



**Maurice
Blackburn**
Lawyers
Since 1919

**Submission in Response
to the Draft Report of the
Inquiry by the Queensland
Productivity Commission
into the National Disability
Insurance Scheme Market
in Queensland.**

February 2021

TABLE OF CONTENTS

	Page
INTRODUCTION.....	2
OUR SUBMISSION.....	2
RESPONSES TO THE PROPOSED REFORMS	5
Recommendations Related to Scheme Access.....	5
Recommendations Related to Market Stewardship.....	11
Recommendations Related to Thin Markets in Rural & Remote Areas.....	15
Recommendations Related to Interactions with Queensland Government Services.....	16
Recommendations Related to Intergovernmental Governance	17

Introduction

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

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

For 100 years, Maurice Blackburn has worked with Australians who have suffered severe and catastrophic injuries, assisting them to access justice, compensation and support as they attempt to rebuild their lives. We assist them in navigating the law, social insurance schemes and private sector insurance. We engage with their families, friends and carers – as well as service providers – as they rally to assist our clients.

Many of Maurice Blackburn's Queensland clients are also NDIS participants and we have also acted in a number of internal review and AAT appeals. We have made numerous submissions to both the Commonwealth Productivity Commission and the Joint Standing Committee on the National Disability Insurance Scheme (the JSC), and to the many subsequent inquiries into the NDIS before and since it was legislated.

Our Submission

Maurice Blackburn congratulates the Queensland Productivity Commission (QPC) on the generation of its report, and we welcome the opportunity to offer our insights into the findings and recommendations.

In the key points noted in the excellent summary document, we note QPC's perspective that:

Stakeholders strongly support the scheme - it has transformed the delivery of disability services by increasing the funding for disability services in Queensland by around 150 per cent, affording access to support for the first time for half of Queensland participants, and providing greater choice and control for around three-quarters of Queensland participants. The scheme is also improving participants' daily lives, relationships and social participation¹.

Our own experience in representing scheme participants when they've fallen foul of NDIS decision making, and in liaising with service providers paints a very different picture. We are seeing an increasing number of complaints from participants and their families/carers about their interactions with the NDIS. This includes uncertainties on primary eligibility, delays in receiving an NDIS plan, the lack of experience and expertise of NDIS planners, a lack of communication about the proposed plan, and also the contents of the plans themselves.

This comes against the backdrop of participants and their families having struggled for decades to access appropriate services, therapy, equipment and care. Our experience reflects a significant number of participants who had been clients of Queensland-government funded disability service providers, and now report being worse off under the NDIS.

¹ Summary Report, page iii

To us, this represents an inconvenient truth. The Commonwealth Productivity Commission report which spawned the NDIS dishonestly painted the federated arrangements preceding the NDIS as being dysfunctional and requiring a 'start again' approach. The reality is that many pre-NDIS State/Territory-funded disability entities performed very well, and the NDIS has been for many, since inception, a terribly negative experience.

The NDIA has sought, repeatedly, to characterise the problems experienced by participants and their families as mere teething issues. The problems are fundamental, and both at a design and implementation level.

As detailed in our original submission, the problems perhaps come into clearest focus during the planning process. Poor skills and processes at the planning stage commonly lead to a request for internal review. A rushed, inattentive and adversarial approach to the reviews process then leads to the engagement of legal representation, both for the client and the NDIA. This means that the whole process frequently becomes more expensive and time consuming than it needs to be.

In our response to the recommendations in the report, Maurice Blackburn argues that it is not appropriate for the NDIA to rely on the internal review and external appeal process as a 'safeguard' for poor decision making by planners. The process is complex, difficult and inequitable for participants. By design of the legislation, the NDIA is not held accountable for its poor decision-making.

On staffing and workforce, Maurice Blackburn believes that the most important factor in ensuring that the disability support workforce is fit for purpose lies in the sector's ability to provide secure, long term employment, for people who have, or are able to gain the right skills to support participants with usually complex needs. We do not agree that the answer to staffing shortfalls is increased flexibility.

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

In this submission, we highlight that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- These vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- The sector is particularly vulnerable to sham contracting arrangement, with workers told they must be independent contractors rather than traditional employees, and
- Technology based employment matching services that actually employ their staff, rather than merely connect contractors to clients, need to be promoted.

In order to compete with other care sectors (such as health and aged care), the employment conditions within organisations registered to provide NDIS services must be first rate. The involvement of the union movement is vital to ensure that wages and conditions are not diminished, and that participant safety and welfare is not placed at risk.

We do not believe that the QPC report focuses sufficiently on the needs of workers in the disability support field.

