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

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

Dear Committee

Submission to the Inquiry into Transitional Arrangements for the NDIS and into General Issues around the Implementation and Performance of the NDIS

Victoria Legal Aid (**VLA**) welcomes the opportunity to provide a submission to the Joint Standing Committee on the National Disability Insurance Scheme (the **Committee**) in relation to both transitional arrangements and general issues around the implementation and performance of the National Disability Insurance Scheme (**NDIS**). We are grateful for your extension of time to provide this submission.

About Victoria Legal Aid

VLA is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. VLA is the leading provider of legal services to Victorians with disabilities and mental illness. In 2016-17, 22,849 clients (or 26 per cent) disclosed that they fall within this category. Our Mental Health Disability Law program provides expert legal advice and advocacy to people diagnosed with mental health issues, including cognitive neurological, intellectual and psychosocial disabilities. In addition, VLA conducts a large criminal practice regularly assisting clients who have complex disabilities where disability is directly implicated in their alleged offending. In 2016-17, 13,800 of the 51,500 clients who received criminal law assistance from VLA identified as having a disability.

VLA is also the leading provider of legal advice and advocacy to people seeking assistance with social security matters in Victoria. In 2016/17, our Commonwealth Entitlements program provided legal advice on 2,297 social security matters and funded 69 grants of aid. VLA is also funded by the Federal Government to provide legal services for NDIS cases that are complex or novel. To date VLA has assisted in over 50 NDIS appeals. We provide advice and representation to applicants who challenge decisions of the National Disability Insurance Agency (**NDIA**) at the Administrative Appeals Tribunal (**AAT**).



Summary of submission

Our submission addresses a single issue: clear and dramatic market failure affecting the provision of disability services to a small but significant cohort of our clients with complex disabilities, with very significant consequences such as imprisonment for periods of several months. This market failure occurs across Victoria including in inner Melbourne.

This issue appears to be increasing as the roll out of the NDIS expands across Victoria. This issue is arising during the Victorian transitional phase but does not appear to be a consequence of mere transition. Rather, it rather highlights serious risks to the implementation and performance of the NDIS generally for clients with complex disabilities.

To date, each of our experiences of market failure have arisen in the context of clients with disability within the criminal justice system. We are confronted with clients with significant intellectual disability:

- who are NDIS participants, with plans providing for intensive supports including 24/7 care to support their independent living;
- who are remanded into custody, or at risk of a loss of liberty;
- whose offending is directly related to their disability;
- who cannot obtain bail because they cannot safely return home without residential care supports in place;
- **who cannot attract service providers to provide the necessary support or attract providers to coordinate their home supports;**
- who are unfit to plead to charges (in some cases, very minor charges) and so must remain in custody; and
- for whom, in Victoria, there is no 'provider of last resort' or even clarity about which federal or State agency may have responsibility for ensuring their access to essential disability services.

In these circumstances (a) market failure; and (b) failure to allocate responsibility by the Victorian and Commonwealth parties to the NDIS means that these clients are detained in isolation cells and solitary confinement for long periods such as several months. In most cases, they are detained for a greater period of time than they would have served for the offences themselves.

For clients with such vulnerabilities, this incarceration carries significant risk. Our practice experience has shown clients on remand with intellectual disability to be:

- at serious risk of harm to their mental health due to their lack of intellectual and emotional resources to cope with the stressful custodial environment;
- at risk of physical harm, often exacerbated through interactions with other prisoners who do not understand the nature and effect of the disability; and
- at risk of social harm, whereby customary social supports in the community are either disrupted or removed completely, making the transition back to community care more difficult.

In our view, the NDIA and the Victorian government must urgently allocate clear and transparent responsibility for immediately providing services to this vulnerable cohort of clients.

As we demonstrate below, for these clients, the operation of the NDIS has produced a vacuum of government and market responsibility for ensuring that they actually receive disability services. Our clients in this situation have no choice and no control over their services. They have no certainty about whether they will receive services at all. The effect of the combination of market failure and lack of governmental responsibility include a loss of liberty, the risk of indefinite detention, alienation, distress and trauma. The shocking vulnerability of our clients to this system failure undermines the objectives of choice, control and dignity which was intended to drive the NDIS.

