audit Office report tabled in November 2016 revealed a significant shortage of supply in the workforce required to meet the NDIA targets saying, "It will take at least a decade for the right number of disability workers and businesses to come online".¹⁶

Strategies to address the growing shortage of workers are likely to involve either reducing quality standards or increasing costs, or both.¹⁷ 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:

- (i) Unscrupulous entities and individuals will enter the market, seeking to exploit the funds available;
- (ii) Unskilled and untrained people will be recruited to work with people with complex multifaceted needs;
- (iii) Those individuals will be highly vulnerable to exploitative conduct by their employing entity;
- (iv) Participants will suffer detriment, or die as a consequence; and
- (v) The intended benefits in increased workforce participation will be illusory.

As the Issues Paper sets out, some jurisdictions have greater capability to meet workforce targets than others. The challenges in this regard are always greater in rural and remote areas. For example, Northern Sydney and Eastern Adelaide already have more than 80% of

the expected workforce needed for the full operation of the NDIS, whereas South-Western Sydney, Southern Melbourne and Beenleigh in Queensland presently have less than 40% of the expected workforce needed. This suggests that workforce readiness for the full NDIS will be patchy, and that some regions may struggle to be ready even over the long term.

The Issues Paper correctly states that an ageing population will reduce supply and increase demand for carers. The incidence of disability increases with age, and so an ageing population will require more disability carers. The aged care sector is also likely to demand more carers as the population ages. This will lead to greater competition with the disability care sector and potentially lead to higher wages, and greater scheme costs.

If workforce readiness is, at best, patchy; and it is accepted that workforce planning is a fundamental objective which will take considerable time and investment; the case for a change in rollout schedule is compelling.

Furthermore, the Issues Paper also highlights the issue that carers – both formal and informal – are older than the general population, on average. Many formal carers are approaching retirement age and will need to be replaced. Similarly, increasing numbers of informal carers, as they age, may be unable to provide care for family members or friends with a disability, and will need to be replaced by formal carers. In either case, additional carers may be needed beyond those anticipated by the scheme, which may increase costs.

Will participants be ready?

QUESTIONS (p27)

- *How well-equipped are NDIS-eligible individuals (and their families and carers) to understand and interact with the scheme, negotiate plans, and find and negotiate supports with providers?*

As acknowledged by the Issues Paper, for many participants entering the NDIS, the ability to exercise choice and control over the quantity and scope of supports will be a new experience they hope will provide them with freedom, dignity and a better quality of life. However, for some, entering the scheme, determining a plan of supports, finding providers, and negotiating services will be daunting and difficult, and perhaps especially for self-managed participants. For example, a recent New South Wales State Government survey indicated there is low awareness and understanding of the scheme. The survey found 62% people with a disability have still not heard about how to access the scheme and 57% are unaware of when the program starts.¹⁸

According to Fran Connelly, author of *How to thrive under the NDIS*, currently the plans on the portal are often very different to the plans the participants eventually receive from their planner, and there have been reports of lengthy delays in the process, with some plans taking up to eight weeks. There have also been many cases of rushed planning meetings held over the phone, and in some instances, local area coordinators with no prior disability experience. Moreover in July 2016, people who chose to self-manage their NDIS plan could no longer obtain their money in advance, where previously a float of one month's funding had been available. Many families have been forced to pay upfront for services without assistance. For clients and their carers these sorts of issues only add to the confusion and stress.¹⁹

The experiences outlined above are consistent with anecdotal feedback from participants' providers. Moreover, those providers commonly report being reticent to be in any way critical

of the NDIA for fear of being targeted for negative treatment by the bureaucracy, and/or their organisation risking being defunded.

As the Issues Paper rightfully sets out, the response to these challenges could have a bearing on scheme sustainability, both in terms of costs and the wellbeing of participants. If participants find it difficult to negotiate the right individualised supports, then the insurance approach of the NDIS will be undermined – if participants get the wrong supports at the wrong time, scheme costs would be expected to increase. Alternatively, if participants find it difficult to find providers and negotiate services, then this could lead to underutilised supports, which would improve the bottom line of the scheme, but could have ramifications for the wellbeing of participants and future scheme costs.

Governance and administration of the NDIS

QUESTIONS (p28)

- *Do existing administrative and governance arrangements affect (or have the potential to affect) the provision of services or scheme costs? What changes, if any, would improve the arrangements?*
- *Are there appropriate and effective mechanisms for dealing with disputes with the NDIA?*

Governance and administration

As stated in the Issues Paper, measures to underpin good governance will be critical to the ability of the NDIS to provide services to people with disabilities over the long term. A board should be appointed based on their expertise and skills in managing large insurance funds and delivering a significant policy and organisational reform.

Good governance and administration of a national disability insurance scheme requires separation of regulatory and service functions to ensure appropriate incentives exist to minimise the potential for a conflict of interest between setting appropriate service standards and providing the service. It is crucial that the regulatory body be independent, with the primary task of regulating in accordance with established legislation.

The Board Members should be focused on the governance of the organisation and not be pursuing personal ideological agendas that would undermine the broader goals of the organisation. Issues of conflict should be tightly managed and the highest standards of governance pursued.

The resignation of the Chief Executive Officer and his departure in late 2017 provides the opportunity to provide a fresh approach at the top of the NDIA. We believe the incoming CEO should have a pragmatic, realistic approach to questions of implementation. They should not be pursuing a wider agenda (eg based on the New Zealand model), and they should be prepared to collaborate with others in finding the best set of outcomes for Australians with a disability.