Ensuring that NDIS pricing is competitive will assist in the retention and attraction of workers – especially in regional and remote areas of the State. The Commonwealth Government has almost complete control of this particular lever and must ensure that NDIS fees for services encourage and promote long term service provision in the disability support sector.

We remain of the view that the obvious deficiencies in the disability support workforce represent an existential threat to the efficiency and sustainability of the NDIS. The original Commonwealth Productivity Commission report was deeply deficient on that front. It gave scant attention to the need for, and content of workforce infrastructure planning. Participants and other stakeholders are paying the price for that unforgivable myopia today.

Without immediate and extensive action, the NDIS workforce will quickly become under supplied and under skilled, and predictable tragic consequences for participants will quickly follow.

All Maurice Blackburn submissions to public policy inquiries are drawn from the lived experience of the clients we represent, and our staff who work with them. To that end, we restrict our commentary to those recommendations that directly impact our practice and our clients.

Our responses to selected Recommendations appear below.

Responses to the Proposed Reforms

Recommendations Related to Scheme Access

Draft Recommendation 1

To improve the access of eligible people with a disability to the NDIS, the Queensland Government should:

- *propose that the Disability Reform Ministers' Meeting oversight the development of the proposed national outreach strategy, including the preparation of a publicly available implementation plan and periodic public reporting on progress*
- *contribute to the development of the proposed national outreach strategy by:*
 - *evaluating the effectiveness of existing programs, and any overlaps or gaps between them*
 - *reviewing information about the population of potential participants in the scheme in Queensland*
 - *identifying barriers to potential participants from accessing the scheme and about how to address them*
 - *assessing which programs should be retained and refined*
 - *considering the roles of the Queensland Government and the NDIA in delivering outreach programs*
- *propose the monitoring and evaluation of independent assessments, conducted independently of both the NDIA and the organisations selected to implement them*
- *suggest that the review of national advocacy and decision-making supports consider how the access process could be simplified, to enable and encourage more people with a disability to complete it without the need for these supports.*

Maurice Blackburn response:

Maurice Blackburn supports recommendations aimed at making scheme access easier and more predictable for potential participants.

We are very concerned about the development and implementation of the Commonwealth's proposed 'independent assessments' model². We urge the QPC to ensure that they are familiar with the very valid concerns emanating from the disability support sector in relation to this development³.

There are questions and legitimate concerns around the binding nature of independent assessments.

The Tune Review called for 4 protections to be built in⁴:

- a. participants having **the right to choose** which NDIA-approved provider in their area undertakes the functional capacity assessment;

² <https://www.ndis.gov.au/participants/independent-assessments>

³ See, for example, the concerns expressed by Synapse: <https://go.synapse.org.au/e/676233/es-strait-islander-communities/4c951/170347100?h=OcBUABHdAiOnloCjSC7A75bmCQ1BLnwbYYJPCAkElio>; and Every Australian Counts: <https://everyaustraliancounts.com.au/questions-for-minister-robert-about-ndis-independent-assessments/>.

⁴ https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf; para 4.34 (our emphasis)

b. participants having **the right to challenge** the results of the functional capacity assessment, including the ability to undertake a second assessment or seek some form of arbitration if, for whatever reason, they are unsatisfied with the assessment;

c. the NDIA-approved providers being subject to **uniform accreditation requirements** that are designed and implemented jointly by the NDIA and appropriate disability representative organisations; and

d. the NDIA providing **clear and accessible publicly available information**, including on the NDIS website, on the functional capacity assessments being used by the NDIA and the available panel of providers.

We urge the QPC to insist that these safeguards be put in place.

'Choice and control' has been a mantra of the NDIS since its inception. However, in our view, the legislative and regulatory changes which are contemplated for the purpose of the proposed 'independent assessments' are designed to remove and limit choices as to reasonable and necessary supports, and to permit of a much tighter level of control over participants' lives by the NDIA.

How well Tune's hypothesised safeguards manifest themselves in thin markets, or translate into NDIA practices, will require careful and ongoing monitoring.

We note that legislative change will be necessary to enable information collected for one purpose (eg. eligibility) to be used for another (eg. plan construction, later reviews). Tune notes this in paragraphs 4.10 and 4.39 of his report⁵. He notes that legislation will need to be amended to:

... require a prospective participant to undergo an assessment for the purposes of decision-making under the Act, using NDIA-approved providers in a form set out by the NDIA.