While VLA appreciates the complexity of the transition to the NDIS for both State and Federal agencies, in our view, this is an issue which must be resolved now and, importantly, for which there is a ready solution.

We urge the Committee to make provider of last resort arrangements a priority issue, and to recommend that urgent interim measures be put in place by the NDIA and State governments to ensure that people in the above situation receive disability services immediately.

Our experience of market failure

Background

Across our criminal and mental health law practice, our lawyers are confronting a series of distressing market issues confronting clients with complex disability and difficult behaviours. These clients have been transitioned to the NDIS and, in some cases, require 24/7 support and support coordination because of the complexities of their disabilities. The NDIS has accepted that these supports are both reasonable and necessary and its plans include large amounts of funding for these services.

However, these individuals are failing to attract providers in the NDIS market. Further, and extremely concerning, the failure of our clients to attract a service provider has, in some cases, become **the** factor preventing their release from custody after being remanded, in some cases for relatively minor offending (eg, shop theft or assault). Critically these issues appear to be affecting young adults with complex disabilities, both with and without prior criminal history, on remand.

Profound intellectual disability in many cases results in clients who are unable to navigate the complexity of the justice system, and may be found to be *unfit to be tried* pursuant to the relevant legislation. Issues of potential unfitness will have the corollary of meaning that relatively minor offences must be dealt with in the County Court, resulting in lengthy delays pending the determination of fitness to be tried. This is having the effect of magnifying the consequences of market failure, with vulnerable clients being remanded in custody – potentially indefinitely – for offending which would not otherwise attract custodial sentences.

At present, VLA is aware of four current clients for whom failure to attract service providers (to coordinate their support services or to perform residential care) have inhibited their release from custody. At present, three of these clients remain detained. At least one of these clients remains detained **indefinitely**. We are aware of three relevantly identical cases in New South Wales. We are also aware that a similar case was brought to the attention of the Committee by the Office of the Public Advocate in Victoria during public hearings arising from the *Inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition*.¹ This issue is an emerging one for VLA and we are yet to have a concrete sense of how many other NDIS participants are also in this situation, though anecdotal reports from our criminal practice suggest that market failure is entangled in a number of other complex detention cases where the client is an NDIS participant.

VLA is very concerned that these clients remain in custody because they are not able to realise their NDIS plans. While we support the vision and mission of the NDIS, it must be recognised that a small, but not insignificant, cohort of individuals are not in a position to independently contract and attract disability services pursuant to their NDIS plans. Where these clients have further challenges due to their involvement in the criminal justice system, our experience demonstrates that the market cannot reliably support them.

We set out two case studies which exemplify these issues. The first case study sets out the situation of one of our current clients. The second case study has been deidentified. Additionally, this second case study does not tell the story of a single client, but rather reflects the experiences of multiple other clients we are also assisting. Neither case study is embellished to overemphasise the singular importance of a service provider to each of our clients in these situations. They also do not overemphasise the impacts of custody on the clients or the circumstances of their continued incarceration.

Case studies

Francis' story

Francis is 19 years old. He has no prior criminal convictions and has never been in custody before. He likes watching youtube videos on his Ipad, listening to music with big headphones and all things related to Metro Trains. Francis has a significant intellectual disability and autism. Before he transitioned to the NDIS, Francis lived in a DHHS house with DHHS funded workers who provided live-in care to him 24/7 as the complexities of his disabilities were such that he was not capable of living independently.

In September this year, Francis was remanded on charges relating to an assault. After Francis was remanded, the agency contracted to provide services to Francis in his home quit, stating that they were withdrawing services because Francis posed a 'business risk'. In custody, Francis was initially detained in solitary confinement. He was clothed in a canvas smock and subject to handcuffing when outside her cell. He remains subject to handcuffing at all times outside her cell. He is very vulnerable in custody.

¹ See, Joint Standing Committee on the NDIS, *Report on provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017) at 54 - 56.

Francis says that he wants to go home and that being in prison makes him sad. He finds the environment frightening and doesn't feel comfortable engaging with other people in the prison.