Appeal and review process

Appropriate and effective appeal and review processes within a national disability insurance scheme are critical to establishing access to disability services and the amount of compensation an eligible individual receives. Their availability also has a direct influence on efficiency, as extended delays in the decision making process can impose financial hardship

on workers, particularly where they use their sick, annual or long service leave while waiting for a decision.

At present, a client or potential client of the NDIA can pursue a decision at the Administrative Appeals Tribunal (AAT) and have a finding in their favour but they are unable have costs paid. It creates an asymmetry of power that will lead to untested decisions and unfair outcomes. It is also contrary to the intent of Scheme to provide fairness and control to people with a disability.

A Comcare-like model could be adopted where a win in the AAT entitles a 75% costs on Federal Court scale; but no adverse costs if the participant is unsuccessful.

It is obvious that clients need an avenue to challenge a decision when the Scheme is doing things for the first time. It is in the interest of everyone – the person at the centre of the decision, their family, the Authority, the Government and the taxpayer that the best decisions are made and the scheme is a success.

Conclusion

If it is done right, the NDIS will provide Australians with a disability easy and much-needed access to quality care and support. Clearly, the NDIS is facing major challenges many of which have been miscast as minor, teething problems. To deliver transformational change as is needed, major architectural changes are required, together with realism on the issue of the timing of rollout.

Much is yet to unfold concerning the realities of what the NDIS will offer the majority of Australians with disabilities, and society at large. We commend the view that haste will engender bad outcomes if a reasonable assessment is that the preparation for roll-out is inadequate. This is a once in a generation reform for people with disabilities and their families, and we need to do this properly.

There are also complex, significant questions to be asked about the interaction between the NDIS and the NIS and other parts of the Australian disability landscape.

The macroeconomic challenges posed the evidence, internationally and nationally of long-tail schemes are massive. The 2011 Report's endgame is bordering on utopian, and it was unrealistic for those across the Tasman to think it could work in economic or fairness terms. It is no surprise that the New Zealand scheme has not been replicated elsewhere. The multiple profound inequities which result from such a scheme may not have been foreseen by those in New Zealand 40 years' ago, but the dangers are writ large for us now.

Maurice Blackburn wants a modern Australia to be a place that supports people with disabilities, provides opportunities and choices, and enables people to live independently, with dignity. A fair and adequate compensation system with access to common law rights needs to be part of that future.

-
- ¹ Treasury, National Injury Insurance Scheme, <http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/National-Injury-Insurance-Scheme>
- ² National Commission of Audit, National Disability Insurance Scheme, <http://www.ncoa.gov.au/report/phase-one/part-b/7-2-the-national-disability-insurance-scheme.html>
- ³ 'NDIS rollout: Research finds disability groups face collapse', 7 September 2016, The Sydney Morning Herald
- ⁴ Fran Connelly, FPAdmin, 12 December 2016, http://www.fpmagazine.com.au/347588-347588/#_ednref3
- ⁵ NDIA, Building the National Disability Insurance Scheme Progress Report: Year Two, NDIA, July 2015 p.4, <http://www.ndis.gov.au/profress-report-2015>
- ⁶ Whalan, Acton and Harmer, A review of the capabilities of the National Disability Insurance Agency, January 2014, p.5, www.ndis.gov.au/sites/default/files/./capability_review_2014_0.pdf
- ⁷ National Commission of Audit, National Disability Insurance Scheme, <http://www.ncoa.gov.au/report/phase-one/part-b/7-2-the-national-disability-insurance-scheme.html>
- ⁸ Whalan, Acton and Harmer, A review of the capabilities of the National Disability Insurance Agency, January 2014, p.6, www.ndis.gov.au/sites/default/files/./capability_review_2014_0.pdf
- ⁹ Whalan, Acton and Harmer, A review of the capabilities of the National Disability Insurance Agency, January 2014, p.7, www.ndis.gov.au/sites/default/files/./capability_review_2014_0.pdf
- ¹⁰ Ibid.
- ¹¹ Whalan, Acton and Harmer, A review of the capabilities of the National Disability Insurance Agency, January 2014, www.ndis.gov.au/sites/default/files/./capability_review_2014_0.pdf
- ¹² The Disability Trust, Your Voice Your Choice, January 2017, p.15, <http://disabilitytrust.org.au/wp-content/uploads/January-2017.pdf>
- ¹³ Simon Morrison, The New Zealand no fault accident compensation scheme – the financial viability of the NZ model, Precedent Magazine, January/February 2013, issue 114, p.39, <http://search.informit.com.au/documentSummary:dn-202505687648993;res-IELHSS>
- ¹⁴ Treasury, National Injury Insurance Scheme, <http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/National-Injury-Insurance-Scheme>
- ¹⁵ <https://www.anao.gov.au/work/performance-audit/national-disability-insurance-scheme-transition-disability-services>
- ¹⁶ ANAO Report No.24 2016–17 Performance Audit, National Disability Insurance Scheme—Management of the Transition of the Disability Services *Market*, 9 September 2016
- ¹⁷ Senate Joint Standing Committee on the NDIS, Progress report on the implementation and administration of the NDIS, 29 July 2014, p. 152, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint?National_Disability_Insurance_Scheme/Report
- ¹⁸ 'How Siobahn Daley became the public face of the NDIS', The Sydney Morning Herald, 7/11/16
- ¹⁹ Fran Connelly, FPAdmin, 12 December 2016, http://www.fpmagazine.com.au/347588-347588/#_ednref3