This is reflective of a pattern that we see in the administration of workers' compensation schemes:

- (i) It represents a shift toward a "We tell you what to do" mentality – quite the antithesis of 'choice and control',
- (ii) If you fail to comply with our tightly defined requirements, the compensation scheme will suspend or terminate your entitlements, or deny you eligibility,
- (iii) An 'independent' person will be engaged to conduct the assessment,
- (iv) The criteria by which that assessment will be conducted will be those set by the Act and Rules, with little or no scope for how the particular individual is affected,
- (v) The person conducting the assessment will need to undergo a vetting process to be approved by the NDIA. This guarantees a panel of experts who are paid by and economically beholden to the NDIA,
- (vi) The results are designed to be 'independent' reports which:
 - (a) Deny scheme eligibility to applicants that the NDIA don't want,
 - (b) Drive down the cost of the participants' plans, and
 - (c) Maintain lower costs by entrenching a requirement for further 'independent assessment' reports in the plan review process.

⁵ https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf; p.61 & p.67

Although Tune is clear he does not support a closed panel model⁶, there is valid concern about the selection criteria for those who will end up being able to administer independent assessments (for example, do they understand the difference between having medical expertise, compared with disability expertise).

The fact that they're to be paid by the NDIA will make it hard to avoid the perception of conflict of interest⁷.

Moreover, if the legislation is amended to permit the Commonwealth and the NDIA to be more prescriptive about what is, or is not, 'reasonable and necessary'; the necessarily bespoke nature of participants' plans will be undermined.

Every person with a disability is unique, and what is envisaged by the 'independent assessment' process is designed to produce less bespoke and more cookie cutter plans.

Maurice Blackburn has particular concerns about to what degree the Queensland Government is likely to be left 'holding the can' if legislation is changed to give the Commonwealth more control over definitions of 'reasonable and necessary'. We urge the QPC to examine the potential impacts on State and Territory Governments, especially in light of recent changes to the bilateral agreements that dictate funding and responsibilities.

Draft Recommendation 2

To improve NDIS plan creation, the Queensland Government should:

- *propose that the Disability Reform Ministers' Meeting develop a statement on the definition of 'reasonable and necessary supports' and the meaning of 'choice and control'*
- *complete preparatory work to enable it to make an effective contribution to the development of the statement*
- *contribute to the NDIA's review of draft plans*
- *propose that the NDIA:*
 - *review options for enabling and encouraging participants to access information about the planning process before the planning meeting*
 - *develop, implement and report on a strategy to remove barriers to self-managed plans, when it is within the capacity of the participant.*

Maurice Blackburn response:

The federal Joint Standing Committee on the National Disability Insurance Scheme (the JSC) conducted a thorough review of the Planning process in 2019/2020. The final report of that inquiry⁸ made a number of significant recommendations on how the Planning process could be improved.

Maurice Blackburn suggests that the QPC should recommend the adoption of all 42 recommendations from that inquiry.

⁶ https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf; para 4.37

⁷ See, for example, <https://www.thesaturdaypaper.com.au/news/politics/2020/12/05/exclusive-the-seven-year-plot-undermine-the-ndis/160708680010805#hrd>

⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDIS_Planning/Final_Report

That report is as notable for what it did *not* recommend as what it did propose. It did not recommend anything of the nature of the 'independent assessment' process that the federal government, regardless, is about to implement. We contend that that was at least in part because the authors of that report understood the need for flexibility to foster bespoke plans.

Maurice Blackburn advises caution in seeking prescriptive definitions around 'reasonable and necessary' and 'choice and control'. While it is important that there is sufficient information available to the NDIA such that it can make good and predictable decisions based on these principles, it is vital that they never become a bureaucratic, tick-box exercise, generating one-size-fits-many outcomes.

Draft Recommendation 4

To improve the effectiveness of plan reviews, the Queensland Government should propose that the NDIA publicly report on plan reviews, including their outcomes and performance against goals.

Maurice Blackburn response:

While we are pleased to see a recommendation related to plan reviews, we believe this recommendation fails to address the core issues plaguing the NDIA's internal and external review processes.

We agree that the current review and appeals framework is anathema to the NDIS being truly held accountable for producing and defending plans which fall far short of the 'reasonable and necessary' supports required by the legislation. Requiring the NDIS to publicly report on the outcomes of plan reviews would be a powerful first step in improving the planning process.

Unfortunately, in our experience, the NDIS' review process provides only a nominal level of accountability and creates a number of barriers to participants seeking independent and thorough review of NDIA decision-making.

The NDIA's handling of internal reviews has been particularly problematic. As noted in our original submission, the Commonwealth Ombudsman received 400 complaints about the Agency's handling of reviews in an 18-month period to January 2018, which represented 32.5 per cent of all complaints about the NDIS⁹. In our view, a number of factors may be contributing to this.