Francis' lawyer applied for bail in the Magistrates' Court. All parties agree that Francis will not pose an unacceptable risk to the safety of the community if he is properly supported in his home. The Magistrate hearing the matter indicated that if an agency is contracted to provide 24/7 care for Francis, she would grant him bail.

However, at this stage, no service provider is willing to take on this contract and there is no provider of last resort. DHHS have said to Francis that they are only his landlord and that it is up to the NDIA to find a service provider. The NDIA have said to Francis that they are merely his insurer and 'just a bank'. No-one has come forward, claiming it is Francis' responsibility to find a new service provider.

Ultimately, Francis remains in custody and has been refused bail, only because no service provider will contract with him. A service provider has indicated they may be interested to take the contract for his residential care on February 2018, but this arrangement is not certain.

Since Francis has been remanded, the NDIA have increased the funding in his NDIS plan to over \$1,000,000 from about \$200,000 but despite this, no other service provider has expressed interest in taking on this contract.

By February 2018, Francis will have been detained for six months.

Because of the complexities of Francis' disabilities, he is not able to plead guilty to the charges. If he were able to plead guilty, a likely sentencing outcome would be a good behaviour bond or a fine. It is uncontroversial that he would not receive a custodial sentence, given his age, lack of prior criminal history and disabilities.

Elijah's story

In 2016, Elijah was remanded into custody, after being charged with breaching an intervention order taken out by his family and assaulting police attending the family home at the time of the breach. Elijah has autism and a profound intellectual disability which means that he is prone to impulsive behaviour and often cannot understand consequences for his actions. Elijah is 28 years old and before he was remanded, he was living in public housing with DHHS funded workers to support him, because he cannot live independently.

While Elijah was in custody, he transitioned over to the NDIS. In his plan, funding was provided for a specialist support coordinator to coordinate the allocation of funds for the other substantial services provided in his plan.

No service provider was willing to take on this role.

The NDIA have said that they are the provider of funds, not a provider of services. DHHS have said that it is not possible for them to take on the specialist support coordinator role.

Because of Elijah's complex disabilities and his incarceration, when the market failed he was not able to search for service providers himself. The specialist support coordinator role was critical for Elijah, because this role was the gateway for him to access the other services funded under his plan.

The nature of Elijah's disability means that he has difficulty in receptive communication: he struggles to understand the court process and the advice of his lawyer. As a result, it is necessary to have Elijah's fitness to be tried assessed in the County Court. This has resulted in unavoidable delay as the case is transferred from the Magistrates' Court.

Market failure in this case has profoundly affected Elijah's liberty, independence and inclusion in the community. Without a specialist support coordinator, Elijah has not been able to use his NDIS funds to go 'shopping' for agencies to provide him with 24/7 care. This meant that the rest of the funding under Elijah's package was rendered inaccessible to him.

Until services are in place for him, Elijah's lawyer has had to withdraw his bail application which would have enabled him to remain in the community pending the determination of fitness to stand trial. This is because Elijah's access to the substantive support services under his funding plan are critical to him being safe at home.

Transitional arrangements for provider of last resort in Victoria

Our clients in Francis and Elijah's cases are clearly affected by market failure. As the Committee would be aware, the risk of thin markets and market failure under the NDIS was anticipated by the NDIS, as well as by State parties to the bilateral agreements and key stakeholders in the roll out. Specifically, as the NDIS 'Market Approach: Statement of Opportunity and Intent' states:

even in a mature NDIS marketplace, insufficient local demand, limited service delivery, workforce shortages, and lack of infrastructure will produce "weak" or "thin" markets; primarily in rural, regional and remote areas.²

In response, the model anticipates that there will be a process of commissioning a provider of last resort where 'the Agency directly commissions the provision of goods and services in order to ensure supply.'³ This process is, to our knowledge and certainly in our experience, entirely unrealised in Victoria.

Most recently, the Productivity Commission has taken significant evidence from stakeholders that weak markets are likely to, and have arisen, not just in remote areas, but in response to "people in or exiting the criminal justice system, including those with intellectual and/or psychosocial disability on limiting terms who are seeking to transition out of custody...".⁴ While this is undoubtedly correct, to this evidence must be added that in our experience market failure is the critical factor causing clients to remain in custody at all.

