

19 August 2020

Ms Bonnie Allen
Committee Secretary
Joint Standing Committee on the National Disability Insurance Scheme
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email:

Dear Ms Allen,

Thank you for the opportunity to present to the Committee on Tuesday, 28 July 2020.

I have read the proof Hansard, and have found that no corrections to the transcript are needed.

There are two Questions on Notice to which we committed to respond with additional information. Our responses are detailed below:

1. How do you think the focus can be shifted away from workforce flexibility and towards security in the NDIS funding environment?

Maurice Blackburn suggests that the whole NDIS funding model, when it comes to workforce development, is based on flexibility. Fee for service arrangements purposefully prioritise transactional workplace relationships, rather than aim for security and predictability of work. So shifting the focus away from workforce flexibility and towards security will be very difficult, as it is entirely at odds with the basic foundations of the scheme.

Workforce flexibility has potential benefits for scheme participants. They are able to target their funding to receive personal support when they need it. There are less benefits for workers, who may be put in a position where they need to find enough shifts to piece together a career.

Workplace flexibility also has enormous benefits for unscrupulous operators. The disability workforce is made up of some of the most vulnerable worker cohorts in Australia, and they are particularly susceptible to actions of unscrupulous employers.

We are aware, for example, of workers who have experienced:

- No minimum hours on discontinuous shifts
- Workers forced to travel between support arrangements in their own time
- Workers forced to update files in their own time

Agencies which insist that workers must be independent contractors rather than traditional employees basically sidestep the need to ensure that employees are receiving the usual workplace entitlement - such as superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect. This places these organisations at a competitive advantage over employers who are doing the right thing by their employees.

As noted in our submission, 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.

Maurice Blackburn believes that the NDIS is uniquely placed, as both the accreditor of service providers and as the determiner of price, to require that anyone who engages staff in the disability support sector must have:

- First class employment practices
- A demonstrated commitment to accreditation, training and development
- No history of wage theft and/or superannuation theft
- A remuneration process based on award conditions
- Appropriate quality assurance processes in place.

We note that parallel care sectors (for example health and aged care) increasingly share that reliance on vulnerable workers, and insecure working arrangements. Maurice Blackburn believes that the employment conditions within organisations registered to provide NDIS services must be first rate, if the disability support sector is going to attract the best qualified and most experienced operators.

Casual employment suits the circumstances on many workers. The challenge is to find ways to ensure that:

- Casualisation is a function of choice for the employee
- Career development opportunities are made available to casual employees, just as they are to those with tenure
- "Casual" is not a byword for "insecure". Casual work need not be insecure.

The risks of relying on a highly flexible, highly mobilised workforce are currently playing out in the aged care sector in Victoria. There is growing concern about the capacity of a highly flexible and mobilised workforce to ensure the health and safety of service recipients in the disability sector. Whichever sector best balances employment conditions with the needs of care recipients will attract the best workers.

Finally, we note that the NDIS principle of 'choice and control' for participants is often raised as a justification for the focus on flexibility that underpins the NDIS design. However, in our

submission, the principle of 'choice and control' cannot possibly be exercised in a workforce that is insecure and under skilled, or lacks the resources to respond to demand.

2. What could be done to better support providers in the transition to fee for service under the NDIS, to ensure that staff can be retained?

Maurice Blackburn has long argued that there is a strong case for retaining some form of block funding for selected institutions while the workforce development questions are still being answered.

As noted on our submission, funding certainty must be maintained in order for service providers to feel confident in offering attractive, permanent jobs.

The uncertainty generated by the NDIS funding model makes it very difficult for organisations to plan. This was not the case under previous funding models. Assistance needs to be provided to organisations in helping them determine what business planning (including workforce planning) looks like under piecemeal, fee-for-service funding arrangements, and whether such businesses are actually sustainable.

The upskilling of small to medium sized organisations, to provide them with the business skills they need to survive in the disability support sector would be a useful priority. We believe the same need exists with not-for-profit providers.

Importantly, organisations need to be able to budget for administration costs, and the costs associated with coordinating their staffing arrangements. Fee-for-service arrangements do not allow for such business expenses.