- i. It is generally unclear whether the person undertaking the review has any additional expertise or experience in disability supports and care needs. If that is not the case, then the problems created by the original planner's lack of expertise are simply replicated. In our experience, this is particularly problematic in cases of catastrophic disability and complex care needs.
- ii. The ability of participants to obtain additional expert evidence about their needs (for example, from an occupational therapist) is extremely limited in most cases. It is therefore uncommon for the person conducting the internal review to have access to any new evidence that might better inform their decision.

⁹ Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013*', May 2018, 2.3.

iii. There seems to be significant confusion over the correct interpretation of the legislation and associated instruments across the NDIA. This leads to inconsistent application of the rules and different outcomes depending on who is making the decision at any point in time.

We believe the QPC report, and Recommendation 4, could be improved by addressing these factors.

We also believe that a recommendation relating to the imposition of time caps in the review process would be beneficial. While participants must file a request for a review within three months of receiving notice of the decision, there is no timeframe currently imposed on the Agency to actually complete the review. Many participants report waiting months for any response¹⁰, by which time their current plan may have expired, whereupon the process has to start again.

The AAT appeal in *Simpson v National Disability Insurance Agency*¹¹ highlighted this problem. The appeal involved a request for internal review of an unsuccessful eligibility application and a delay of over nine months in the Agency completing the review. The AAT found that the delay was unreasonable as there was nothing complex or unusual about the request, and that the applicant was therefore entitled to lodge an appeal in the AAT despite the internal review not being completed. The AAT also specifically noted that this situation was not unusual and it had identified other people in the applicant's position.

In our original submission, we noted that the best ways to achieve a quicker, more efficient internal review system are:

- The adoption of a process for ensuring that the decision maker is properly experienced and qualified, and has access to sufficient and thorough evidence from which to make an informed decision;
- The adoption of legislated time limits for the completion of an internal review;
- The adoption of a philosophy in relation to planning of 'do it right the first time'; and
- The adoption of a process whereby applicants who have successful outcomes in the AAT have a legislated entitlement to payment of their legal costs at 100 percent of the Federal Court scale.

At present, there are powerful structural disincentives to accountability embedded in the legislation. If internal reviewers are cognisant that there will be cost consequences in the AAT of not making quality review decisions, the number of substandard internal review decisions will reduce.

This exacerbates what is already a gross imbalance of power between participants who face huge health and financial challenges, and a massively resourced federal bureaucracy which can appoint and pay law firms at will.

If initial planning is robust, comprehensive and responsive, and decision makers know that costs accountability is the consequence of poor decisions, then the reliance on the review system would be greatly reduced.

In our initial submission, we wrote extensively on how the external review process is grossly skewed to the NDIS and against the participant. We noted that the AAT process has proven difficult for NDIA clients for a number of reasons:

¹⁰ Ibid

¹¹ [2018] AATA 1326 (22 May 2018).

i. The 'no costs' nature of the AAT restricts law firms from offering a 'no win, no fee' service in which the costs are recovered from the unsuccessful party and precludes most participants from accessing legal representation because of the prohibitive cost of paying themselves.

Legal Aid has received some funding for these appeals but resources are notoriously scarce. A number of disability advocacy groups have also been funded to provide support but most are only able to provide advice rather than formal legal representation.

This means that most participants will have to rely on pro bono representation or be self-represented. However, as shown in the case studies in Appendix A, the value of supports under dispute can amount to tens or hundreds of thousands of dollars *per year*. Many involve complex disabilities, high-care needs and require sophisticated expert evidence, which most participants will not be able to afford or arrange;

ii. The legislation and rules are also unclear, difficult to interpret and subjective; and

iii. Some disputes involve complex questions of statutory interpretation, or the interaction between the NDIS and other sources of support (for example, Medicare and the health system).

The NDIA engages private firms to represent them in every AAT appeal at great cost. Because of the barriers to engaging legal representation, the participants themselves are rarely represented. This too, runs completely counter to the 'choice and control' mantra which permeates the NDIS's stakeholder communications.

This problem is compounded by the difficult and complex legal issues that arise during the appeals. It is entirely unreasonable to expect a self-represented participant to be able to navigate and respond to arguments put to them by sophisticated lawyers and barristers representing the NDIA. The complexity of the legal process is not something a participant should be required to engage in unassisted.