The Commission ultimately isolated that some of the NDIS participants most at risk of market failure were people across the community with:

- complex, specialised or high intensity needs, or very challenging behaviours

² Statement of Opportunity and Intent at 15.

³ Statement of Opportunity and Intent at 27.

⁴ NSW Legal Aid, *Legal Aid NSW submission to the Productivity Commission Position Paper* (2017) at 10.

- an acute and immediate need (crisis care and accommodation).⁵

Earlier this year, the Committee heard similar evidence from the Office of the Public Advocate in Victoria.⁶ This Committee ultimately recommended that:

... the NDIA provides details how it is ensuring a provider of last resort is available for all NDIS participants unable to find a suitable service provider, regardless of their location, circumstances and types of approved supports.

These remarks have also been echoed now by the Productivity Commission,⁷ and the Australian National Audit Office.⁸

However, in Victoria, provider of last resort measures or any real solution to address the very serious effects of market failure remain opaque, unclear and incomplete. The Victorian bilateral agreement is silent as to what will occur in the event of market failure. Instead, it states:

The Parties agree that these arrangements will be used to continually review market, sector, participant, workforce and system readiness to transition to the NDIS and that if this monitoring indicates significant concerns that put agreed transition arrangements at risk, then a strategy for addressing the issues will be developed.

The Parties agree that participants should not be put at risk and that the agreed strategy could include changes to the phasing schedule.⁹

The Bilateral Agreement also defers detail regarding implementation arrangements including arrangements to support readiness of the disability services market, including providers, broader sector, workforce and participants to an 'Operational Plan' agreed between the Parties and the NDIA. However, this Operational Plan provides no practical framework for acting to remedy the unpreparedness of private providers to be engaged to provide services to this cohort of client. Instead, among other things, it states that:

The NDIA, Commonwealth and Victorian Government will continue to work together in regard to progressing effort and contingencies related to Victorian sector and system readiness.¹⁰

and that:

...the NDIA will lead on identifying and developing approaches to ensure that a provider of last resort is available, as well as support for participants in crisis.¹¹

⁵ Productivity Commission, *National Disability Insurance Scheme – Costs* (2017) at 36.

⁶ See, Joint Standing Committee on the NDIS, *Report on provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017) at 54 - 56.

⁷ Productivity Commission, *National Disability Insurance Scheme – Costs* (2017) at 36.

⁸ Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market* (2016-2017) at 27.

⁹ See, Schedule E to the National Disability Insurance Scheme (NDIS) - Bilateral Agreement between Commonwealth and Victoria - 16 September 2015 at 2.

¹⁰ Paragraph 6.1 of the Victorian Operational Plan.

¹¹ Paragraph 6.5 of the Victorian Operational Plan.

The Victorian bilateral agreement stands in contrast with the Northern Territory equivalent which explicitly provides a framework for a 'provider of last resort'.¹² While we understand that this framework has also been affected by implementation issues, it anticipates the possibility of market failure and the need to develop a framework for 'provider of last resort' service arrangements to mitigate service delivery risks.¹³ The schedule states that 'the NDIA is the responsible entity for ensuring provider of last resort services are in place for all participants in the NT'.¹⁴

The current arrangements between the Commonwealth and Victoria do not allocate or make transparent what government entity is responsible for ensuring that vulnerable people receive services. In our experience, and as we have detailed above, a failure of the NDIS and DHHS to agree and take responsibility for market failure is not a theoretical issue. Rather, it is having immediate and profound consequences for our clients in Victoria at the forefront of the roll-out of the NDIS in Victoria.

Conclusion and recommendations

The importance of ensuring the provision of disability services to NDIS participants with complex needs cannot be overstated.

In our view, urgent and immediate solutions must be developed to address circumstances where the continued detention of our clients with complex disabilities is directly linked to the failure of the market to provide disability services under the NDIS. Without a provider of last resort framework in place, VLA expects that this problem will grow as the NDIS broadens the rollout of the scheme across Victoria.