As noted in our submission, 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. Our concern is that the sector stands to lose much of its experience and expertise, unless significant support is maintained until such time as a true marketplace exists.

Questions on Notice from within the transcript:

There were also several questions which we took on notice during our discussion at the Public Hearing. We have gleaned the following questions from the transcript, and include our responses below.

1. On page 26 of the transcript, Ms Payne asked:

Ms PAYNE: *In the context of the devastating death of Ann Marie Smith, would you comment on the role of the NDIS Quality and Safeguards Commission and how that may or may not be appropriate?*

Mr Ballantyne: *I would take the question of whether that specific organisation is the most appropriate model on notice. Ultimately, whatever form it takes, I think the key deficiency at the moment is the reach of it and the coverage of it. To date, I've not really seen anything that suggests—as I said, the appropriate framework is being built to manage not only a hugely increased workforce in terms of size but an increasingly disparate workforce in terms of individual arrangements and smaller providers.*

Our additional response:

There is no doubt that arms-length, independent oversight of service quality is essential.

We note that the Committee is undertaking a specific, separate inquiry as to whether the Quality and Safeguards Commission is the most appropriate model to fulfil that purpose. We look forward to reading the Committee's report from that inquiry.

Maurice Blackburn believes that the NDIS Quality and Safeguards Commission has a near-impossible task in ensuring that agencies and individual providers are offering appropriate services, by engaging the right people and offering appropriate working conditions.

To put it simply, it is much more difficult to regulate the outputs of 100,000 different small or individual providers than it is to monitor 10,000 larger organisations.

Any reliance on reactive processes to monitor quality and safeguards will be inadequate.

- As noted earlier, 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.
- If the provider is found to have inadequate systems and processes in place to ensure service quality – such as in the tragic case of MS Smith – they should not be registered as an NDIA provider.
- Also as mentioned earlier, there needs to be a major focus on training and professional development in order for the sector to attract and retain the best people. The outputs of the quality and safeguards oversight function should inform that professional development.

2. On page 26 of the transcript, Ms Payne also asked:

Ms PAYNE: *Do you feel that there are currently sufficient protections in place to ensure that workers in the disability sector are not exploited?*

Mr Ballantyne: *I would like to take that on notice. If it's something that the committee is interested in, we'll be happy to get the input of our industrial and employment team, who deal with both individual workers and unions in this area.*

Our additional response:

Maurice Blackburn has consulted widely in responding to this question – with those who work in the industrial/employment law sector, as well as with our union colleagues who deal with cases of worker exploitation on a daily basis.

A recent survey by the University of NSW¹ of 2,341 disability workers showed some alarming findings:

¹ Cortis, N., & van Toorn, G. (2020). *Working in new disability markets: A survey of Australia's disability workforce* Sydney: Social Policy Research Centre, UNSW Sydney
<http://doi.org/10.26190/5eb8b85e97714>.

- Unpaid work was common among full and part time workers and was considered essential for completing core service delivery tasks.
- Respondees worked an average of 33.8 paid hours and 2.6 unpaid hours in the previous week, across all their disability jobs.
- The most common work tasks performed during unpaid time were completing case notes or other forms or reports, which was performed by 67% of those who performed at least an hour of unpaid work in the previous week. Other common tasks included communicating with colleagues or other service providers (performed by 56% of those doing unpaid work), handover (52%) and communicating with a supervisor (47%).
- Only 51% agreed they receive the training they need to do their work safely.

Recent research by the Australia Institute² goes further, noting that:

- Disability Support Workers (DSW) are experiencing increased instability and precarity in their jobs, elevated levels of mental and physical stress, and irregular hours and incomes;
- New workers joining the disability services sector are often less skilled, less trained, less experienced, and sometimes reluctant;
- DSWs experience particular challenges working in the private realm of NDIS clients' homes;
- The informal and inconsistent provision of transportation and other necessary functions to NDIS clients results in a significant shift of costs and risks to workers;
- DSWs are experiencing increased levels of violence in their work;
- Relationships with managers have changed dramatically under the new system, undermining effective supervision, coaching, and training; and
- Worker turnover, given the insecurity of work and income and the challenging conditions of work, is extreme.