Put simply, the current situation results in the most uneven of playing fields, is grossly unfair, and does little to promote trust and accountability. The efficacy of plan reviews would be greatly improved by genuine accountability, which is missing at present. An external review process with a pronounced power imbalance does nothing to improve decision-making within the NDIA.

Instead of encouraging good decision-making at first instance or in the internal review phase (and thereby minimising legal disputes), the restrictions against accessing legal representation simply shield the NDIA from taking responsibility for poor decision-making. If participants could access appropriate legal representation and the NDIA was also liable for legal costs in unsuccessful matters, it seems likely that more attention would be paid to getting the plan right in the first place.

Maurice Blackburn urges QPC to consider recommendations which would address this power asymmetry.

Once again, Maurice Blackburn reiterates our belief that the numbers of external reviews would fall if the planning process was more thorough, if the plan reassessment process was taken seriously by the NDIA, and internal review process was effective and efficient. Recommendations to this effect, or backing in JSC recommendations of a similar nature, would enhance the current report.

Recommendations Related to Market Stewardship

Draft Recommendation 9

The Queensland Government should propose that the NDIA develop an Application Programming Interface (API) that allows participants to share their NDIS information and receive provider proposals in a safe way, to facilitate digital marketplaces.

NDIA and NDIS Quality and Safeguards Commission (QSC) policies should support the development of digital marketplaces such that digital intermediaries are able to use both provider and participant information.

This will:

- *assist providers in identifying new market opportunities, such as opportunities to coordinate demand in markets where there are relatively few participants (through demand pooling), and achieve economies of scale*
- *allow participants to 'post' required supports for tender*
- *provide direct information for market stewardship on thin markets (where tenders are unmet)*
- *facilitate price monitoring.*

Where the NDIA and QSC hold information on the quality of supports provided, that information should also be made available to enhance the value of digital marketplaces.

Maurice Blackburn response:

Maurice Blackburn holds significant concerns about the apparent 'Uberisation' of the disability support workforce.

We do not share the central tenet in the report that 'flexibility' is core to ensuring that the disability support workforce is sufficient to meet demand. In fact, we believe that quite the opposite is true.

We are concerned that the appearance of a highly casualised, piecemeal approach to work will deter potential new entrants into the disability sector workforce, particularly with respect to carers.

In our opinion, a high-quality, better skilled workforce is needed if the quality of support to individuals with complex needs is to improve.

Maurice Blackburn has long advocated that measures should be put in place to enhance skills training and capacity of the disability workforce. This would be a major, long-term investment, ultimately paying dividends in participant safety and community confidence in the scheme.

Many observers of the NDIS have asked why the NDIS Quality and Safeguards Commission (the QSC) did not conceive of measures to better protect vulnerable people, highlighted in circumstances such as in the tragic death of Anne-Marie Smith in Adelaide. Those concerns are legitimate. Maurice Blackburn believes that the current workforce infrastructure settings for the NDIS pose increasing and unacceptable risks of participants being exposed to deplorable and dangerous behaviours. Further deaths and serious adverse outcomes are inevitable without a comprehensive workforce strategy re-work.

Strategies to address the growing shortage of workers through greater flexibility risk either reducing quality standards or increasing costs, or both. It should not be permitted to bring a 'lowest common denominator' approach to the provision of services to eligible individuals.

There must be sufficient and properly qualified staff available Australia-wide. The risks in not adopting that approach are plain:

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

It is important that the legislative and regulatory frameworks underpinning the NDIA's work recognise that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- That these vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- The sector is vulnerable to sham contracting arrangements, with workers told they must be independent contractors rather than traditional employees. These employees are then missing out on superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect,
- The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants, and
- The most precarious employment markets are also much less likely to be unionised. It is crucial that the NDIA liaise with the union movement on any structural enhancements that can be put in place to ameliorate exploitative working arrangements.

It is essential that technology based employment matching services actually employ their staff, rather than merely connect contractors to clients. This should be the focus of Recommendation 9.

In order to compete with other care sectors (such as health and aged care), the employment conditions within organisations registered to provide NDIS services must be first rate. Coordinated engagement with unions is one key way to ensure a race to the bottom does not accelerate.

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.

We also believe that the Queensland government should give consideration to the appointment of a person or entity whose sole responsibility is to oversee and report upon the operations of the NDIS in Queensland. This entity should be vested with legislative functions and powers to permit full evaluation of quality and operational issues affecting NDIS

participants in Queensland, and could operate in ways analogous to the office of an Ombudsman.

Draft Recommendation 10

The Queensland Government should propose that the NDIA allow in markets where there are significant and persistent shortfalls in supply:

- *extended service agreements to be offered by participants as an incentive to providers to enter the market and/or expand supply*
- *longer duration participant plans to support the use of extended service agreements.*

Maurice Blackburn response:

Maurice Blackburn supports this recommendation.