Allowing this issue to persist in the scheme to be 'ironed out later' undermines the basic principles of the NDIS. The shocking vulnerability of our clients to this system failure stands in stark contrast to the values of choice, control and dignity which are intended to drive the NDIS. Our clients in this situation have no choice and no control over their receipt of services. Instead, for these clients, alienation, incarceration, serious distress and trauma, have been the consequence of simultaneously being technically 'rolled into' the NDIS, and pushed out of the service market without any guarantee of receiving supports which are key to their daily living.

The current abdication of government responsibility to actually **provide** services to our clients is stripping away the rights and opportunities for people with disability under the *National Disability Insurance Act 2013* (Cth), including, to:

- Realise their potential for physical, social, emotional and intellectual development (s 4(1)).
- Contribute to social and economic life to the extent of their ability (s 4(2)).
- Have certainty that [they will] receive the care and support they need over their lifetime (s 4(3)).

¹² See Schedule K of the Northern Territory bilateral agreement.

¹³ Paragraphs 2-3 of Schedule K.

¹⁴ Paragraph 7 of Schedule K.

- Receive reasonable and necessary supports, including early intervention supports (s 4(5)).
- Expect respect for their worth and dignity and to live free from abuse, neglect and exploitation (s 4(6)).
- Engage as equal partners in decisions that will affect their lives, to the full extent of their capacity (s 4(8)).
- Pursue their goals and maximise their independence (s 4(11)(a)).
- Live independently and to be included in the community as fully participating citizens (s 4(11)(b)).

Obviously, at an individual level, the indefinite or prolonged detention of a person in custody is damaging and distressing.

Inaction on market failure appears to be transferring the burden of the complexities of the transitional process, the risks of an emerging market, and the delicacy of intergovernmental negotiation to NDIS participants. Such an outcome is directly opposed to the undertakings the Commonwealth and State parties made under the 2016 Bilateral Agreement that in the roll out of the scheme 'participants should not be put at risk'.

It is our view that a provider of last resort **must** exist and be urgently developed to remedy the unmet (but fully funded) needs of some of Victoria's most vulnerable people. While we understand that support providers in NSW have previously indicated that, with time and pricing modifications, the market will be in a position to 'be the provider of last resort' – this is clearly not the current context within which the NDIS is operating. It is impractical and unrealistic to defer to a market solution for these clients where it is uncontroversial that the current market is unable to meet the outstanding need and where the circumstances of failing to act are so grave.

Instead, in our view, the NDIA and the Victorian government must urgently allocate clear and transparent responsibility for immediately providing services to this vulnerable cohort of clients. While we do not express a clear view whether an ultimate provider of last resort may be best sourced from within State disability services, we highlight that the State presently (and unlike the NDIS marketplace) retains a pool of highly trained staff with long-running experience providing disability services to clients with complex disabilities. Regardless of the shape of any final arrangement, in our view, the State and the NDIA must take immediate action to ensure that clients are not without service provision in these circumstances.

Recommendations

1. NDIS participants who remain in custody because of a failure to secure disability services should be identified by the NDIA and the Victorian government as a matter of urgency.
2. Immediate and robust service solutions should be developed for these clients, whether this is consistent with current policy or developed on an interim bespoke basis working between State and Commonwealth parties.

3. The Bilateral Agreement in Victoria should be amended to provide a clear framework for a provider of last resort. Consequent amendments should be made to the Operational Plan.
4. The NDIS should publish its policy on provider of last resort, providing clear indications to participants about how to engage the NDIS for assistance as a matter of urgency.

Please do not hesitate to contact Hollie Kerwin if you wish to discuss any aspect of our submission.

We confirm that we have contacted the Committee Secretariat and understand that the Committee is unable to accommodate any further witnesses within the public hearing on transitional issues in Melbourne on 8 November 2017. However, your Secretariat has suggested that VLA register to provide evidence in the afternoon session in relation to general issues. We confirm that we will attend the general issues session in the afternoon and provide evidence in this forum. We also remain ready to attend the earlier session if the Committee considers it would be assisted by further evidence in this session.

Yours faithfully

DAN NICHOLSON

Executive Director, Civil Justice, Access and Equity

Executive Director for the Western Suburbs and Barwon regions