Whilst issues such as these do not reflect illegal activity, they are illustrative of working conditions that no worker would choose, if there were other options available.

In this way, research results such as these would indicate that there are currently insufficient protections in place to ensure that workers in the disability sector are not exploited.

Much of the responsibility for this lack of adequate protections for DSWs, at least as far as the NDIS is concerned, comes down to scheme design. We agree with the analysis of the Australia Institute, who write³:

The government is charged with the responsibility to defend the human rights safety of people with disability; to establish a framework and rules for the defence or maintenance of minimum labour standards...; and to implement the market-based delivery process for the whole scheme. These goals and responsibilities are clearly contradictory; in practice, the latter goal has largely subsumed and overwhelmed the first two.

We are seeing right now the downside of having a workforce philosophy and strategy based around flexibility⁴. The COVID-19 crisis is showing us graphically how a lack of permanency,

²https://d3n8a8pro7vnm.cloudfront.net/theausinstitute/pages/3070/attachments/original/1569981935/Precarity_and_Job_Instability_Under_the_NDIS_Formatted.pdf?1569981935; p.6

³ Ibid; p.10

⁴ See for example <https://www.theage.com.au/national/victoria/coronavirus-fears-rise-in-disability-homes-after-two-deaths-20200811-p55km3.html>

lack of entitlements such as sick pay and a highly mobilised workforce are leading to dreadful outcomes in the sector.

We urge the Committee to consider how the rights, protections and entitlements of workers in the disability support area can be elevated to the same level of consideration as those who pay for the work, outsource the work, and the end beneficiaries of that work.

3. On page 28 of the transcript, Senator Brown asked:

Senator CAROL BROWN: *You also mentioned in your submission sham contracting. Do you collect data on sham contracting in the NDIS?*

Mr Ballantyne: *Not to my knowledge. Again, I can take that on notice. As I said earlier, there are a number of unions we have relationships with that work in this space. I will take on notice the question of whether we have hard data, if that's okay*

Senator CAROL BROWN: *Can you also take on notice how rife sham contracting in the industry is? If you can provide a response to that, that would be good.*

Mr Ballantyne: *Absolutely.*

Our additional response:

Once again, we consulted widely in responding to this question to gauge the extent of sham contracting within the disability support sector.

Sham contracting has obviously been an issue in the disability sector for some time. The Fair Work Ombudsman has had success in prosecuting cases of sham contracting in the disability workforce⁵.

Perhaps the most salient point here is that all the environmental and cultural conditions which predispose an industry to sham contracting still exist within the disability support sector:

- A massive power imbalance in the relationship between those that source the work and those that do it
- A lowly paid workforce drawn from vulnerable cohorts
- A highly casualised and mobilised workforce
- An unwillingness for workers to complain about conditions or working arrangements through fear of retribution, or a perceived inability to find another job
- High turnover
- A lack of union presence
- A range of tasks and functions which have traditionally been subject to sham contracting – such as cleaning
- A workforce that is not well versed in their employment rights.

The emergence of employment-matching platforms further increases the likelihood of insecure work, and forcing workers to believe that being an independent contractor is the only avenue available to them. The quality of these platforms, in terms of the quality of their worker relationships, and their responsibility for quality control is highly variable. While some

⁵ See for example *Fair Work Ombudsman v Care Providers Pty Ltd & Ors* [2018] FCCA 3771

fully employ their staff, others merely act as a matching service. This has led to poor outcomes in parallel industries⁶ and demonstrates the difficulty faced by any regulatory body in this sector.

Maurice Blackburn respectfully suggests that the Committee engage regularly with unions (such as HSU, ASU and UWU) and workplace advocacy agencies – and with disability sector workers themselves - to monitor whether sham contracting and dodgy labour hire arrangements emerge as threats to NDIS service provision.

Thank you again for the opportunity to participate in the Committee's valuable work.

If the Committee identifies any way that Maurice Blackburn might further assist, please do not hesitate in making contact.

Yours faithfully,

Tom Ballantyne
Principal Lawyer
Maurice Blackburn

⁶ See for example <https://www.thesaturdaypaper.com.au/news/politics/2020/05/23/exclusive-govs-58m-aged-care-app-offers-no-duty-care/15901560009868>