The reliance on market forces to ensure demand is met, in areas where this has never been the case, is a fallacy. While Recommendation 10 focuses on extended service agreements offered by participants, direct action is required by governments and the NDIS to ensure supply.

Draft Recommendation 11

To inform participants, providers and other stakeholders on the nature of harm arising in the NDIS market, the Queensland Government should propose that the NDIS Quality and Safeguards Commission report regularly on the incidence and context of participant harm.

Maurice Blackburn response:

The JSC has recently conducted a thorough inquiry into NDIS Quality and Safeguards Commission¹². This inquiry has received significant input in relation to participant harm perpetrated as a result of unqualified staff and unethical corporate practices.

The QPC should ensure that Recommendation 11 reflects the recommendations of that inquiry, once they're to hand. This may require Queensland legislation to give force to the methods by which participants are protected from unsavoury and dangerous behaviours.

Draft Recommendation 12

The Queensland Government should propose that the NDIS Quality and Safeguards Commission work closely with stakeholders such as the Aged Care Quality and Safety Commission and the Australian Commission on Safety and Quality in Health Care to streamline quality standards and introduce mutual recognition of professional qualifications across relevant sectors.

Maurice Blackburn response:

¹²https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/QS_Commission

Maurice Blackburn supports this recommendation.

As noted above, in order to compete with other care sectors (health, aged care), the employment conditions for workers within the disability support industry must be first rate.

The streamlining of quality standards cannot come at the expense of participant safety. If workers with the right qualifications and values set believe they are not working in an area where participant safety is paramount, they will seek employment in a sector where it is.

Draft Recommendation 13

The Queensland Government should fund a pilot for Allied Health Assistant roles to better understand the role in the context of disability services, particularly in relation to delegation and supervision, and risk management.

Greater use of Allied Health Assistants can help alleviate some of the shortage of allied health professionals and provide a pathway for support workers or new workers to the industry seeking to increase their skill levels. The pilot should be led and coordinated by industry.

Maurice Blackburn response:

Maurice Blackburn supports this recommendation in principle, but would caution that such Assistants should never be in substitution for the expertise that tertiary qualified professionals in the allied health space bring to participant welfare.

Questions of training, qualifications, minimum competency standards, oversight and monitoring and quality-checking would all require deeper consideration.

Draft Recommendation 14

In response to economic conditions arising from COVID-19, and given persistent challenges in attracting support workers to the disability sector, the Queensland Government should temporarily relax the eligibility criteria for the CERT III Guarantee to allow workers who already have a CERT III to receive funding assistance for a disability sector related CERT III.

Maurice Blackburn response:

Maurice Blackburn supports this initiative. The removal of barriers to having appropriately qualified staff would go a long way to ensuring that disability support is a viable career choice for those with an appropriate values set.

Draft Recommendation 15

The Queensland Government should propose that the Australian Government introduce a Provider Guarantee as a counterpart to the Participant Service Guarantee.

As part of the Provider Guarantee, the NDIA and the NDIS Quality and Safeguards Commission should institute processes to regularly review their regulatory requirements to ensure that they produce net benefits. A timetable of reviews should be publicly released, with the review process being transparent and involving consultation with the sector.

Maurice Blackburn response:

Maurice Blackburn supports the introduction of a Provider Guarantee.

Maurice Blackburn has long advocated for a requirement that the 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. Further, if a provider is already registered but does not meet the new standards, the NDIS accreditation should be withdrawn.

This should be clearly spelled out in the Provider Guarantee.

Recommendations Related to Thin Markets in Rural & Remote Areas

Draft Recommendation 27

The Queensland Government should propose that the NDIS Thin Markets Project prioritise the development of a thin market framework that:

- *establishes arrangements for identifying thin markets and developing timely responses*
- *responds to the underlying causes of thin markets on a case-by-case basis*
- *considers options for improved market coordination, including mechanisms to facilitate coordinated purchasing among participants*
- *considers alternative commissioning models for purchasing supports where other market-oriented options are not viable*
- *ensures thin market responses are adequately and consistently evaluated and reported.*

Maurice Blackburn response:

Our experience in representing NDIS participants from regional and remote areas (of Queensland in particular) frequently uncovers concerns including that in many cases the issue of thin markets creates substantial impediments for participants, particularly those whose plans are considered to be manifestly inadequate from the outset and who are seeking review of these plans.

This includes:

- Inadequate and unrealistic pricing with respect to the key services a person with catastrophic, long-term injuries may require;
- Significant difficulties for clients in rural, regional and remote areas in securing reliable access to appropriate care services;

- Equally significant challenges with respect to accommodation and the availability of appropriate supported/assisted accommodation, particularly in rural, regional and remote areas;
- Pricing policies that serve only to limit services and in many instances lead to the withdrawal of key service providers from the NDIS market; and
- A shortage of legal or advocacy support for NDIS clients who must navigate a complex system while also assessing whether their care plans are adequate and should be reviewed.

In our submission to this inquiry, we argued that block funding should be seriously considered as part of a range of approaches to alleviate short-term issues in transitional funding arrangements, and responding to thin markets.

We have long argued that having the NDIS as the price setter creates an irreconcilable tension with the practicalities of the availability and cost of services being vastly different region to region.

Maurice Blackburn believes that, in response to thin markets, the pricing of services in regional and remote communities should be aligned with the true market cost of providing those services. This is especially pertinent in the areas of:

- Staffing;
- Transport (and travel); and
- Access to technology.

We believe that none of this is in conflict with the tenor of Recommendation 27.

Recommendations Related to Interactions with Queensland Government Services

Draft Recommendation 35

The Queensland Government should evaluate the effectiveness and efficiency of its interventions to promote access to the NDIS. That evaluation should consider all impacts, including but not limited to the effects on participants, providers, adjacent markets, other Queensland Government services, the Australian Government and NDIA, and adjacent markets (such as allied health).

As part of developing a robust and complete approach, the Queensland Government should consider evaluating and quantifying the impact of NDIS transitions on mainstream government services in Queensland, for example the impact of NDIS access on hospital resources.

Maurice Blackburn response:

Maurice Blackburn is broadly supportive of this recommendation. Care should be taken to ensure that such a review is conducted by people with an appropriate knowledge and experience of the disability support industry in Queensland – both pre and post NDIS transition.

The impact upon Queensland-government funded entities is an important issue for closer scrutiny. It is also linked to the issue of plan adequacy. In our experience, the more restrictive and less adequate the NDIS plan, the more likely it is that participants' unmet needs will lead the participants to other resources including those funded by Queensland Health.

While we acknowledge that there are boundary issues legislated in the NDIS Act, it is nevertheless important that every dollar the NDIA should be allocating to support participants is actually allocated to minimise the pressure on State infrastructure and funding. The potential exists for this issue to become more acute given our predictions about how the 'independent assessments' process will be designed to function.

Recommendations Related to Intergovernmental Governance

Draft Recommendation 37

To provide effective governance to support the development of the NDIS market, the Queensland Government should propose that the Disability Reform Ministers' Meeting:

- *be established as soon as possible*
- *provides a forum for states and territories to have a continued role in policy development and implementation*
- *has a clearly defined purpose, including to identify and ensure the implementation of reforms for the NDIS*
- *has clearly defined roles*
- *maintains the independence of the NDIA*
- *publishes regular reports on its progress in delivering its work program*
- *publicly reports annually on the performance of the NDIA and the NDIS market.*

Maurice Blackburn response:

Maurice Blackburn fully supports this recommendation.

We have an overarching concern that the role of the States and Territories in overseeing and administering the NDIS is diminishing, and that the Commonwealth is using an incremental approach to minimising State and Territory involvement.

We believe that the States and Territories are better placed to understand the nature of the needs of people with disability within their communities.

We also contend that the States and Territories are better placed to give an honest assessment of the design and implementation issues which have plagued the NDIS, and to therefore not merely skim the surface on the question of remedial measures.

There have been at least 15 major inquiries into the NDIS since it commenced. The abiding conclusions to be drawn from those inquiries are that the NDIS has fundamental architectural defects, compounded by what has been, often, woeful governance and implementation.

The Productivity Commission report upon which the scheme was based was a deeply flawed piece of work, and the various inquiries since inception have reported upon the egregious impacts of poor design, governance and implementation.

The Commonwealth has an unenviable record of service delivery at the coalface, and the NDIS has done nothing to remediate that deservedly bad track record. The States and Territories must play a part in improved accountability.

Maurice Blackburn is aware that, anecdotally, NDIS participant complaints make up a significant proportion of all approaches by constituents to parliamentarians' offices. We see no evidence that the levels of distress being experienced by participants are abating. An honest appraisal of the NDIS ought to have decision making on design, governance and implementation changes done by those in positions through which change can be effected.

A States and Territories-led approach to the remedial steps needed is less likely to be coloured and impeded by the 'great legacy' narrative. The NDIS legislation passed with the support of both sides of politics, and there is no reason in principle why there ought not to be bipartisanship on the major changes needed.

We endorse the Disability Reform Ministers' Meeting (DRMM) playing a greater role in ensuring that States and Territories do not end up 'carrying the can' of funding things that the federal government decides are not reasonable or necessary.

The need for the DRMM to continually listen to the concerns of participants and the disability support sector cannot be overstated.

Draft Recommendation 38

The Queensland Government should propose the NDIS Act be amended to

- *change the process for agreeing to Category A rules to reduce the time it takes to implement or amend the rules*
- *incorporate the changes proposed by the Board of Treasurers in its submission to the Tune Review, or other arrangements that would assist the Disability Reform Ministers' Meeting to better understand and oversight the NDIS's financial situation.*

Maurice Blackburn response:

Maurice Blackburn notes the recommendations to the Tune Review by the Board of Treasurers¹³:

The Board of Treasurers recommends the Review consider the following proposals to improve the operation of the Act and increase the efficiency of the Scheme's administration:

1. Specifying within the NDIS Act a requirement for COAG DRC to receive timely access to detailed information on scheme finances and scheme financial sustainability. At a minimum, reporting to COAG DRC should include information on:

- *Scheme finances (including payments made to the NDIA in each jurisdiction by each co-funder)*
- *Financial sustainability (including actuarial analysis and cost projections)*

¹³ https://www.treasury.sa.gov.au/_data/assets/pdf_file/0009/137637/Board-of-Treasurers-submission-to-Tune-Review.pdf: p.9

2. Including provisions in the NDIS Act for the Scheme Actuary's full Annual Financial Sustainability Report to be provided to COAG DRC as a matter of course. The tabling of the report could form a part of the reporting process proposed in Recommendation 1.

3. For additional checks and balances to be embedded in legislation to mitigate any emerging risks to Scheme financial sustainability, including a process by which the NDIA Board is required to escalate concerns raised by the Scheme Actuary to COAG DRC, when those risks are beyond the NDIA Board's control.

4. Strengthening the legislated link between the stated Objects of the Act and payments to the NDIA, specifically for Commonwealth payments which are variable and therefore determine the funding envelope for participant supports, to provide greater assurance that the Scheme is being funded in a way which sufficiently supports an insurance-based approach.

We are supportive of the recommendation that these proposed changes, or other arrangements that would assist the DRMM to better understand and oversight the NDIS's financial situation, be incorporated into the Act.

We do not, however, support any changes to the NDIS Act which would permit of the NDIA being more prescriptive in promulgating Rules which then impact upon participants' plans. Any streamlining of the processes by which Rules changes may be made must be respectful of the States' and Territories' powers to veto such changes.

We support fully the need for financial transparency of the NDIA, and that the DRMM should play an important role in that regulation.

Draft Recommendation 39

The Queensland Government should propose the Disability Reform Ministers' Meeting commission periodic independent reviews of whether the processes for developing new regulatory obligations and the obligations themselves remain fit-for-purpose.

Maurice Blackburn response:

Maurice Blackburn notes the section of the Summary Report, under the heading "Review of Regulatory Obligations"¹⁴ which says:

The large number of rules, regulations, operational guidelines, policies, standards, codes and advice increases the transaction costs and risks of the scheme for providers and participants. Many providers and participants highlighted concerns about the burden of these interventions and the costs of 'navigating' the scheme. There could be scope to reduce this burden while achieving the same or better scheme outcomes, and protecting vulnerable participants.

Excessive burdens could develop if:

- new interventions are introduced without going through a rigorous policy development process, involving consideration of a range of options, stakeholder consultation and assessment of costs and benefits*

¹⁴ Page 38

- *interventions remain in force after the circumstances that justified their introduction have changed. Regulatory regimes often include sunset provisions to ensure that regulations are periodically reviewed to confirm that they remain efficient and effective.*

The DRMM could commission periodic independent reviews to ensure the processes for developing new regulatory obligations and the obligations themselves are fit for purpose.

Maurice Blackburn shares QPC's concerns about the constancy of changes to the regulatory obligations under the NDIS. We also endorse the view that this would develop excessive burdens if there is inadequate policy development, consultation and analysis prior to implementation.

We reiterate however, that there is in our view a need for more and better regulation of workforce issues, for the reasons set out previously.

We agree that it would be appropriate for DRMM to maintain a watching brief over these processes.

Once again, it is important that States and Territories remain involved in this overseeing process, through the DRMM, so the fears and concerns of participants and providers can be taken into account.